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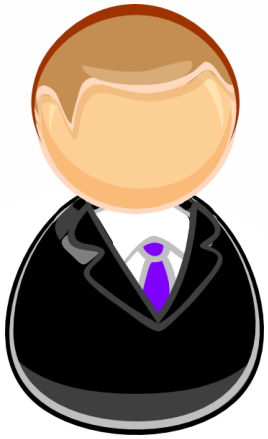
WARNING: CONFUSION AHEAD

WHO IS MY CLIENT ANYWAYS!?

NAVIGATING THE TRIPARTITE RELATIONSHIP

The Tripartite Relationship

Insurer



Insured

Defense Counsel

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The Tripartite Relationship

A relationship so complex that it could "tax socrates"

- The "tripartite" relationship refers to the relationship among an insurer, its insured, and defense counsel retained by the insurer to defend the insured against third-party claims.

- This relationship can present actual or potential conflicts between the insurer and the insured, placing defense counsel in difficult, and often confusing, positions.

- Accordingly, it has been considered "a source of unending ethical, legal, and economic tension."

- Gonzales, J., dissenting
State Farm v. Traver,
980 S.W.2d 625 (Tex. 1999)

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The Tripartite Relationship (continued)

- In some jurisdictions, like Minnesota and Alabama, the policyholder and the insurer have been considered dual clients

- Other jurisdictions, like Arizona and California, consider the policyholder the primary client, implying that the lawyer has at least has a secondary obligation to the insurer.

- In Texas, Montana, Michigan, and Connecticut, the law is clear that the policyholder is the only client

- Regardless of whether the defense counsel represents only the insured or both the insurer and insured, the **defense counsel's duties and obligations are ultimately governed by the Model Rules of Professional Responsibility and other relevant ethical standards**

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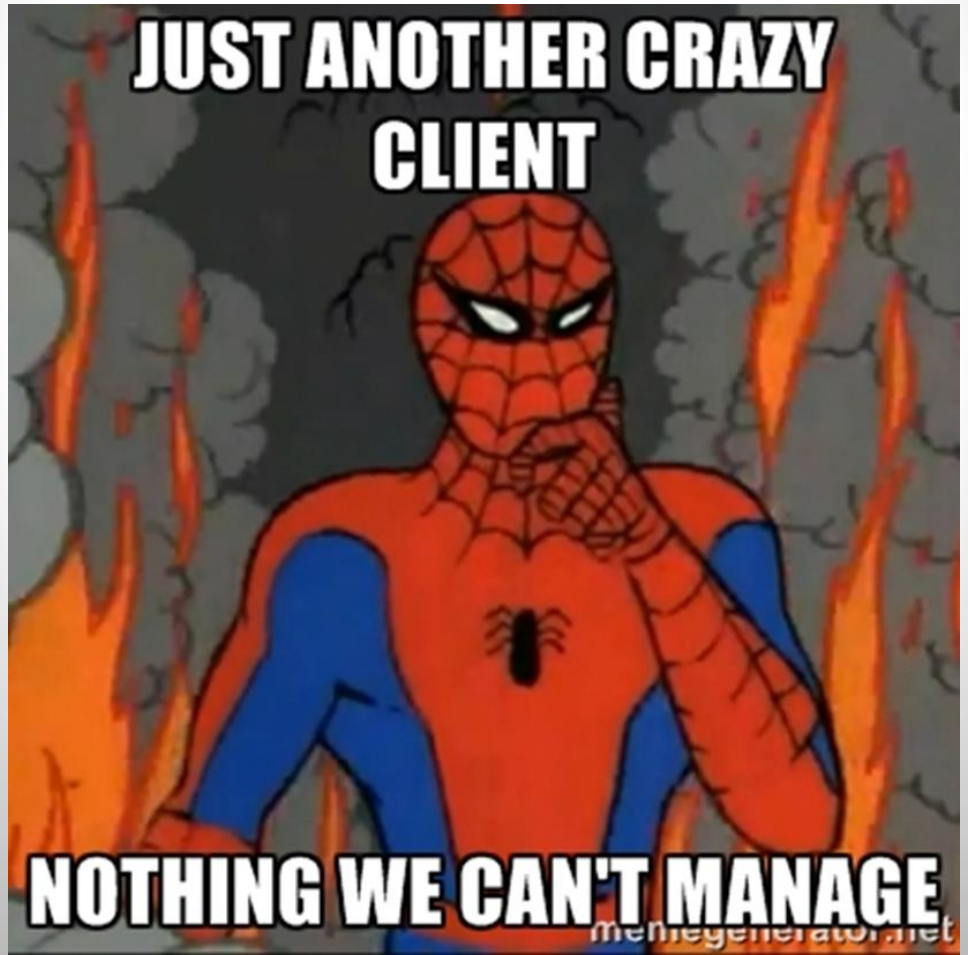
This presentation will provide guidance on how to handle conflicts that will inevitably arise when dealing with the tripartite relationship



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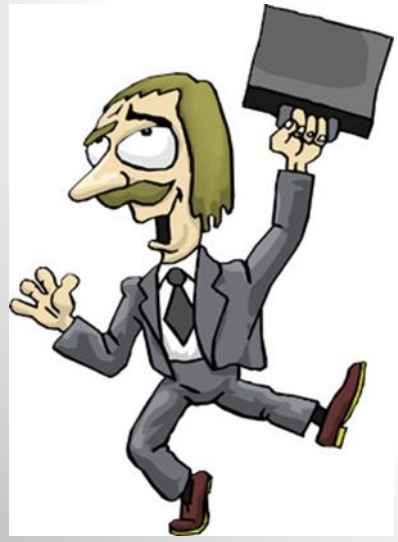
Common Scenario # 1:

"scorched earth" defense v. cost-effective defense

Expenses!? What expenses!? I just want to win and prove a point no matter what the cost!!!



Insured

versus

Please, sir. Let's just think this over. The cost to defend this case is just going to be too much!

Insurer

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The Fix…

- Under this scenario, extreme cost constraints potentially expose defense counsel to malpractice liability for inadequate defense preparation.

- One thing is clear: defense counsel **MAY NOT** permit an insurer to influence his or her exercise of professional judgment in rendering legal services to the insured.

- A third-party, such as an insurer, is **PROHIBITED** from interfering with defense counsel's independent professional judgment, irrespective of the tripartite relationship.

- The best way to resolve this potential dilemma is through open communication with the insurer.

- By keeping the insurer apprised of the status of the litigation, along with the steps necessary to protect the insured's interests, defense counsel reduces the risk of the insurer imposing significant cost restraints on his or her litigation plan.

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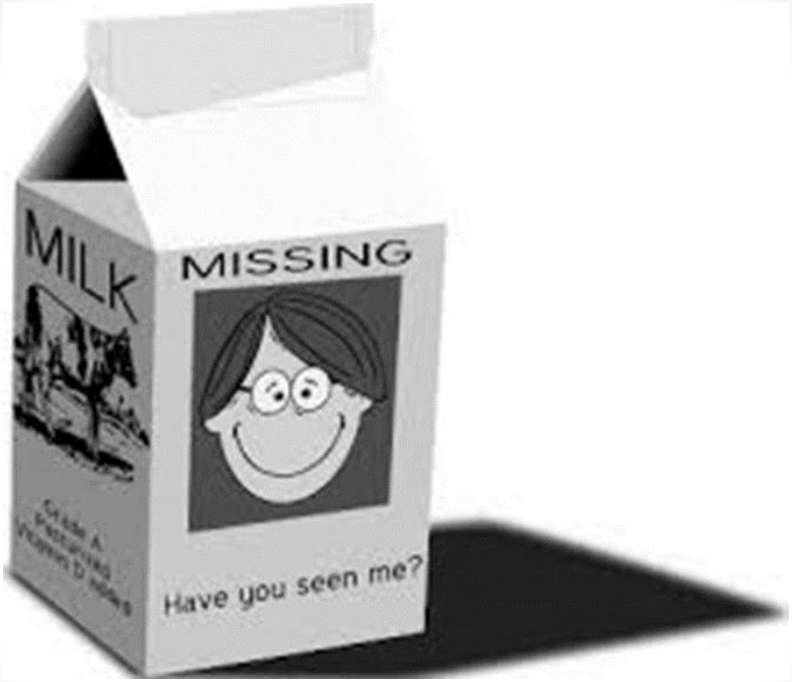
Common Scenario # 2:

the absentee or uncooperative insured



We all know this Insured. That's right – the insured who doesn't return calls, emails, voicemails, faxes, letters, correspondence…you name it, he doesn't respond

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The Fix…

- Under this scenario, the insured is often times tempted to withhold all information from the insurer for fear that such information might be used against him in a subsequent coverage action

- Adjuster **MUST** explain that there is a "duty to cooperate" with defense counsel, and that insurer can pull coverage if they receive no such cooperation

- Remember: **COOPERATION IS A TWO-WAY STREET**: the insured's duty to cooperate is contingent on the insurer's reciprocal duty to act in good faith to bring that cooperation about.

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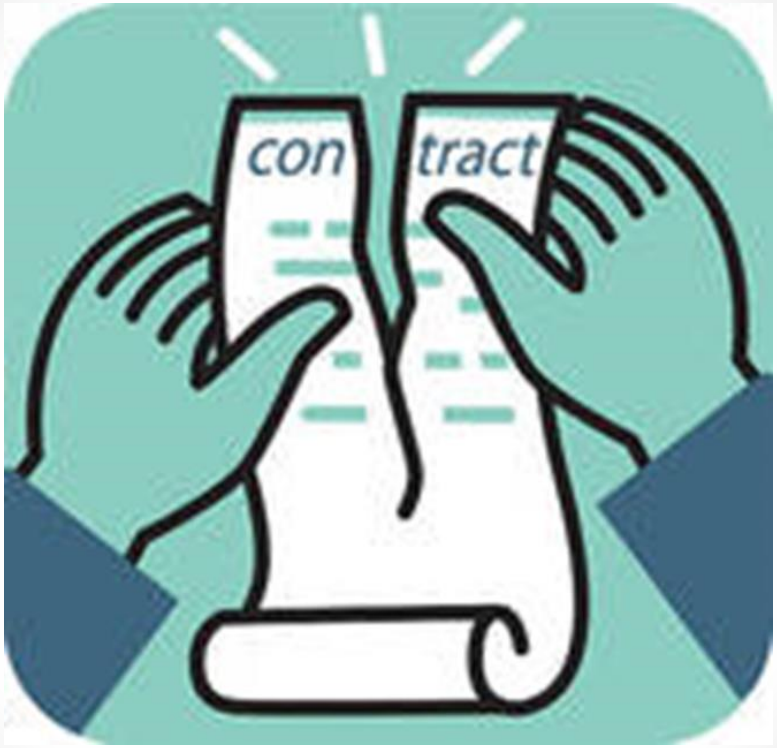
Common Scenario # 3:

Insured's Right to Independent Counsel



When is the insured afforded independent counsel?

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The Answer…

- Under standard policies, and absent a conflict of interest regarding the defense counsel, the insurer has the right to select defense counsel for the insured and to control the defense

- When there is a conflict of interest regarding the defense, the insured is entitled to independent counsel

- Tip: carefully analyze the facts of each case to determine whether there is any substantial basis for concluding that the insurer has an interest that could be served by an impaired defense. If so, independent counsel should be provided.
  - *"If there is a reasonable possibility that the manner in which the insured is defended could affect the outcome of the insurer's coverage dispute, then the conflict may be sufficient to require the insurer to pay for counsel of the insured's choice."*
    - US/IN-Armstrong Cleaners, Inc. v. Erie Ins. Exch., 364 F. Supp. 2d 797 (S.D. Ind. 2005).

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The Answer Continued…

That said, if the insured desires to pursue a claim against the other side, or desires legal services not directly related to the defense of the lawsuit against him/her:

(1) the insured will likely need to make his/her own arrangements with this or another lawyer.

(2) the insured may also hire another lawyer, at his/her own expense, to monitor the defense being provided by the insurance company.

(3) If there is a reasonable risk that the claim made against the insured exceeds the amount of coverage under his/her policy, the insurer should advise, and the insured should consider, consulting another lawyer.

The Right to Select Defense Counsel

a multi-state survey

- Alabama
  - Under Alabama law, a carrier defending under a reservation of rights does not necessarily give the insured the right to select independent counsel at the insurer's expense.
    - See L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins Co. 622 So.2d 1283, 1290 (Ala. 1993)

- California
  - Under California law, a conflict of interest creates a duty for the insurer to provide independent counsel, unless the insured waives that right in writing. The Insured's choice of counsel, however, is limited by the insurer's customary rates and minimum qualifications.
    - The conflict of interest must be an actual conflict; a mere potential or theoretical conflict is not sufficient.
      - See San Diego Navy Federal Credit Union v. Cumis Ins. Society 162 Cal.App 3d 358 (1984)

The Right to Select Defense Counsel

a multi-state survey (cont'd)

- Florida
  - Florida law is more onerous. The Insured can retain independent counsel under certain circumstances.
    - (1) he must establish why the Insurer's counsel of choice is unacceptable.
    - (2) he must show actual prejudice, harm, or some equally compelling reason why the Insurer's appointed counsel was not agreeable.
      - Prime Ins. Syndicate, Inc. v. Soil Tech Distributors 2006 WL 1823562 (M.D. Fla. June 30, 2006)
    - (3) he must affirmatively reject the carrier's defense offered under reservation of rights before he/she can retain her own lawyer.
      - Aguero v. First American Ins. Co. 927 So.2d 864 (Fla. 3d DCA 2005)

The Right to Select Defense Counsel

a multi-state survey (cont'd)

- Illinois
  - Illinois law tends to favor the Insured. If there is a true conflict of interest, the Insurer must decline to defend and pay for independent counsel for Insured.
    - Murphy v. Urso
      88 Ill.2d 444, 454 (1981)

- Louisiana
  - Louisiana has not adopted a consistent approach to determine whether an Insured can retain its own counsel at the Insured's own expense. Rather, the outcome of each case is fact specific.

The Right to Select Defense Counsel
a multi-state survey (cont'd)

- New York
  - Under New York law, the Insured is entitled to independent counsel at the Insurer's expense if there is a clear conflict of interest.
    - New York State Urban Development Corp. v. VSL Corp. 563 F.Supp. 187 (S.D.N.Y. 1983)
      - **"Clear conflict of interest"** means a conflict that places the loyalty of the Insured in doubt.
        - Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles & Kaufman, LLP 2006 WL 2135782 at *15 (E.D.N.Y. July 28, 2006)
  - If the Insured is able to choose independent counsel, that counsel's fee must be reasonable
  - It has also been held that the Insurer has no affirmative duty to inform the policy holder of its right to selection of independent counsel
    - Sumo Container Station, Inc. v. Evants, Orr, Pacelli, Norton and Laffan, P.C. 278 A.D.2d 169 (N.Y.App. 2000)

The Right to Select Defense Counsel
a multi-state survey (cont'd)

- Texas
  - An insurer's right to defend a lawsuit "encompasses the authority to select the attorney who will defend that claim and to make other decisions that would normally be vested in the insured as the named party in the case"
    - Rx.com, Inc. v. Hartford Fire Ins. Co. 426 F.Supp. 546, 559
  - If the insurance policy gives the Insurer the right to control the defense of a case, the Insured cannot choose independent counsel and require the insurer to reimburse the expenses, unless "the fats to be adjudicated in the liability lawsuit are the same facts upon which coverage depends."
    - N. County Mut'l Ins. Co. v. Davalos 140 S.W.3d 685, 688 (tex. 2004)

The Right to Select Defense Counsel

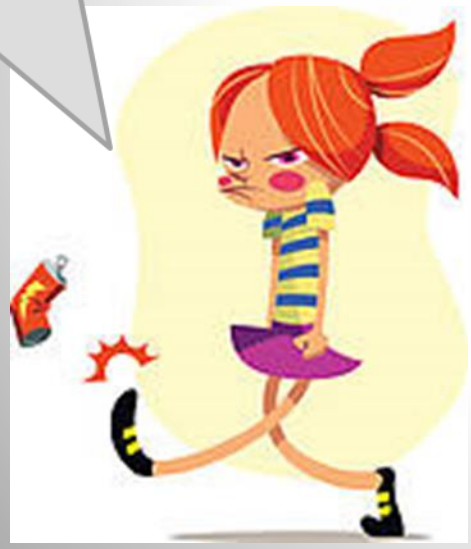
a multi-state survey (cont'd)

- Washington
  - Washington rejects the contention that a conflict of interest automatically exists when an Insurer agrees to defend an Insured under a reservation of rights.
    - Johnson v. Continental Cas. Co.
      788 P.2d 598 (Wash. 1990)
  - Even where there is a conflict of interest, Washington law stills allows the Insurer to select defense counsel, but the Insurer will be charged with an "enhanced duty of good faith" in these limited situations.
    - Tank v. State Farm Fire & Cas. Co.
      715 P.2d 1133 (Wash. 1986)

Common Scenario # 4:

The Client That Does Not Want to Settle…Ever

But I don't wanna settle!!!!!



Insured

versus

Please, I am begging you to accept this offer. Out of the last 10, this is the best one yet!!!

Insurer

The Fix…

- Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies the Insured's consent and agreement is required.

- That said, sometimes, a settlement (even if within the policy limits) is not always (1) what the insured wants, or (2) in the insurer's best interests.

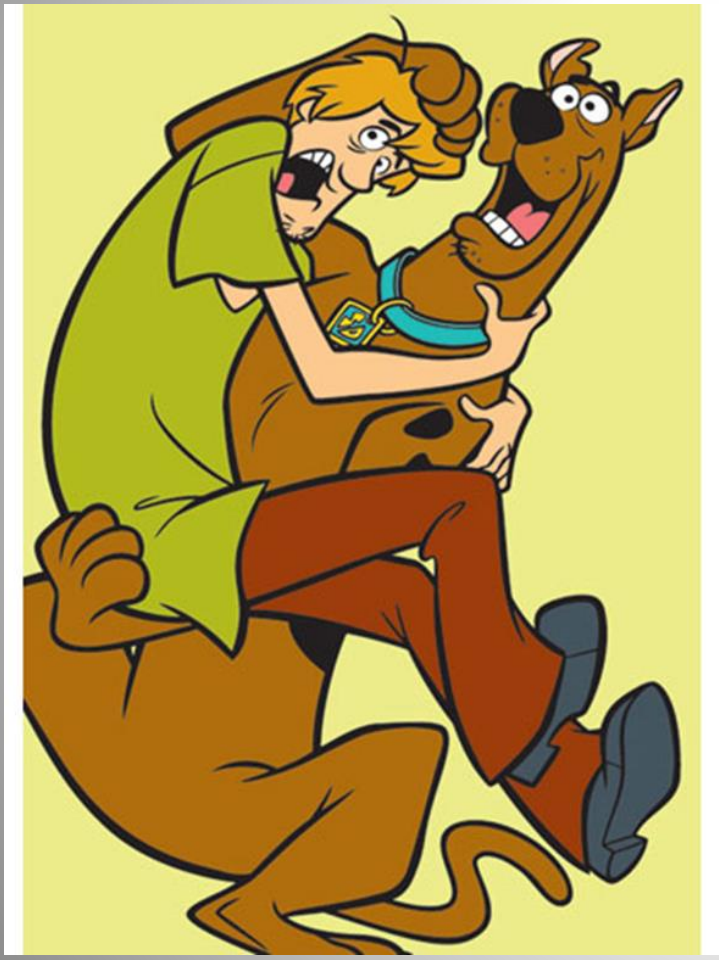
- To avoid this problem, as part of its enhanced duty of good faith, the insurer **SHOULD** and sometimes **MUST** allow the insured to make the ultimate choice regarding settlement.

  - In other words, don't be pushy and always abide by the wishes of the client.

- Defense counsel **MUST** assist the insurer in fulfilling this obligation

Common Scenario # 5:

the one, the only…BILLING GUIDELINES



Billing guidelines are commonplace for insurance companies that routinely hire defense counsel to represent their insureds

Insurers use these guidelines to eliminate confusion; **however, this seems to be the opposite effect**

This next slide will provide insight on approaches to avoid conflicts over billing requirements

The Fix…

- **Insurers**:
  - Be mindful that if you prohibit or limit the defense counsel's task performance that the Insured might not receive the best possible benefit or defense
  - Be mindful that at the time the defense counsel agrees to undertake representation of the insured, the defense counsel is likely unaware of exactly what that case may entail
    - Each case is different and could require more or less of the tasks necessary to defend the Insured
- **Defense Counsel:**
  - Always consult with the insurer at every critical stage
  - Document each and every task performed, whether covered or not.

Sooo…
What have we learned???

Conclusion

- The tripartite relationship is, for lack of better terms, an enigma.
  - It has even been described as an “ethically sanctioned duality of representation,” and “conceptually impoverished.”

- Bottom Line: conflicts of interest are inevitable when an insurer appoints defense counsel to defend an insured.

- Solution:
- (1) defense counsel must keep all parties informed, while being mindful of the confidential nature he has with the insured.

- (2) Conflicts can be eliminated when Insurers and defense counsel **communicate** and **work together** to efficiently prepare and present the best possible defense for the insured

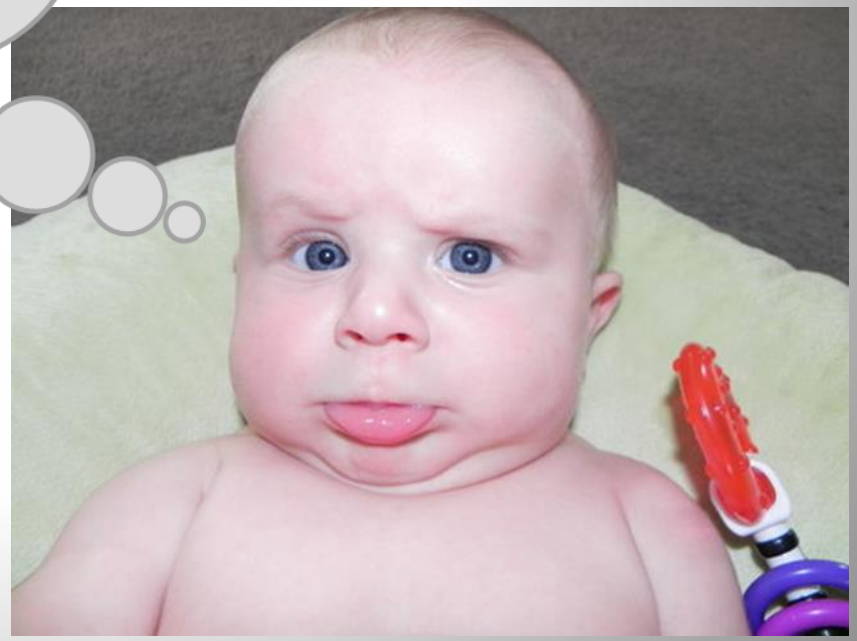
Last Slide, I Promise…

Remember

- Defense counsel owes a duty of confidentiality to the insured, regardless of the tripartite relationship with the insurer
- Defense counsel should keep both the insured and insurer adequately informed of any and all settlement discussions
- Defense counsel owes the insured a duty of undivided loyalty
- Defense counsel has a duty to advise the insured about the risk judgment might be entered against the insured for more than the amount of the insurance, and that the insured might have to pay any such amount.

And when all else fails, always remember….

Waaittttt a minute, Mr. Defense Counsel…you billed how many hours for research!?!?..... Yeahhhh, that's getting cut.



Any Questions??