A Practical Guide to The Tripartite Relationship in Health Care Defense Litigation

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Introduction

Members of DRI have heard about the tripartite relationship between the insured, insurer and defense counsel since the beginning of our insurance defense practice. The relationship has been defined as "a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose." *American Mut. Lib. Ins. Co. v. Superior Court*, 113 Cal Rptr. 561, 571 (Ct. App. 1974). The majority of jurisdictions have determined that defense counsel retained by the insurer has two clients – the insurer and the insured. However, the one-client model (i.e. the insured as the client) is gaining popularity. Is the tripartite relationship different when examining professional liability claims in the health care context? What about when captive insurance companies or self-insured entities are involved?

This writing will examine the basics of the tripartite relationship, in general, the tripartite relationship in the health context and offer some practical advice for how defense counsel can work to minimize the potential for conflicts in these relationships. Let's start by looking at the rules that govern defense counsel and how we ethically approach our representation of insureds.

Model Rules of Professional Conduct

Several Model Rules of Professional Conduct are important when analyzing the tripartite relationship. Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer addresses who is considered to be a client. Rule 1.6: Confidentiality of Information addresses who a lawyer is allowed to reveal confidential information to (i.e. insured versus insurer). Rule 1.7: Conflict of Interest: Current Clients defines when a conflict of interest occurs between two (2) current clients. Rule 1.8(f): Current Clients: Specific Rules addresses who can pay for a lawyer's services. And finally, Rule 5.4: Professional Independence of a Lawyer indicates that a 3rd party payor of legal services should not be able to direct or regulate the lawyer's professional judgment in providing legal services.

Unique Role of Insurance Defense Counsel

Insurance defense lawyers are uniquely situated in the legal world as their services are regularly paid for by someone other than the client they are representing. This leads to the question of, "who, truly, is the client?" As we know, legal ethics dictates

that the defense attorney's loyalties lie with the "client." But, is the insured or the insurer considered the client? The answer may depend on your jurisdiction.

A majority of jurisdictions recognize the two-client model where the attorney represents both the insured and the insurer who hires them. *Professional Responsibility-Problems of Practice and the Profession 251,* Nathan Crystal (5th ed. 2012). Therefore, under the Rules of Professional Responsibility cited above, any potential conflict includes those between two *current* clients and not simply between a client and the person paying for the legal services. There is also a variation of the two-client model – the "favored client model" – where courts acknowledge the existence of two clients but indicate that when there is a conflict between the two clients, the obligation to the insured is stressed. *Advantages of the One-Client Model in Insurance Defense,* Jean Flemings Powers, 45 N.M. L. Rev. 79, 83 (2014).

Captive/Self-Insured Model of Insurance

For those not closely involved with captive insurance companies or self-insured entities, these terms are often used interchangeably. However, they are quite different in meaning. A self-insured entity sets aside an amount of its monies to provide for any losses that would typically be covered under an insurance policy. This is the corporation itself budgeting for the anticipated cost of their losses. A self-insured retention is a dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy kicks in and provides its coverage.

A captive insurance company is an insurance company that is wholly owned and controlled by its insureds. One of its purposes is to insure the risk of its owners, and its insureds benefit from the captive insurer's underwriting profits. Under a captive program, claims are typically managed just as they are in mutual insurance companies. The risks and benefits in a captive company reside with the insured. Captive insurance companies often arise when the products in the marketplace do not meet the needs of the insured. Captive programs often allow organizations to offer broader coverage, create more stable pricing and availability, improve cash flow, and provide increased control over the insurance program.

Tripartite Issues with Self-Insureds and Captive Companies

The tripartite relationship with self-insured entities and captive insurance companies presents different issues from the standard insurance defense situation. When analyzing the question of "who is the client" in a self-insured situation, the answer, on first blush, seems simple. The client appears to be the hospital

system/medical provider. However, one must analyze who actually employs the physician. In several health systems, the medical providers are employees of the larger corporate entity making the client hospital system and the client medical provider one and the same from the corporate structure standpoint. However, some healthcare systems have a separate corporate entity that employs medical providers that may be partly owned by the hospital system and a second legal entity (i.e. the local School of Medicine or separate legal entity). Under that corporate structure, the answer of "who is the client" is more closely aligned with the standard insurance defense tripartite analysis.

For captive insurers, the answer to the question of "who is the client" is akin to the standard insurance defense tripartite relationship. While captive carriers have a financial relationship to the parent healthcare system, the captive is typically a separate legal entity and an independent captive insurance company. Therefore, the issues that arise for a captive carrier more closely resemble the traditional tripartite relationship of insurer-insured-defense counsel.

You may be thinking, why does this matter? How does this affect the defense of the provider in medical negligence cases? Below are some points in the litigation process where these issues regarding the tripartite relationship may arise and some practical considerations regarding how to address them.

Selecting of Counsel

While not necessarily a tripartite dilemma, selecting defense counsel can create a potential disagreement between the insurer and the insured. Typically, under the language of an insurance policy, the insurer controls the selection of defense counsel. While some jurisdictions require independent counsel for insurers when a reservation of rights has been issued or there is a coverage issue, it is typically up to the insurer who to retain as defense counsel. As we all know, insurance companies have panel counsel with whom they have an established relationship, agreed upon rates and, generally speaking, an agreed upon strategy for how cases should be defended. When an insured requests defense counsel outside of the insurer's panel counsel, some questions to be considered when selecting counsel should be:

- What experience does this counsel have with medical professional liability cases?

- Does the insurer have concerns about the competencies of counsel and their ability to defend the insured in this case?

- Does the insured's request include panel counsel of the insurer, but their representation of the insured could create conflicts of interest in other cases?
- If the counsel is not panel counsel, is counsel willing to accept the insurer's hourly rates? If not, is it appropriate for the insured to compensate counsel for the difference in rates?
- Is the insured's preferred counsel better situated to be secondary counsel paid for directly by the insured?

Several questions can arise with selecting counsel and should be reviewed in the context of the case as well as other cases with the insurer. Considering the insured's counsel preference may be more appropriate in professional liability policies compared to standard insurance defense matters given the insured's ability (in many cases, their requirement) to consent to settle.

Control of Discovery and Expert Reviews

Conflicts between the insurer and insured can develop when determining the extensiveness of the discovery to be conducted. Most professional liability policies contain a consent to settle clause giving the healthcare provider the ability to decide when they wish to settle a claim and when they wish to continue defending a claim. If the insured has this power, it seems appropriate that the insurer allows them access to all reasonable information to help make this decision. If additional discovery, depositions, expert reviews, etc., are beneficial, it may be appropriate to undertake these expenses, within reason.

When it seems like further discovery or expert reviews would be futile to the defense of the case, a candid conversation with defense counsel and the insurer explaining the positives and negatives of continuing to defend the claim is appropriate. Candidly focusing on what evidence will be presented at trial by both sides is helpful. Stressing to the healthcare provider that resolution of a case is not about who is right or wrong, but in some ways is a business decision made from an objective mindset can be helpful. Litigation Stress Coaching by a qualified provider can assist the healthcare provider to better understand this process.

Determining when to Settle

Deciding when to settle a professional liability case for a healthcare provider can be challenging. Rightfully so, some providers focus on the medicine as the nuances of trial and evidence presentation are outside of their comfort zone. It is defense counsel's responsibility to explain to the providers/insureds exactly how evidence will be presented in the courtroom and how a jury will perceive certain facts. Helping the providers understand procedural issues and burden of proof

requirements can be an important factor in adjusting the perspective of the provider. While the provider may technically be "correct" in the medicine provided, juries do not always agree with these positions. Many DRI members have tried cases where the medicine was strongly on their side, but ultimately the jury found against the provider. Helping the insureds understand this possibility is the responsibility of defense counsel. Additionally, having the insurance representative and/or in-house counsel participate in discussions about other relevant concerns (i.e. National Practitioner Data Bank reporting, underwriting ramifications, recredentialing impact, etc.) can also be helpful.

If the insured continues to want to defend their case despite these frank conversations, there can be exceptions to the consent to settle clauses contained in their insurance policy if an insured unreasonably withholds their consent. There can also be statutory language in your jurisdiction that allows insurers to settle a case under certain circumstances despite consent to settle clauses in the insurance policy. Understanding the options available in your jurisdiction is important.

Final thoughts

It is important to note that many healthcare institutions have adopted a values-based approach to providing care to their patients and in internal interactions with employees. As such, the values of the healthcare institution guide the day-to-day decisions of healthcare providers when dealing with their patients and their colleagues. This way of thinking can become ingrained in provider's mindsets. The litigation process is, in many ways, the anthesis of a values-based approach. Decisions in litigation are rooted in facts, trial rules, and decisions from Judges. It is important for defense counsel to recognize this approach to healthcare and keep this in mind when addressing insureds and healthcare-based insurers.