Pulling Back the Curtain: A Frank Conversation with Insurance Adjusters About Collaboration

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Serving Two Masters:[1] Problems Facing Insurance Defense Counsel And Some Proposed Solutions

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I. Introduction

Insurance defense counsel[2] serve two masters, the insured and the insurer. When both are united to defeat the plaintiff's claim, insurance defense counsel have little difficulty serving both masters. Problems occur when differences between the insurer and the insured develop, and potential differences are frequently lurking. In those circumstances, either the insurer or the insured, or both, may look to insurance defense counsel for assistance. Many if not most legal malpractice claims against defense counsel include the allegation that counsel represented conflicting interests. Indeed, one commentator has described the likelihood of counsel facing such charges as a "risk which has become an occupational hazard for insurance defense counsel."[3]

This article discusses some of the ethical issues and other pitfalls which confront insurance defense counsel. Unfortunately for the Massachusetts practitioner, many issues have not been presented to our appellate courts for resolution, and case law outside of Massachusetts is not consistent. As with many areas of the law, some bad cases have resulted in much loose dicta. This article analyzes several recurring conflict of interest and other problems facing insurance defense counsel and offers some guidance.

II. The Problems

The conventional liability insurance policy contains two promises: (1) a promise that the insurer shall pay "all sums which the insured shall become legally obligated to pay as damages because of ... [covered injury];" and (2) a promise that the insurer shall "defend any suit against the insured seeking damages on account of ... [covered injury]," even if any of the claims are "groundless, false, or fraudulent." The policy typically grants the insurer the unfettered right to control the defense of the lawsuit against the insured; requires the insured to cooperate with the defense; and obligates the insurer to pay for the cost of defense. In addition, there is a policy limit on the indemnity obligation (which usually causes no controversy) and the policy is strewn with exclusions (which are more subject to controversy between the insurer and insured). Because "[i]t is axiomatic that an insurance company's duty to defend is broader than its duty to indemnify,"[4] an insurer will frequently defend a suit for which it believes it has little or no indemnity obligation, a belief not always shared by its insured. Even when coverage is clear the insured may be indifferent or even hostile to cooperating with insurance defense counsel in defeating the plaintiff's claim, which can cause special problems.

The insurer is bound not only by its contract with the insured, but also by judicially imposed obligations to act in good faith. Moreover, in Massachusetts, insurers must comply with statutory obligations under G.L.M. c. 93A and c. 176D. Insurance defense counsel must be conscious of the parameters of these obligations since, for some purposes, counsel may be the agent of the insurer.[5] Insurance defense counsel is also bound by the Disciplinary Rules, some of which impose additional obligations. The relationship between insurance defense counsel and the insurer is usually an ongoing one in which the attorney has a strong financial interest. In addition, counsel may have close personal friendships with the insurer's employees. On the other hand, the relationship between defense counsel and the insured may be limited to a particular case. Each of these circumstances creates potential areas of improper conduct by defense counsel.[6]

Failure of defense counsel to discharge the obligations to either master may subject the attorney to: (1) liability to the insurer, (2) liability to the insured, and/or (3) disciplinary action. Thus, in Smiley v. Manchester Ins. & Indem. Co.,[7] an attorney was held liable to the insurer when he had authority to settle two actions for $20,000, declined an offer to settle both for $17,000, and judgments totaling $55,000 resulted. The insurer was sued for bad faith and brought a third-party action against defense counsel who was found to be negligent as a matter of law.[8] In *Lysick v. Walcom*,[9] the attorney was found liable to the insured for conduct similar to that of the attorney in *Smiley*.[10] In *Matter of Farr*,[11] the plaintiff, a passenger in A's car, was injured when A's car collided with B's car. The plaintiff's attorney concluded that an action against A and the operator of B's car would not be successful and that only B should be sued. Subsequently, B's insurer retained the same attorney to defend B and the operator of B's car against a claim by the other injured parties without full disclosure to and consent by the plaintiff. The attorney conveyed information obtained from the plaintiff in the attorney-client relationship to B's insurer without the plaintiff's consent. The Indiana court held that this conduct warranted a public reprimand.[12]

The most frequent source of conflict between the insurer and the insured involves what is or may be covered by the insurance policy. Courts have been critical of defense counsel who have become involved in coverage issues[13] except, in some circumstances, courts have praised defense counsel for becoming involved in insurance coverage issues.[14] Courts have frequently stated that insurance defense counsel "owes to his client, the assured, an undeviating and single allegiance,"[15] except that in other circumstances, courts have stated that defense counsel owed duties to the insurer at the expense of the insured.[16] In connection with the defense of alternative theories of recovery, some courts have stated that insurance defense counsel should not request that special questions be propounded to the jury,[17] while other courts have criticized insurance defense counsel for failing to request special questions.[18] To avoid

judicial criticism, civil liability to either master, or disciplinary action, insurance defense counsel "is forced to walk an ethical tightrope...."[19]

III. Duties of Attorney—General

In Massachusetts the ethical obligations of an attorney to his client are governed primarily by Supreme Judicial Court Rule 3:07, entitled the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, which were promulgated effective October 2, 1972, and subsequently amended.[20] Rule 3:07 adopted in large part the Model Code of Professional Responsibility and the Canons of Ethics proposed by the American Bar Association in 1970.[21]

Without being all-inclusive, the Disciplinary Rules provide that an attorney retained by an insurer to represent the insured shall preserve the client's confidences and secrets (Canon 4), shall exercise independent professional judgment on behalf of the client (Canon 5), and shall represent the client competently (Canon 6) and, within the bounds of the law, zealously (Canon 7).

IV. Who Does the Lawyer Represent and What Is the Scope of the Representation?

It is now well-established that when an attorney is retained by an insurance company to represent its insured, the insured is the client.[22] Many courts have stated that the attorney owes the same fiduciary duty of loyalty and independent judgment to the insured that he would if he had been retained directly by the insured.[23] But these statements go too far to the extent they can be interpreted to imply that defense counsel has an affirmative duty to side with the insured in any dispute with the insurer.[24]

Although the cases are almost unanimous in stating that the insured is the client, many cases also refer to the insurer as the client. The Supreme Judicial Court has stated that "the law firm is attorney for the insured as well as the insurer."[25] This is the majority rule.[26]

Even if the insurer were not considered a client, it is obvious that insurance defense counsel has obligations to the insurer. Thus, for example, there can be little doubt that the insurer may require counsel to submit a written evaluation of the likelihood of success including an evaluation of the credibility of the insured as a witness. The insurer also is entitled to be kept apprised of the progress of litigation. If the insured refuses to attend his deposition or trial, the insurer is entitled to be informed of that fact even if the insurer uses that information to disclaim coverage on the basis of breach of cooperation.

DR 5-105(C) prohibits an attorney from representing two clients with differing interests unless (1) both consent after full disclosure, and (2) it is obvious that the lawyer can adequately represent the interest of both.[27] Courts which have discussed the matter under the previous ABA Conflicts Canon used the fiction that purchase of the insurance policy amounts to consent in advance by the insured to the employment of an attorney hired by the insurer to defend claims brought against it.[28] This fiction is useful to meet the consent requirement in DR 5-105(C); however, it does nothing to fulfill the additional requirements that it be "obvious" that the lawyer can "adequately" represent the interest of each.

In the typical case where there is adequate insurance coverage for the claim, it is almost always "obvious" that defense counsel can "adequately" represent the interests of both. However, if the insurer defends under a reservation of rights or the claim exceeds the available coverage, then the scope of defense counsel's representation must be limited to comply with DR 5-105(C).[29] Before it is "obvious" that the lawyer can "adequately" represent the interests of each in these latter situations, it must be clear that the scope of representation of defense counsel is limited to the defense of the claim brought against the insured irrespective of the amount or existence of insurance.[30]

When the settlement demands are within the policy limit, usually only the insurer is interested in receiving advice concerning settlement. The insured (and excess insurers when they exist) becomes more interested in settlement advice as the value of the case approaches the policy limit. It is the duty of

counsel in the latter situation to provide advice concerning the advisability of settlement not only to the insurer but also to the insured.[31] If counsel restricts his representation to the defense of the claim asserted against the insured, then it is usually "obvious" that he can "adequately" represent the interests of all in defeating the plaintiff's claim.[32]

Counsel encounters difficulty when there is a conscious or unconscious attempt to represent the interest of either client in potential or actual disputes between them. This can easily occur during a frequently recurring factual scenario: The insurer advises the insured in a reservation of rights letter that the plaintiff's claim exceeds the policy limit. Inevitably the question arises whether the claim can or should be settled at or near the policy limit.

In handling an excess claim defense counsel should "conduct himself as if his client either (1) had no insurance or (2) as if the insurance policy has no limits."[33] The court in *L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co*.[34] explained that counsel must communicate offers of settlement to the insured in situations involving a reservation of rights because:

> In a reservation-of-rights defense it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement. In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections came from the injured party or the insurance company.[35]

Defense counsel is not guilty of malpractice merely because the case does not settle and an excess verdict results.[36]

At least in the absence of consent after full disclosure, defense counsel may not properly represent the insurer on coverage issues adverse to the insured.[37] This is so even after the tort suit against the insured has terminated.[38] In general, defense counsel should steer clear of any coverage issues which involve potential or actual conflicts between the insurer and the insured. Two major exceptions, which are discussed below, are (1) the duty of defense counsel concerning breach of cooperation issues and (2) the use of special questions.

To summarize, the scope of the representation of insurance defense counsel is to provide a competent defense of the claim asserted against the insured even if the insured is indifferent or hostile to providing such a defense. Insurance defense counsel does not represent the insurer (or the insured) in potential or actual coverage disputes between either client except that insurance defense counsel (1) must provide a competent defense to the plaintiff's claim and (2) cannot collude with the insured in connection with the plaintiff's claim.[39] The legal and ethical tightrope can be a narrow one; the discussion below concerning breach of cooperation illustrates where it has usually been drawn.

V. Breach of Cooperation

As noted above, the typical insurance policy provides that the insured must cooperate with the defense of any covered claim. If the insured's breach of this condition prejudices the defense, the insurer is relieved of its obligations under the policy.[40] Frequently uncounseled insureds fail to understand the importance of cooperating with defense counsel.

One of the most difficult problems for insurance defense counsel is the insured who is indifferent or even hostile to cooperating in the defense of the plaintiff's claim. As stated above, insurance defense counsel is ethically and contractually obligated to provide a competent defense to the plaintiff's claim, which usually requires the cooperation of the insured.

How far must insurance defense counsel go to obtain cooperation by the insured? The best answer is that defense counsel should do whatever would be done if he had been retained directly by the insured, who was likely to pay any judgment which might ensue. This includes, but is not limited to, providing candid advice in appropriate circumstances to the insured concerning the significance of the insurance cooperation clause.[41] A discussion of a few illustrative cases indicates what the courts have done in this area.

In *Van Dyke v. White*,[42] the tort plaintiff brought a garnishment action against the insurer after entry of judgment against the insured. Defense counsel had refused the plaintiff's offer for a continuance when the insured did not appear for trial, and his client was defaulted. The insurer's defense was breach of cooperation, and the court ruled that the insurer had waived it by continuing to defend without a non-waiver agreement. The court had the following comment on the conduct of counsel:

> Nothing could be plainer. The lawyer employed by the insurance company to represent White owed him a duty of undivided loyalty, but he acted for the respondent (the insurer) instead of for White. Such a situation is contrary to public policy.43

Defense counsel in *White* did not act as if he had been retained directly by the insured. If a defendant does not appear for trial, the defendant's counsel should agree to a plaintiff's offer for a continuance and, indeed, has an ethical and legal obligation to request a continuance. If the continuance is denied and the insured's presence is required for a competent defense,[44] then counsel should seek leave to withdraw forthwith.[45]

In *Allstate Ins. Co. v. Keller*,[46] statements were taken from the insured, Keller, and the injured passenger, Eckert, shortly after an automobile accident, and both indicated that Keller was driving at the time of the accident. Nine months later, Keller gave the insurer a written statement in which he stated that Eckert was driving. When Eckert sued Keller, defense counsel admitted in the answer to the complaint that Keller, the insured, was the driver. Subsequently, however, defense counsel took the deposition of his client for the sole purpose of developing evidence by which the insurer could successfully deny coverage for lack of cooperation. Keller was never advised of this purpose. After discussing the insurer's claim of lack of cooperation and waiver of this defense, the court stated:

> [A]n attorney is required to disclose to his client all facts and circumstances within his knowledge, which, in his honest judgment might be likely to affect the performance of his duty for that client ... (citation omitted). A client may presume from an attorney's failure to disclose matters material to his employment that the attorney has no interest which will interfere with his devotion to the cause confided in him, or betray his judgment ... (citation omitted). [A]n insurer's attorneys are bound by the same high standards which govern all attorneys whether or not privately retained....47

In contrast to *Allstate v. Keller* is the conduct of defense counsel in *Apex Mut. Ins. Co. v. Christner*.[48] In that case, after the operator of the insured motor vehicle gave deposition testimony in substantial agreement with a prior statement to the insurer, she telephoned the plaintiff's attorney and executed a handwritten statement which "asserted relevant facts not previously disclosed to the insurer , declared that she had told untruths in her deposition, and admitted that she was fully and solely responsible for the accident."[49] Plaintiff's counsel telephoned defense counsel that day, and subsequently defense counsel obtained a copy of the statement by court order.[50] Thereafter, the insurer successfully sought a declaration that the insured had breached the cooperation clause. The court distinguished *Allstate v. Keller* by noting that in Allstate "the attorneys took the insured's deposition for the purpose of strengthening the insurer's position in the anticipated declaratory judgment action," without disclosing that purpose to the insured.[51] In *Apex* defense counsel came across information (a prior inconsistent statement of his own client) in the course of defending the case. Defense counsel is obligated to convey information about prior inconsistent statements of the insured to the insurer since the evaluation of the impact of such statements is inextricably intertwined with the defense of the case.[52]

Finally, in *Ideal Mut. Ins. Co. v. Myers*,[53] the insurer sought to avoid the policy based upon misrepresentation but provided a defense when a wrongful death claim was brought against the estate of the insured pilot. The court held that the failure of defense counsel in the tort suit to discuss with the insured a potential conflict of interest did not estop the insurer from asserting policy defenses because the insurer's reservation of rights letter had already informed the estate of the potential conflict, and the attorney did not actively work against the estate on the conflicting coverage question:

> Finally, the defendants claim that the conduct of [defense counsel] estops [the insurer] from asserting any policy defenses. According to the defendants, [defense counsel] never discussed the potential conflict of interest arising from Ideal's representation of the Myers Estate; the defendants rely upon *Employers Cas. Co. v. Tilley*....
> ....
> Notwithstanding [defense counsel's] obligation to the Myers' estate, the defendants do not indicate how [defense counsel's] failure to explain the potential conflict of interest between Ideal and the Myers Estate prejudiced the Myers Estate. As noted above, Ideal's reservation of rights letter

> already informed the Myers Estate of a potential conflict of interest arising from Ideal's representation of the Estate in the [tort] action. Moreover, quite unlike the attorney in Tilley, [defense counsel] did not actively work against the Estate on the conflicting coverage question. [Defense counsel's] affidavit establishes, and the defendants do not dispute, that he 'performed those services before, after, during the pendency of the [tort] action.' Thus the potential conflict never actually emerged; [defense counsel's] conduct, therefore, does not operate to estop Ideal.54

It is not defense counsel's job to determine whether or when the insurer is likely to succeed in disclaiming for breach of cooperation; that is the job of coverage counsel. Of course, if defense counsel is instructed by the insurer to withdraw, then, subject to local rules and DR 2-110(A)(2),[55] counsel should withdraw.[56] Defense counsel's obligation to seek leave to withdraw on his own motion is only appropriate when all reasonable efforts to seek the cooperation of the insured have proved fruitless and the cooperation of the insured is essential to a competent defense of the case.[57]

VI. Problems in Asking Special Questions

Special questions in the tort case may assist the parties to resolve coverage issues.[58] The most frequent problem exists where the claimant asserts negligent and intentional conduct as alternative theories of recovery, and the insurer takes the position that it does not provide indemnity for intentional conduct. In an assault and battery claim which includes an allegation of negligent conduct, there are three possible outcomes, only one of which will be satisfactory to both the insured and the insurer: judgment for defendant. In the event of recovery based only on negligence, the insurer may be disappointed, and in the event of recovery based only on intentional conduct, the insured will not be happy. It is clear beyond peradventure that defense counsel may argue in favor of judgment for the insured based upon either negligence or intentional conduct but cannot properly argue that the claimant should recover based upon intentional conduct.[59] The problem is most acute when there is no evidence of negligent conduct (defense counsel may have a criminal conviction or plea of guilty in his file in connection with a criminal proceeding arising out of the alleged assault and battery), and the likelihood of a successful defense

based upon consent or justification appears to be remote. Some courts have intimated or stated that defense counsel should not request a special verdict.[60]

If special questions are propounded with the consent of both the insured and the insurer, no one should complain. In some situations, it may be beneficial to both to have special questions propounded instead of going through the expense of relitigating, in an entirely separate coverage proceeding, issues which could have been decided in the underlying tort suit.

If the insured objects to having special questions propounded, it is improper for defense counsel to request them, and, indeed, he must object to any being propounded. As noted above, counsel can never act contrary to the express instructions of the client.

What should counsel do in the intermediate situation: One master requests that special questions be propounded, and the other says nothing? The most prudent course of action would be for counsel to explain the significance of the special questions to both the insured and the insurer. It is important for defense counsel not to proceed in this situation without both parties having a full understanding of the legal significance of asking special questions.[61]

There is a line of cases which suggests that defense counsel (and the insurer) have an affirmative obligation to ask for special questions (or their procedural equivalent) where there is an issue of allocation of the verdict.[62] In *Duke v. Hoch*,[63] accountants were sued for negligence and intentional misconduct (the latter was excluded by the policy), and the jury returned a general verdict. In the garnishment suit by the judgment creditor, the district court entered judgment for the insurer and on appeal, the Fifth Circuit discussed the obligation of defense counsel to request a verdict designating the respective portions of the total damages representing covered and non-covered damages.[64] The court found that defense counsel "was required to make known to the insured the availability of a special verdict and the divergence of interest between them and the insurer springing from whether damages

were or were not allocated."[65] Because the record did not indicate whether counsel had done so, the court vacated the judgment and remanded the case.[66]

VII. Maintaining Confidences and Avoiding Collusion

A. Communications Between the Insured and the Insurer

For the purpose of protecting communications of defense counsel to the insurer or insured from discovery by third parties, such as the claimant, it is in the interest of both that an attorney-client relationship exist among the lawyer and both. Courts that have discussed the issue have uniformly held that such communications are privileged.[67]

As a general proposition, when an attorney has two clients with respect to a particular matter, the attorney cannot have any secrets between them as to that matter. This rule applies to insurance defense counsel. For example, in *Klefbeck v. Dous,*[68] a letter to the insurer by trial counsel hired by the insurer expressing counsel's opinion as to legality of automobile registration was held admissible in a tort plaintiff's action to reach and apply.[69] The court reasoned that counsel "was acting for both the insured and the company and the subject matter of the communication in question was concerned with a material issue in the pending actions. Such communication was not privileged against the insured or against the tort plaintiff , who by virtue of the statutes of Maine and of this Commonwealth ... stood in the place of the insured as against the company to the amount of her claim."[70] However, "... virtually every rule is subject to some exception."[71]

B. Keeping Secrets from the Other Client

Problems can develop when either the insured or the insurer asks defense counsel to keep something confidential from the other client. If either suggests that counsel do something improper, counsel ought to be able to explain why it cannot be done without being required to disclose the improper request to

the other client. Occasionally, when a lawyer has multiple clients, one may suggest a course of action which is inconsistent with the lawyer's obligation to the others. There is nothing wrong if the lawyer explains why the suggested improper action cannot be undertaken and yet maintains in confidence from the other clients the fact that one has suggested an improper course of action.

A few courts have stated that in certain narrow circumstances defense counsel may be obligated to keep secrets from the other client. In California, there is dicta suggesting that candid evaluations of the insured are for only the insurer. In *American Mut. Liability Ins. Co. v. Superior Court*,[72] the court stated:

> [I]t may well be that in the full discharge of his obligation to his client-insurer, the attorney may communicate to the insurer objective evaluations of his client-insured, which are for the consideration only of the client-insurer in permitting it to discharge its duties to the insured under the insurance contract. Similarly there may be confidences indulged by the insured to the attorney which in turn are not, intended for the insurer.73

As a practical matter, in the event of an excess verdict it seems dubious whether such evaluations of the client-insured received by the insurer could be kept from the insured. In that situation, the courts have uniformly found that counsel's evaluations are part of the communications concerning the common matter which are discoverable.[74] The California cases cite no authority which have permitted such communications not to be discovered.

Frequently insureds convey information to defense counsel which they request be held in confidence from the insurer or the disclosure of which to the insurer would obviously prejudice the insured's coverage. It is well established that defense counsel must keep such confidential information from the insurer—unless the subject matter is inextricably intertwined with counsel's obligation to provide a competent defense.[75] In *Parsons v. Continental Nat. Am. Group*, it was improper for defense counsel to convey confidential psychiatric information indicating that the insured intended his brutal assault on the claimant because it was obvious that the information could be used to prejudice the insured's coverage[76] position and the information was not essential to a competent defense of the claim.[77]

Counsel must, however, report the status of the litigation to the insurer even if the insurer uses developments at trial to disclaim coverage.[78]

Some courts have stated that counsel must not only refuse to disclose confidential information to the insurer but must also withdraw:

> If an insured imparts to the lawyer information which would or might provide a basis for denying policy coverage—such as fraud in obtaining the policy—the lawyer is bound not to disclose the information to the insurer, and to withdraw from the representation of both the insurer and the insured.79

This course of action was also suggested by the *Parsons* court for the lawyer who came across the confidential psychiatric information involving his client.[80]

The suggested remedy of withdrawal is a poor solution. First, and most importantly, when one considers the detailed billing information which must be submitted by defense counsel to the insurer in order for fees to be paid, it will only be the particularly obtuse claims person who will not be directed toward the source of the reason for withdrawal if defense counsel seeks leave to withdraw in circumstances presented in Parsons. If, on the other hand (assuming that the matter is not essential to the defense of the case), counsel simply maintains the confidence, then the likelihood that the insurer will come across information the insured wishes to withhold is reduced. Second, when counsel seeks leave to withdraw, the insurer's duty to defend still exists, and new defense counsel must be found. (One possible solution to this would be to have the insured select counsel, with the insurer being liable for the reasonable costs of defense.) Third, defense counsel may come across the prohibited information on the eve or in the middle of trial. To require defense counsel to withdraw in these circumstances is impracticable. The better approach is that counsel need not withdraw unless the subject matter of the confidential information is inextricably intertwined with counsel's obligation to provide a competent defense.

C. Avoiding Collusion

There is much dicta as to how insurance defense counsel is obligated, like all other attorneys, to maintain confidences.[81] The obligation presents a most acute problem when the insured appears to perpetrate a fraud upon the insurer. In Massachusetts, prior to the July 1, 1979, Amendment to the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, there was a conflict between the confidence Disciplinary Rules associated with Canon 4, which required the attorney to preserve confidences and secrets of his client,[82] and DR 7-102(B)(1), which provided, at that time, that:

> (B) The lawyer who receives information clearly establishing that:
>
> (1) his client has, in the course of the representation, perpetrated a fraud upon a person or a tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.83

Prior to the 1979 amendment, there was a split of authority as to whether DR 7-102(B)(1) prevailed over the confidence rule, DR 4-101(B). The Massachusetts Bar Association Committee on Professional Ethics expressed the view that Canon 7 should prevail.[84] The Oregon Supreme Court, interpreting the identically worded Disciplinary Rules, advised that the lawyer must withdraw but not disclose.[85] There was also a strong dictum by the Supreme Judicial Court intimating that defense counsel was free to disclose to the insurer collusive or fraudulent conduct. In the course of deciding that a child can bring a claim against his parent (to the extent of the automobile insurance coverage) the court stated that:

> The parent is usually represented by counsel provided by the insurance company. Such counsel is ever alert to protect the interests of the insurance company and ready to expose any attempts at collusive and fraudulent conduct.86

Effective July 1, 1979, the Supreme Judicial Court adopted an amendment which added the following words to DR 7-102(B)(1): “except when the information is protected as a privileged communication.”[87] Thus, when counsel receives information subject to the attorney-client privilege

which indicates that his client has perpetrated a fraud upon the insurer, he ethically must call upon his client to reveal the fraud; however, if the client refuses, he is precluded in Massachusetts from communicating that information to the insurer. Of course, the attorney is not permitted to "assist his client in conduct that the lawyer knows to be illegal or fraudulent,"[88] and the attorney is mandated to withdraw as counsel if he knows or it is obvious that the continued employment will result in violation of a Disciplinary Rule.[89] The attorney may also request the court to permit him to withdraw under such circumstances.[90]

Even after the 1979 amendment, there remain areas of dispute concerning the circumstances under which an attorney may disclose a client's intention to commit perjury in civil litigation.[91]

VIII. Impeaching the Client

Every jurisdiction which has addressed the issue, except Massachusetts, has held or stated that insurance defense counsel may not impeach the insured in cross-examination or in closing argument. Perhaps the leading case is *Pennix v. Winton*,[92] in which defense counsel in his closing argument contended that there was collusion between the plaintiff and his client and said that his client's version of the accident was "the most ridiculous story you every sic heard in your life."[93] Apparently the jury was persuaded, since it returned a defendant's verdict. On appeal, judgment was reversed because of counsel's closing argument. The court stated:

> The confusion of a jury in a situation in which counsel reversed their normal positions, counsel for the defendant attacking his client and counsel for the plaintiff upholding the defendant, may readily be imagined. Every attempt of plaintiff's attorney to establish the credibility and good faith of defendant might well be regarded by the jury as additional evidence of the collusion charged by defendant's own counsel.94

Massachusetts stands alone in permitting counsel to impeach his own client.[95] In *Horneman v. Brown*[96] and *Goodney v. Smith*,[97] the court held that it was reversible error to refuse defense counsel's offer of a prior inconsistent statement by the defendant. It is noteworthy that both *Horneman* and

Goodney involved compulsory motor vehicle insurance, which does not require cooperation of the insured. Thus *Horneman* and *Goodney* can be distinguished on the basis that the insurer cannot use the insured's refusal to cooperate as a basis for disclaiming. Stated otherwise, an insurer is obligated to pay a claimant under the compulsory liability automobile insurance coverage even if the insured's refusal to cooperate with the defense of the claim prejudices the insurer's rights. *Horneman* expressly stated, "Courts must necessarily examine such cases with care, to prevent fraudulent cooperation between a plaintiff and a nominal defendant at the expense of the insurer ... (citation omitted)."[98] It does not appear that the Supreme Judicial Court in *Horneman* or *Goodney* considered the concern discussed in *Pennix*, to wit, that it is unseemly for a jury to hear a defendant's attorney arguing against his client's credibility while the plaintiff's lawyer asks the jury to believe the defendant. *Horneman* and *Goodney* ought not to be followed except, perhaps, with respect to claims involving only compulsory automobile insurance.

IX. Things to Avoid

A. DR 5-107(B) and the Right of the Insurer to Control the Defense

DR 5-107(B) provides:

> A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.99

Rising legal costs are a constant source of concern to the insurance industry (and others). In tendering a case to defense counsel, an insurer may instruct that defense counsel shall not take depositions, retain experts, undertake "extensive" discovery, etc., without the prior written consent of the claim supervisor. Although the contract gives to the insurer the unfettered right to control the defense, defense counsel must comply with DR 5-107(B). In addition, Canons 6 and 7 require that an attorney act competently and zealously to protect the interest of the client. As a practical matter, there is usually no problem when the claim falls wholly within the policy limit and there are no coverage

defenses.[100] On the other hand, problems may develop when the policy limit is low or coverage defenses have been asserted. In a frequently quoted statement, the court in *American Employers Ins. Co. v. Goble Aircraft SP*.[101] set forth the standard as follows:

> When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client. It is immaterial that such a procedure increases the cost to the carrier beyond the policy coverage limit.
>
> The attorney may not seek to reduce the company's loss by attempting to save a portion of the total indemnity in negotiations for the settlement of a negligence action, if by so doing he needlessly subjects the assured to judgment in excess of the policy limit. His duty to the assured is paramount. The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by the insurance carrier.102

American Employers was a declaratory judgment action by an insurer under a general liability policy to determine the defense obligation arising out of 46 fatalities when a fishing boat capsized. The insurance policy had an indemnity limit of $100,000 for each person and $300,000 for each accident.[103]

On the other hand, neither *Goble* nor DR 5-107(B) mean that an insured or defense counsel may demand that the insurer spend millions for defense but not a penny for tribute. If the insured purchases the minimum statutory automobile coverage, defense counsel does not necessarily breach DR 5-107(B) by failing to incur a million dollars in legal fees in defending the case. It is obviously also proper for defense counsel to use paralegals in non-legal work, assign more routine or simpler cases to junior attorneys with lower billing rates, and to have preparation of complicated cases, to the extent possible, done by junior attorneys under the supervision of a senior.

To comply with DR 5-107(B), the best approach is to determine what counsel would do to defend the claim if there were no insurance, the insured was likely to pay any judgment, and the attorney expected to be paid by the insured.

B. Conflicts Between Multiple Insureds

Occasionally an insurer issues policies to two parties involved in an accident, and both wish to assert claims against each other. If the insurer settles one claim there is no problem with defense counsel defending the other claim where counsel had nothing to do with the settlement of the first claim.[104]

A more common problem is where the insurer insures more than one defendant. The mere fact that two defendants are involved does not, in all circumstances, mandate that the insurer retain separate counsel for each entity. For example, in *Spindle v. Chubb/Pac. Indem. Group*,[105] the court held that defendant physicians could be jointly represented by same attorney even though they had different policy limits and potential liabilities because no different defense was warranted for either physician.[106]

However, it is improper for an attorney to represent parties who interests conflict. Thus, an attorney may not appear for both the owner and operator of a vehicle without full disclosure and consent, when there exists a question of permissive use involved which would affect the insurance coverage of the operator.[107] Similarly, an attorney may not properly represent a driver and passenger without full disclosure and consent in circumstances where the passengers have potential claims against the driver.[108] Finally, it is improper for counsel to stipulate to facts without the knowledge or consent of the insured which have an adverse impact on the insured while limiting the liability of the insurer which hired defense counsel.[109]

C. Representation of Interest of Insured in Counterclaim

It is not uncommon for the insured to want to assert a counterclaim and request that counsel retained by the insured represent the insured in the counterclaim. DR 5-105(C) does permit such multiple representation, after full disclosure and consent, if it is "obvious" that the attorney can "adequately" represent the interests of all. As a practical matter, such representation should be avoided by insurance defense counsel since it is often difficult to assess the degree of differing interests between the insured

and the insurer and because it is not usually "obvious" that the attorney can "adequately" represent the interests of both. Both defense counsel and the insurer are obligated not to interfere with the insured's right to assert a counterclaim.[110]

X. Nonsolutions

Occasionally, appellate courts when wrestling with conflict problems created by liability insurance have expressed the view that the problem can be resolved by having the insured represented by two counsel at trial.[111] This view has not met with enthusiasm by trial judges.[112] In almost all situations it is totally impracticable to have two lawyers defending the same client. Decisions have to be made with respect to how to answer interrogatories, cross-examine witnesses, object to questions, request jury instructions, etc., and it is asking too much of the judge or jury to listen to arguments by two lawyers defending the same client who have differing views on these matters.

Another possible solution which has superficial appeal is to allow the insured to choose the lawyer with the insurer being liable for reasonable counsel fees. Again there is some dicta suggesting that the whole problem is that counsel is paid by the insurer.[113] In some insurance policies, the insured has the right to choose defense counsel. In those cases, courts have found that counsel owes a duty of candor and loyalty to the insurer to the extent the insured seeks indemnity from the insurance company.[114] Indeed a moment's reflection reveals that if an attorney is to look to an insurer (or any third party) to pay all or a portion of the judgment which may be recovered against his client, then the attorney must owe some duties to that entity.[115] Furthermore, it is desirable for the attorney's reports on the claim to the insurer to be protected from discovery by the claimant by the attorney-client privilege. Once this assertion is made and the duties are recognized, however, then counsel retained initially by the insured has two clients. As noted in the beginning, if "both are united to defeat the plaintiff's claim,"

counsel will have “little difficulty in serving both masters.” What shall counsel do if there is a difference of opinion?

XI. Conclusion

In most cases, there are no problems for insurance defense counsel in representing both the insurer and the insured because both are in agreement with defeating the plaintiff’s claims. Nonetheless, because the duty to defend is broader than the duty to indemnify and because reasonable insurers and insureds may also differ as to how a case should be handled as well as have conflicting interests on coverage issues, defense counsel frequently face ethical dilemmas. This article discusses and attempts to answer only some of the ethical issues and other pitfalls which confront insurance defense counsel. Counsel is obligated to provide a competent defense and must refrain from favoring either client in potential or actual disputes—except when defending in a competent manner appears to or actually benefits one client.

Footnotes

[a] Richard L. Neumeier is a partner at Parker, Coulter, Daley & White and has been thinking about the problems of serving two masters for 20 years.

[1] “No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, despise the other. Ye cannot serve God and Mammon.” Matthew 6:24 (King James).

[2] This term is used here to describe the lawyer hired by the insurance company to defend claims against its insured. To be distinguished is insurance coverage counsel who is retained to advise the insurer as to the extent of insurance coverage, if any, or to prosecute or defend declaratory judgment actions. The insurance coverage attorney serves only one master, the insurer. See Houston General Ins. Co. v. Superior Court, 108 Cal.App.3d 958, 964-66, 166 Cal.Rptr. 904, 908-09 (1980); Saftler v. Government Employees Ins. Co., 95 A.D. 54, 56-59, 465 N.Y.S.2d 20, 22-24 (N.Y.App.Div.1983).

[3] Mallen, Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice, 45 INS.COUNS.J. 244, 246 (1978).

[4] Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 10 (1989).

[5] Defense counsel is the insurer's agent for the purpose of settlement communications. Cernocky v. Indemnity Ins. Co. of No. Am., 69 Ill.App.2d 196, 203-04, 216 N.E.2d 198, 203 (1966).

[6] Criticism of counsel may result even when there is no basis for such criticism. Thus, in Siebert Oxidermo, Inc. v. Shields, 430 N.E.2d 401 (Ind.App.Ct.1982), aff'd, 446 N.E.2d 332 (Ind.1983), when defense counsel was unable to set aside a default judgment, personal counsel for the insured argued:

> ... the trial court erred in failing to reconsider an apparent conflict of interest arising from the fact that the attorney who originally represented it in filing the motion to set aside the default judgment was employed by its insurance carrier under the defense clause contained in the policy. The total argument is that because the carrier would be relieved of liability (because it had not been timely notified of the suit) if the judgment were not set aside, we should believe that the carrier and the attorneys somehow failed to present the manufacturer's case for relief from judgment.
>
> We consider the argument impertinent, if not scandalous. Without considering the respected reputation of the attorney involved, we point out that on a daily basis, defense attorneys employed by insurance carriers on behalf of policyholders are called upon to deal with matters in litigation where the interests of the policyholder and the carrier do not coincide. Under such circumstances, the attorney's duty is, of course, to the insured whom he has been employed to represent. In response, the defense bar has exhibited no inability to fully comply with both the letter and spirit of Canon 5 of the Code of Professional Responsibility. If it were otherwise, we suspect the desirability of requiring carriers to supply defense counsel would have long since disappeared as a term of the policy.

Id. at 402-03; see also Tews Funeral Home, Inc. v. Ohio Casualty Co., 832 F.2d 1037, 1039 (7th Cir.1987) ("We will not anticipate that counsel selected by Ohio at its expense will violate the strict fiduciary duty owed to both Tews and Ohio"); Federal Ins. Co. v. X-Rite, Inc., 748 F.Supp. 1223, 1229 (W.D.Mich.1990) ("To hold that the insurer who, under reservation of rights, participates in selection of counsel, automatically breaches its duty of good faith is to indulge the conclusive presumption that counsel is unable to fully represent its client, the insured, without consciously or unconsciously compromising the insured's interests. The Court is unable to conclude that Michigan law professes so little confidence in the bar of this state"). Point Pleasant Canoe Rental v. Tinicum TP., 110 F.R.D. 166, 171 (E.D.Pa.1986) ("... Petitioners are asking me to announce a per se rule that counsel provided to an insured by an insurance company is likely to disregard his ethical duty to his client.... I am unwilling to adopt such a per se rule").

[7] 49 Ill.App.3d 675, 364 N.E.2d 683 (1977), aff'd, 71 Ill.2d 306, 375 N.E.2d 118 (1978).

[8] See also Atlanta Intern. Ins. Co. v. Bell, 438 Mich. 512, 514, 475 N.W.2d 294, 296 (1991) (insurer entitled to sue defense counsel under doctrine of equitable subrogation where counsel failed to plead comparative negligence in defending insured).

[9] 258 Cal.App.2d 136, 65 Cal.Rptr. 406 (1968).

[10] See also Joos v. Auto-Owners Ins. Co., 94 Mich.App. 419, 288 N.W.2d 443 (1980) (same).

[11] 264 Ind. 153, 340 N.E.2d 777 (1976).

[12] 264 Ind. at 172, 340 N.E.2d at 788.

[13] See, *e.g.*, Lake Havasu Com. Hosp. v. Ariz. Title Ins., 141 Ariz. 363, 376, 687 P.2d 371, 384 (1984) (defense counsel criticized for advising insurer to send letter to insured advising that the policy did not cover certain losses).

[14] See, *e.g.*, Snodgrass v. Baize, 405 N.E.2d 48, 53 (Ind.App.Ct.1980) (defense counsel gave written explanation to insured's counsel about insurer's duty to defend and indemnify lawsuit against insured for shooting plaintiff; the court stated that "[t]he law firm's actions were model to be followed in such situations").

[15] See American Employers Ins. Co. v. Goble Aircraft, Sp., 205 Misc. 1066, 1074, 131 N.Y.S.2d 393, 401 (Sup.Ct.1954).

[16] Thus in Salonen v. Paanenen, 320 Mass. 568 (1947), in the course of finding that the insurer was not estopped to deny coverage by continuing to defend after the insured's breach of the cooperation obligation, the court stated:

> The evidence discloses that at the hearing before the auditor the attorney for the company [sic], upon learning that the assured was going to repudiate the statement [to the insurance adjuster about how the accident occurred], said to her, "I am going to continue in the defence of this case to protect the company's rights only.... I want you to understand that in the event that your sister recovers a judgment, that I am going to recommend that the company not pay the judgment for your failure to co-operate. And you can go back and tell your sister and her counsel that."
>
> Id. at 574 n. 1.

[17] See, *e.g.*, Gray v. Zurich Insurance Co., 65 Cal.2d 263, 279 n. 18, 419 P.2d 168, 178 n. 18, 54 Cal.Rptr. 104, 114 n. 18 (1966); Cowan v. Insurance Co. of N. Am., 22 Ill.App.3d 883, 897, 318 N.E.2d 315, 326 (1974).

[18] See American Home Assur. Co. v. Evans, 589 F.Supp. 1276, 1279-87 (E.D.Mich.1984), vacated on other grounds, 791 F.2d 61 (6th Cir.1986).

[19] San Diego Navy Fed. Credit Union v. Cumis Ins., 162 Cal.App.3d 358, 366, 208 Cal.Rptr. 494, 499 (1985).

[20] Massachusetts has not adopted the ABA Model Code. In the Matter of Adoption of Model Rules of Professional Conduct, Petition of the Boston Bar Association, Order, at p. 2 (February 29, 1988).

[21] The Code consists of nine separate Canons, a series of more specific related Disciplinary Rules, numerous Ethical Considerations, and notes to the above. In adopting the code the Supreme Judicial Court stated:

> The Ethical Considerations as appearing in the American Bar Association 'Code of Professional Responsibility and Canons of Judicial Ethics' (1970) are not adopted as a rule of this court but those Ethical Considerations form a body of principles upon which the Canons of Ethics and Disciplinary Rules, as herein adopted, are to be interpreted.

359 Mass. 796, 797 (1971). Thus the Ethical Considerations are only aspirational; violation of only an Ethical Consideration will not result in discipline. Violation of a Disciplinary Rule, on the other hand, may result in disciplinary proceedings. Stated otherwise, compliance with the Disciplinary Rules is mandatory; compliance with the Ethical Considerations is not. In appropriate circumstances, however, the Ethical Considerations may establish a standard for imposing malpractice liability. See DeVaux v. American Home Assurance Co., 387 Mass. 814, 819-20 (1983) (attorney has duty to supervise lay employee, citing Code of Professional Responsibility, EC 3-6).

[22] See ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950) and In re A.H. Robins Co., Inc., 880 F.2d 709, 751 (4th Cir.1989). Thus, an attorney can never act contrary to the express instructions of the client. Illustration of this principle occurred in Reynolds v. Maramorosch, 208 Misc. 626, 144 N.Y.S.2d 900 (Sup.Ct.1955), which involved an action by two unemancipated children against the insured for personal injuries arising out of an automobile accident. Insurance defense counsel filed a motion to dismiss the complaint due to lack of legal capacity of the unemancipated children to bring suit. Among the opposing papers was an affidavit of the insured stating that the motion to dismiss was made without his knowledge and consent, that he wished to waive any defense raised by the motion, and that the suit should be decided on the merits. The court specifically stated that the insured was the client and that while the attorney has the right to terminate the attorney-client relationship if the client did not want to follow his advice, guidance and suggestions, the attorney could not take action contrary to the expressed wishes of the client. 208 Misc. at 630, 144 N.Y.S.2d at 904. The court further stated that the insurer's rights under the contract, including the right to deny coverage for lack of cooperation, were separate and distinct. Id. The motion to dismiss was denied since it had been made without the authority of the client. 208 Misc. at 629-30, 144 N.Y.S.2d at 903-04.

[23] See Bogard v. Employers Cas. Co., 164 Cal.App.3d 602, 609, 210 Cal.Rptr. 578, 582 (1985); McCourt Co., Inc. v. FPC Properties, Inc., 386 Mass. 145, 146 (1982); Norman v. Insurance Co. of N. Am., 218 Va. 718, 727, 239 S.E.2d 902, 907 (1978).

[24] See discussion on breach of cooperation, *infra* at pp. 72-74, and avoiding collusion, at pp. 77-79; see also Buchanan v. Buchanan, 99 Cal.App.3d 587, 596, 160 Cal.Rptr. 577, 583 (1980) (attorney not required to seek express authority of husband-client in seeking dismissal of plaintiff-wife's tort claim for failure to effect service for three years; "It is axiomatic that absent collusion, the best interests of this or any other defendant is the full dismissal of an action....").

[25] McCourt Co., Inc., 386 Mass. at 146 (citing Imperiali v. Pica, 338 Mass. 494, 499 (1959)).

[26] See Gray v. Commercial Union Ins. Co., 191 N.J.Super. 590, 596, 468 A.2d 721, 725 (1983) ("There is no dispute that as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured"). *Cf.* Atlanta Intern. Ins. Co. v. Bell, 438 Mich. 512, 518, 475 N.W.2d 294, 297 (1991) ("... The relationship between the insurer and the retained defense counsel, ... [is] less than a client-attorney relationship....").

[27] SJC Rule 3:07. Occasionally the insurer has been referred to as the employer, not the client. See Moritz v. Medical Protective Co., 428 F.Supp. 865, 872 (W.D.Wis.1977); Allstate Ins. Co. v. Keller, 17 Ill.App.2d 44, 52, 149 N.E.2d 482, 486 (1958); see also Legal Ethics—If An Insurance Company Uses An Attorney To Defend The Insured As An Investigator To Prepare A Policy Coverage Defense, It Is Estopped From Asserting The Defense, 52 TEX.L.REV. 610, 612 (1974); MBA Comm. on Professional Ethics, Op. 77-16, 62 MASS.L.Q. 247 (1977). This view is the distinct minority and it is probably too late in the day to cause most courts to rule that the insurer is the employer. While making the insurer the employer would relieve defense counsel of some of the difficulties created by DR 5-105(C), it would raise other problems for both the insured and the insurer, since communications between defense counsel and the insurer could not be protected from discovery by claimants on the ground of attorney-client privilege.

[28] See Houston General Ins. Co. v. Superior Court, 108 Cal.App.3d 958, 964, 166 Cal.Rptr. 904, 908 (1980); Lysick v. Walcom, 258 Cal.App.2d 136, 146, 65 Cal.Rptr. 406, 413 (1968); Fidelity and Cas. v. McConnaughy, 228 Md. 1, 10, 179 A.2d 117, 121 (1962); see also H. DRINKER, LEGAL ETHICS 114-15 (1953).

[29] In situations where there is more than one insurer and the insurers' interests conflict, counsel's representation must also be limited to defending the claim against the insured:

> Dual representation of a single party by attorneys representing conflicting interests poses inherent difficulties. When matters of strategy arise, for example, whether to call as a witness an individual who offers useful testimony as against an insured claim but could damage the defense against an uninsured claim, the decision must be made by a single counsel whose objective is to provide the best defense possible, with total disregard of the existence of insurance. Moreover, where, as here, there are involved two or more insurers with differing coverages—and thus, the potential for more than two attorneys responsible for the defense, the difficulties inherent in dual representation can only increase proportionately.

N.Y.S. Urban Dev. Corp. v. VSL Corp., 563 F.Supp. 187, 191 n. 2 (S.D.N.Y.1983), aff'd, 738 F.2d 61 (2d Cir.1984).

[30] Defense counsel's representation always consists solely of defending the claim against the insured. Where there are no coverage issues and the claim clearly falls within the policy limit, the limited scope of counsel's representation may not be apparent.

[31] Cousins v. State Farm Mut. Auto. Ins. Co., 294 So.2d 272, 276-77 (La.Ct.App.1974).

[32] In a poorly reasoned and unique opinion, 91-5, the Massachusetts Bar Association Committee on Professional Ethics expressed the

view that insurance defense counsel could not provide the insurer with the attorney's opinion as to the merits of the claim or its value if the attorney knew or had strong reason to believe that the case could be settled within the policy limits. MBA Comm. on Professional Ethics, Op. 91-5, summarized at 19 M.L.W. 1821, 1821, 1846 (June 17, 1991). The opinion cited no relevant precedent, ignored the practicalities presented to defense counsel, insurers, and insureds, and overlooked the duties owed by defense counsel to insureds and insurers. See Neumeier, Ethics Opinion Distorts Duty of Defense Counsel, 19 M.L.W. 1981, 1985, 2009 (July 15, 1991).

[33] Hamilton v. State Farm Insurance Company, 83 Wash.2d 787, 790, 523 P.2d 193, 196 (1974); see also L & S Roofing v. St. Paul Fire & Marine, 521 So.2d 1298, 1303 (Ala.1987) (defense counsel's duties include "realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit"). In handling excess claims, a leading commentator has stated that "although defense counsel can and should evaluate and advise regarding the reasonableness of the settlement demand, counsel should not choose sides and advocate either client's interests as between them." R. MALLEN & J. SMITH, LEGAL MALPRACTICE 416 (3d ed. 1989).

[34] 521 So.2d 1298 (1987).

[35] Id. at 1303 (quoting Tank v. State Farm Fire & Cas. Co., 105 Wash.2d 381, 389, 715 P.2d 1133, 1138 (1986)); accord Hartford Acc. & Indem. Co. v. Foster, 528 So.2d 255, 273 (Miss.1988).

There is some loose dicta arising from cases which went sour that insurance counsel erred by not making full disclosure and obtaining consent in representing the insured and insurer who had adverse interests. See, *e.g.*, Betts v. Allstate Ins. Co., 154 Cal.App.3d 688 at 715-17, 201 Cal.Rptr. 528, 544-46 (1984); Lysick v. Walcom, 258 Cal.App.2d at 146-48, 150, 65 Cal.Rptr. at 413, 414, 416. Such dicta imply that the attorney can adequately represent adverse interests by making "full disclosure" and obtaining consent. This contention is not persuasive and does not withstand analysis because to comply with DR 5-105(C), it must be "obvious" that the attorney can "adequately" represent the interests of all.

[36] See Fulton v. Woodford, 26 Ariz.App. 17, 24, 545 P.2d 979, 986 (1976).

[37] See Industrial Indem. Co. v. Great Am. Ins. Co., 73 Cal.App.3d 529, 533-37, 140 Cal.Rptr. 806, 808-11 (1977) (dual representation improper; counsel disqualified); Hartford Fire Ins. Co. v. Masternak, 55 A.D.2d 472, 475-76, 390 N.Y.S.2d 949, 952 (N.Y.App.Div.1977) (dual representation improper); Shelby Mut. Ins. Co. v. Kleman, 255 N.W.2d 231, 235 (Minn.1977) (attorney did not violate DR 5-105(C) by representing son of insured in tort claim involving question of permissive use and also representing insurer in declaratory judgment action where there was full disclosure and consent).

[38] See ABA Comm. on Professional Ethics and Grievances, Informal Op. 728 (1963) and Informal Op. 822 (1965); see also Hawkins v. Auto-Owners Ins. Co., 579 N.E.2d 118, 123-24 (Ind.App.Ct.1991) (attorney who filed appearance for insured in tort suit and withdrew seven days later was disqualified from representing insurer in subsequent declaratory judgment action even though no confidential information was acquired from insured); *cf.* Currington v. Federated Mut. Ins. Co., 145 Ga.App. 350, 351, 243 S.E.2d 713, 714 (1978) (fact that same attorney instituted declaratory judgment action also filed answer for insured under reservation of rights was not basis for dismissing declaratory judgment action); Allstate Ins. Co. v. Elliot, 89 Ill.App.3d 140, 144, 411 N.E.2d 1072, 1076 (1980) (insurer not estopped to deny coverage by using attorney it initially designated to defend insured to also bring declaratory judgment action—no criticism of counsel's action); Continental Insurance Companies v. Hancock, 507 S.W.2d 146, 150 (Ky.1974) (same).

On the other hand, counsel selected by the insured may simultaneously defend a claim against it, with his fee being paid by the insurer, and represent the insured in a declaratory judgment against the insurer. In Emons Industries, Inc. v. Liberty Mut. Ins. Co., 747 F.Supp. 1079 (S.D.N.Y.1990), Liberty's motion to disqualify insured's counsel, in a declaratory judgment action over a dispute regarding whether the same law firm would continue to represent the insured in a series of DES cases which Liberty was paying to defend, was denied because "the fact that Liberty paid Emons' counsel's fees does not lead to the conclusion that Liberty was a client of such counsel." Id. at 1082; see also Employers Ins. of Wausau v. Albert D. Seeno Const., 692 F.Supp. 1150, 1157 (N.D.Cal.1988), aff'd, 945 F.2d 284 (9th Cir.1991) (same). One reason to distinguish personal counsel from insurance defense counsel in this situation is that usually the latter has an expectation of future business from the insurer. See U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n. 5 (8th Cir.1978).

Cf. Lavanant v. General Acc. Ins. Co., 164 A.D.2d 73, 81, 561 N.Y.S.2d 164, 169 (N.Y.App.Div.1990) (insurer's malpractice claim against personal counsel for allegedly mishandling defense and thereby causing excess verdict was dismissed because personal counsel owed no duty to third party); Draper v. Garcia, 793 S.W.2d 296, 300-01 (Tex.Ct.App.1990) (counsel retained by insured, as required in the policy negotiated with insurer, to defend claims against insured covered by policy was not liable for legal malpractice to insurer, or insurer's recording agent, because no attorney-client relationship existed).

[39] This latter obligation to the insurer is discussed, *infra*, at pp. 77-78.

[40] Darcy v. Hartford Ins. Co., 407 Mass. 481, 491 (1990).

[41] If the insured has personal counsel, it is reasonable for insurance defense counsel to rely upon personal counsel to explain the significance of the cooperation clause. Defense counsel must not assume that an uncounseled insured understands the full implications of the cooperation clause.

[42] 55 Wash.2d 601, 349 P.2d 430 (1960).

[43] 55 Wash.2d at 612, 349 P.2d at 437.

[44] It is not enough for defense counsel to seek leave to withdraw merely because the insured refuses to appear for trial. There are occasional situations in which a competent defense can be presented without the cooperation or presence of the insured. This happens when the plaintiff simply has no case or cannot meet his burden of proof.

[45] *Cf.* Goldstein v. Bernstein, 315 Mass. 329, 334 (1943) ("The company was not required to request or assent to a continuance when the insured failed to appear. Such conduct might have later subjected it to a claim of waiver or estoppel ... The judge properly excluded evidence that counsel for one of the plaintiffs would have been willing to grant a continuance when the case was reached for trial if requested to do so by the attorneys for the insured").

[46] 17 Ill.App.2d 44, 149 N.E.2d 482 (1958).

[47] 17 Ill.App.2d at 52, 149 N.E.2d at 486; see also State Farm Mutual Automobile Insurance Co. v. Walker, 382 F.2d 548, 552 (7th Cir.1967) (defense counsel's participation in depositions and ex parte sworn statements of insured after learning that insured's earlier version of automobile accident was untrue and use of this information to avoid coverage by reason of breach of cooperation created factual question whether insurer had waived breach—summary judgment for insurer reversed); Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex.1973) (similar result on similar facts); *cf.* Car and General Insurance Corp. v. Goldstein, 179 F.Supp. 888, 890-91 (S.D.N.Y.1959), aff'd, 277 F.2d 162 (2d Cir.1960) (summary judgment granted to insurer for breach of cooperation based on inconsistent statements: "Not only was the [insured's] statement to [defense counsel] not privileged from disclosure to the insurance company, it was, in fact, [the insured's] duty, imposed by his contract, to make a fair and frank disclosure to the insurance company because of their common interest in knowing the way in which the accident happened") (insured signed statement at conference with defense counsel that he did not tell truth to insurer as to how accident happened).

[48] 99 Ill.App.2d 153, 240 N.E.2d 742 (1968).

[49] Id. at 158, 240 N.E.2d at 745.

[50] Id. at 158, 240 N.E.2d at 745.

[51] Id. at 171, 240 N.E.2d at 752.

[52] See Snodgrass v. Baize, 405 N.E.2d 48, 54 (Ind.App.1980), petition for reh'g denied, 409 N.E.2d 645 (1980) (no impropriety in defense firm receiving statement taken from insured by investigator employed by insurer where the statement was not obtained by means of the attorney-client relationship and not obtained after discovery of a conflict of interest without having advised the insured of such conflict).

[53] 789 F.2d 1196 (5th Cir.1986).

[54] 789 F.2d at 1202.

[55] DR 2-110(A)(2) provides in relevant part: "A lawyer shall not withdraw from employment until after he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client ..." SJC Rule 3:07.

[56] Some courts have found that even though the insurer's duty to defend has ended, this is insufficient to permit defense counsel to withdraw. See Smith v. Anderson-Tulley Co., 608 F.Supp. 1143, 1146-47 (S.D.Miss.1985), aff'd, 846 F.2d 751 (5th Cir.1988). This result seems dubious.

[57] Leave to withdraw may not be granted when the insured does not appear for trial. See Cascella v. Jay James Camera Shop, Inc., 147 Conn. 337, 340, 160 A.2d 899, 901 (1960) (no error in refusing to permit defense counsel to withdraw when insured failed to appear at trial); *cf.* Brown v. Pennsylvania Railroad, 435 Pa. 84, 87-88, 255 A.2d 554, 555-56 (1969) (reversible error in failing to permit counsel leave to withdraw when case had been put on trial list where there was no prejudice to plaintiff); Swedloff v. Philadelphia Transportation Co., 409 Pa. 382, 385, 187 A.2d 152, 153 (1963) (same).

[58] See, *e.g.*, Newton v. Krasignor, 404 Mass. 682, 683 (1989) (insurer intervened to request special questions, the answers to which resolved the applicability of the intentional act exclusion in homeowners policy).

[59] In Newcomb v. Meiss, 263 Minn. 315, 321-22, 116 N.W.2d 593, 597-98 (1962), counsel was criticized for attempting the latter option even though the trial judge had stated on the record that he would not allow an amendment to the complaint to assert an assault and battery claim and the statute of limitations on such a claim had run. (The insured had been convicted of second degree assault.)

[60] See Universal Underwriters v. East Cent. Inc., 574 So.2d 716, 719 (Ala.1991) ("defense attorneys ... cannot request special interrogatories...."—dictum); Gray v. Zurich Insurance Company, 54 Cal.Rptr. 104, 114 n. 18, 65 Cal.2d 263, 279 n. 18, 419 P.2d 168, 178 n. 18 (1966) ("special verdict might present a potential conflict of interest"); Cowan v. Insurance Company of North American, 22 Ill.App.3d 883, 894, 318 N.E.2d 315, 326 (1974) (dictum that defense counsel should not submit a special interrogatory in claim which included allegations of assault and battery). (In Cowan, the insured argued in the coverage suit that the insurer had a duty to "adjudicate whether there was an 'intentional injury' " in the tort suit by submitting a special interrogatory. 22 Ill.App.3d at 893, 318 N.E.2d at 325.) See also Bartells v. Romano, 171 N.J.Super. 23, 28-29, 407 A.2d 1248, 1250-51 (App.Div.1979) (dictum intimating that defense counsel should not request special questions which could have had a result that $25,000 homeowners' policy applied to claim instead of $100,000 auto policy).

[61] In New York, some cases have endorsed the use of special questions. See Public Service Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 398-99, 425 N.E.2d 810, 813-14 (1981) (independent counsel required; special questions should be asked to determine whether acts complained of (sexual abuse) occurred in the course of professional dental treatment where the insurance coverage included indemnity for damages "because of injury resulting from professional dental services rendered ... and resulting from any claim or suit based upon ... undue familiarity"); American Home Assur. Co. v. Weissman, 79 A.D.2d 923, 925, 434 N.Y.S.2d 410, 412 (1981) (defense counsel selected by insurer—special questions should be used to determine whether acts of lawyer were those of attorney and thus within malpractice coverage rather than investment advisor); Utica Mutual Insurance Company v. Cherry, 45 A.D.2d 350, 355, 358 N.Y.S.2d 519, 524 (1974) (insured, who had been convicted of first degree manslaughter, would be permitted to select independent counsel and special questions should be used to determine whether wrongful death was caused by intentional act or negligence); *cf.* Kaczmarek v. Shoffstall, 119 A.D.2d 1001, 1002, 500 N.Y.S.2d 902, 903 (1986) (insurer's motion to intervene to request a special verdict be propounded denied); Trieber v. Hopson, 27 A.D.2d 151, 153, 277 N.Y.S.2d 241, 244 (1967) (defense counsel should not move for a stay of negligence action pending outcome of declaratory judgment action against insurer claiming breach of cooperation).

[62] See American Home Assur. Co. v. Evans, 589 F.Supp. 1276, 1279-80 (E.D.Mich.1984), vacated on other grounds, 791 F.2d 61 (6th Cir.1986); Yancey v. Utilities Ins. Co., 23 Tenn.App. 663, 137 S.W.2d 318 (1939); Buckley v. Orem, 730 P.2d 1037, 1045 (Idaho App.1986); see also Perkoski v. Wilson, 371 Pa. 553, 559, 92 A.2d 189, 192 (1952) (where trial judge ordered remittur of total amount of judgment for plaintiffs, husband and wife, defense counsel breached obligation to insured-client by permitting husband-plaintiff's lower verdict to be remitted "without disclosing to ... the insured that, if the remittur were made applicable to the verdict for the wife-plaintiff, the company would be liable for the full amount of both judgments...."). But see General Acc. Fire & Life Assur. Corporation v. Clark, 34 F.2d 833, 836 (9th Cir.1929) (no duty to request allocation).

[63] 468 F.2d 973 (5th Cir.1973).

[64] Id. at 974.

[65] Id. at 979.

[66] It is interesting to note that the court reached this conclusion even though personal counsel was present at the underlying trial:

The presence of insured's own counsel did not dispense with the necessity of insurer's [sic] counsel discharging his responsibility to disclose fully the precise situation before proceeding, as counsel having the right to control the defense, with a course of action inuring wholly to the insurer's benefit and wholly to the insured's detriment.

468 F.2d at 979.

[67] See, *e.g.*, Baker v. CNA Ins. Co., 123 F.R.D. 322, 326 (D.Mont.1988); Shapiro v. Allstate Insurance Co., 44 F.R.D. 429, 431 (E.D.Pa.1968).

[68] 302 Mass. 383 (1939).

[69] Id. at 389.

[70] Id. See also LaRocca v. State Farm Mut. Auto. Ins. Co., 47 F.R.D. 278, 280 (W.D.Pa.1969) (same); Henke v. Iowa Home Mutual Casualty Company, 249 Iowa 614, 621-22, 87 N.W.2d 920, 925 (1958) (same); Dumas v. State Farm Mut. Ins. Co., 111 N.H. 43, 49, 274 A.2d 781, 784 (1971) (same); and Longo v. American Policyholders' Ins. Co., 181 N.J.Super. 87, 91, 436 A.2d 577, 579 (1981) (same).

[71] Jedwabny v. Philadelphia Transportation Company, 390 Pa. 231, 237, 135 A.2d 252, 255 (1957) (dissenting opinion of Justice Bell).

[72] 38 Cal.App.3d 579, 113 Cal.Rptr. 561 (1974).

[73] 38 Cal.App. at 592, 113 Cal.Rptr. at 572; accord Glacier General Assur. v. Superior Court, 95 Cal.App.3d 836, 839, 843, 157 Cal.Rptr. 435, 436, 438 (1979) (in bad faith claim "only matters which would be of common interest to both clients" in defense attorney's file were discoverable).

[74] See, for example, LaRocca v. State Farm Mutual Automobile Insurance Co., 47 F.R.D. 278, 280 (W.D.Pa.1969), Dumas v. State Farm Mutual Automobile Ins. Co., 111 N.H. 43, 49, 274 A.2d 781, 784 (1971), and Longo v. American Policyholders' Ins. Co., 181 N.J.Super. 87, 91, 436 A.2d 577, 579 (1981).

[75] See Parsons v. Continental National American Group, 113 Ariz. 223, 226-28, 550 P.2d 94, 97-99 (1976) (insurer waived intentional act exclusion by using to its advantage confidential information received from defense counsel).

[76] The insurer in Parsons disclaimed based on the intentional acts exclusion after receipt of counsel's confidential information. 113 Ariz. at 225-26, 550 P.2d at 96-97.

[77] Accord Lake Havasu Com. Hosp. v. Ariz. Title Ins., 141 Ariz. 363, 376, 687 P.2d 371, 384 (1984).

[78] See Lockhart v. Allstate Ins. Co., 119 Ariz. 150, 154, 579 P.2d 1120, 1124 (1978) (insurer not estopped to disclaim further defense or indemnity obligation after receipt of counsel's report that litigation arising out of shooting resulted in new trial on all issues except negligence and contributory negligence, as to which trial court had directed a verdict and refused to grant new trial; Parsons distinguished).

[79] Moritz v. Medical Protective Co., Inc., Etc., 428 F.Supp. 865, 873 n. 8 (W.D.Wis.1977).

[80] Parsons, 113 Ariz. at 227, 550 P.2d at 98.

[81] See Parsons, 113 Ariz. at 227, 550 P.2d at 98; O'Neil v. Cunningham, 118 Cal.App.3d 466, 476, 173 Cal.Rptr. 422, 428 (1981).

[82] DR 4-101 provides in material part as follows:

Preservations of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law and "secret" refers to other information gathered in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) reveal a confidence or a secret of his client,

(2) use a confidence or secret of his client to the disadvantage of the client,

(3) use a confidence or a secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

DR 4-101(C) permits the lawyer to reveal confidences or secrets with consent of the client, when required under the disciplinary rules or by law or court order, the intention of his client to commit a crime and information necessary to prevent the commission of the crime, and confidences or secrets necessary to establish or collect a fee or defend himself against an accusation of wrongful conduct. Id.

[83] SJC Rule 3:07; DR 7-102(B)(1).

[84] See MBA Comm. on Professional Ethics, Op. No. 76-17, 61 MASS.L.Q. 169 (1976), 77-12, 62 MASS.L.Q. 191 (1977), and 78-9, 63 MASS.L.REV. 229 (1978).

[85] In re A, 276 Or. 225, 238-40, 554 P.2d 479, 486-87 (1976).

[86] Sorenson v. Sorenson, 369 Mass. 350, 365 (1975). See also Massachusetts Electric Co. v. Fletcher, Tilton & Whipple, P.C., 394 Mass. 265, 266 (1985) (defense counsel concluded that Canons of Ethics required him to disclose to plaintiff's counsel fact that employee of insured destroyed damaging documents sought in discovery). In dealing with a similar case, the Appeals Court observed, "When a spouse (in this case the wife) seeks through a lawsuit to recover damages from injuries suffered in a car accident caused by the negligence of the other spouse (the husband), one may suppose the husband's enthusiasm for the defense is muted." Genova v. Genova, 28 Mass.App.Ct. 647, 650 (1990) (no error in admitting an accident report completed by the husband when offered on cross-examination of the plaintiff's first witness, a police officer; the statement was admissible as a "prior inconsistent statement" even though the husband had yet to testify).

87 378 Mass. 838, 839 (1979).

88 SJC Rule 3:07, DR 7-102(A)(7).

89 See SJC Rule 3:07, DR 2-110(B)(2).

90 See generally SJC Rule 3:07, DR 2-110(C).

91 See MBA Comm. on Professional Ethics, Ops. 89-1 and 91-2, 4, 6; 74 MASS.L.REV. 114 (1989); Klubock, Bar Counsel Responds, 74 MASS.L.REV. 119 (1989); Rosenfeld *et al.*, Client Fraud: A Critique of Three MBA Opinions, 20 M.L.W. 2107 (6/22/92); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1314 (1975); Id., Formal Op. 341 (1975) (amendment should be broadly construed to preclude lawyer from revealing any information obtained from the client as to past conduct, including fraud perpetrated during the course of the attorney-client relationship).

92 61 Cal.App.2d 761, 143 P.2d 940 (1943).

93 Id. at 776, 143 P.2d at 944.

94 Id. at 770, 143 P.2d at 948. (The court suggested that under the circumstances the proper course of action was to withdraw. 61 Cal.App.2d at 773-75, 143 P.2d at 946-47.) Accord Katz v. Ross, 216 F.2d 880, 884 (3d Cir.1954) (attorney properly denied request to cross-examine his own client); Price v. Giles, 196 Cal.App.3d 1469, 1473, 242 Cal.Rptr. 559, 561 (1987) (new trial ordered where defense counsel stated in closing argument that client had not "been candid"); Spadaro v. Palmisano, 109 So.2d 418 (Fla.App.1959) (new trial ordered because defense counsel argued that his client, the insured, was lying when he claimed to be the operator of the automobile in which a friend was killed; counsel contended that the friend was the actual driver and stated, "I think you can see what has happened here ... I have no desire to cover up or keep anything from you"; id. at 421); Gass v. Carducci, 37 Ill.App.2d 181, 191, 185 N.E.2d 285, 290 (1962) (insurance counsel may not impeach his client for the benefit of insurance company); Newman v. Stocker, 161 Md. 552, 157 A. 761 (1932) (same); Tanski v. Jackson, 269 Minn. 304, 306 n. 2, 130 N.W.2d 492, 494 n. 2 (1964) (same); Crothers v. Caroselli, 126 N.J.L. 590, 20 A.2d 77 (1941) (same); Friedman v. Berkowitz, 206 Misc. 889, 136 N.Y.S.2d 81 (1954) (same). See also Schwartz v. SAR Corp., 19 Misc.2d 660, 666-67, 195 N.Y.S.2d 496, 503-04 (Sup.Ct., Special Term 1959), rev'd on other grounds, 9 A.D.2d 910, 195 N.Y.S.2d 819 (1959) (improper for defense counsel to submit affidavits suggesting collusion (plaintiff was defendant's uncle) and contradicting defendant's version of the accident in deposition filed with plaintiff's motion for summary judgment; proper course of action for defense counsel is to withdraw).

95 See Goodney v. Smith, 354 Mass. 734, 737 (1968); Horneman v. Brown, 286 Mass. 65, 70-71 (1934). One lower court opinion in New Jersey which permitted cross-examination of counsel's own client, Posner v. Nutkis, 5 N.J.Misc. 593, 137 A. 716 (1927), has been clearly superseded by Crothers, *supra* note 94.

[96] 286 Mass. 65, 70-71 (1934).

[97] 354 Mass. 734, 737 (1968).

[98] 286 Mass. at 71.

[99] SJC Rule 3:07.

[100] *Cf.* Bevevino v. Saydjari, 76 F.R.D. 88, 94 n. 11 (S.D.N.Y.1977), aff'd, 574 F.2d 676 (2d Cir.1978) (dictum criticizing insurer and counsel for inadequate preparation and defense of medical malpractice claim and suggesting that future premiums or damage to insured's reputation may serve as basis for malpractice claim against insurer for inadequate defense even where judgment falls within policy limit).

[101] 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup.Ct.1954).

[102] Id. at 1073, 131 N.Y.S.2d at 401.

[103] Id. at 1070, 131 N.Y.S.2d at 396; *cf.* Allstate Ins. Co. v. Troelstrup, 789 P.2d 415, 420 (Colo.1990) (insurer not estopped from denying coverage for sexual abuse claim by directing defense counsel to minimize cost of defense while insurance coverage for child molestation was resolved in a separate proceeding: "Under these circumstances, Allstate was required only to 'take the necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced,' " quoting 7 C. APPLETON, INSURANCE LAW & PRACTICE §4694 at 53 (Supp.1989)).

[104] Davis v. Brown, 430 So.2d 241, 243 (La.Ct.App.1983).

[105] 89 Cal.App.3d 706, 152 Cal.Rptr. 776 (1979).

[106] Accord Rose and Lucy, Inc. v. F/V Saint Anna Maria, 284 F.Supp. 141, 143 (D.Mass.1968) (where underwriters have hull and personal injury policies on both vessels involved in a collision, it was not required to assume the burden of two separate investigations, and there was nothing improper in retaining single counsel to obtain statements from members of the crew of both vessels a few days after the collision); Oda v. Highway Insurance Company, 44 Ill.App.2d 235, 252-53, 194 N.E.2d 489, 498 (1963) (joint defense of landlords and tenants was not negligent or lacking in good faith) *Cf.* Penn Aluminum, Inc. v. Aetna Cas. & Sur. Co., 61 A.D.2d 1119, 1120, 402 N.Y.S.2d 877, 879 (1978) (defense counsel disqualified for filing third-party complaint against company insured by same carrier who hired him to defend insured).

[107] ABA Comm. on Professional Ethics and Grievances, Formal Op. 222 (1941); see Hammett v. McIntyre, 114 Cal.App.2d 148, 151-53, 249 P.2d 885, 887-89 (1952) (new trial ordered where same firm represented owner and driver and driver's counsel stipulated that driver's negligence was sole cause of accident); J.W. Hill & Sons, Inc. v. Wilson, 399 S.W.2d 152, 153-54 (Tex.1966) (error to refuse to permit counsel for driver to withdraw); see also Tanski v. Jackson, 269 Minn. 304, 306 n. 2, 130 N.W.2d 492, 494 n. 2 (1964) (apparent conflict in counsel's duty to owner to assert assumption of risk defense where intoxication of driver was at issue and duty to protect driver from "serious consequences of a finding that he was intoxicated"); Rejohn v. Serpee, 125 Misc.2d 148, 478 N.Y.S.2d 799 (Dist.Ct.1984) (defense counsel could not represent driver without disclosing that insurer took the position that driver did not have consent to drive; defense counsel held liable to client for subsequently suing driver and another on behalf of insurance company after settlement had been reached).

[108] Woodruff v. Tomlin, 593 F.2d 33, 38-40 (6th Cir.1979).

[109] Ivy v. Pacific Auto Ins. Co., 156 Cal.App.2d 652, 663, 320 P.2d 140, 148 (1958).

[110] See Barney v. Aetna Cas. & Sur. Co., 185 Cal.App.3d 966, 982, 230 Cal.Rptr. 215, 224 (1986); Lowe v. Continental Ins. Co., 437 So.2d 925, 928-29 (La.Ct.App. 2d Cir.1983) (lawyer acted improperly by asserting that client-driver was sole cause of accident (which jury found to be correct) because this breached duty to client who was plaintiff and third-party defendant).

[111] See Employers' Fire Insurance Company v. Beals, 103 R.I. 623, 635, 240 A.2d 397, 404 (1968).

[112] See Jackson v. Trapier, 42 Misc.2d 139, 247 N.Y.S.2d 315 (1964) (request of two insurance companies to designate separate counsel for same defendant refused; "such procedure would ... create chaos in the courts"); Burish v. Digon, 416 Pa. 486, 491, 206 A.2d 497, 499 (1965) (no error in trial court's ruling that only driver's personal counsel and insurance defense counsel could make closing argument in case arising out of intersection collision).

[113] See U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n. 5 (8th Cir.1978); Schwartz v. SAR Corporation, 19 Misc.2d 660, 666, 195 N.Y.S.2d 496, 503 (1959), rev'd on other grounds, 9 A.D.2d 910, 195 N.Y.S.2d 819 (1959).

[114] See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir.1986).

[115] See Waste Management v. Intern. Surplus Lines, 144 Ill.2d 178, 190-201, 579 N.E.2d 322, 326-331 (1991) (even where insurer disclaims and insured retains counsel to defend, neither work product nor attorney-client privilege can shield discovery of defense counsel's files).