



The Tripartite Relationship: Ethical Considerations

Course Objectives

- To define ethics
- To define the tripartite relationship
- To identify each party in a tripartite relationship
- How to identify areas of conflict
- How to ethically handle conflicts

Ethics



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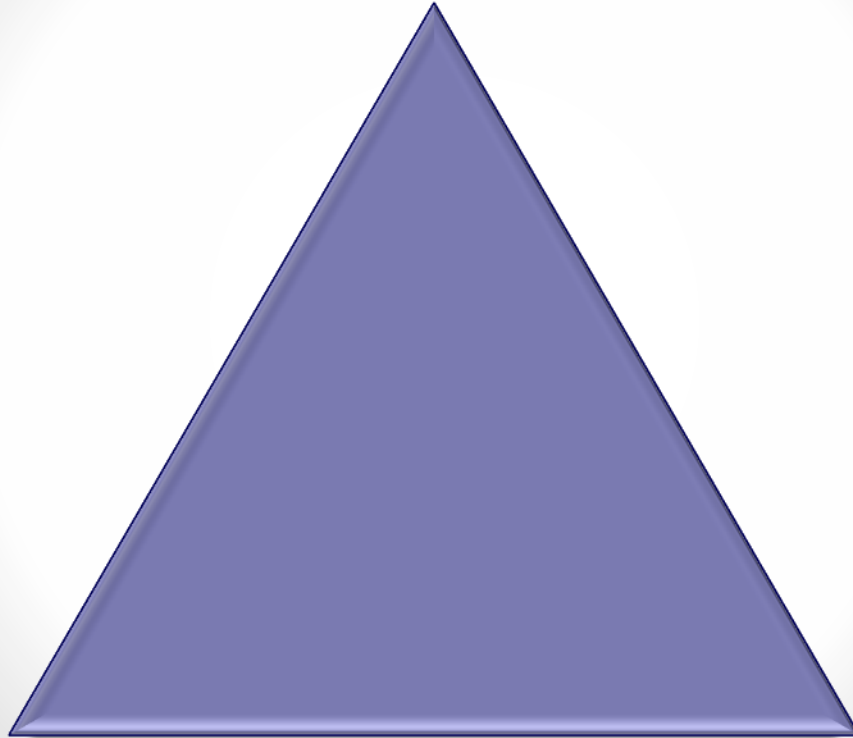
"I've been getting annoying pangs of conscience when faced with ethical dilemmas. Got anything for that?"

Ethics

- “Right vs. right” decisions
- Come from the “head” (intellect)
 - Codes of expected behavior
 - Approved guidelines
 - Derived from morals

What Is A Tripartite Relationship?

Lawyer



Insured
(client)

Insurer
(client ?)

Who's The Client

The intricacies of attorney-client privilege are funny.
But not "ha-ha" funny.
More "psych, you're not protected" funny.



California Codifies Client

San Diego Navy Federal Credit Union v. Cumis Ins. Society, 162 Cal.App. 3d 358 (1984)

- California codified decision California Civil Code § 2860 (1996)
- Conflict = duty to provide independent counsel, unless waiver in writing
- Choice limited by rates and qualifications
- Actual conflict required

Tripartite Considerations

Presents Ethical Challenges

- What happens when the interests of the policy holder do not align with the insurer
 - Attorney faced with a conflict of interest
 - Insurance professional faced with conflict of interest

Tripartite Trouble

Four Main Areas of Conflict

1. Who controls the defense
2. Who controls the information
3. Reasonableness of attorney's fees and expenses / controlling costs
4. Who controls settlement

Rights & Duties

Affect Decisions / Identify & Avoid conflicts

1. Rights and Duties of the Insured
2. Rights and Duties of the Insurer
3. Rights and Duties of Counsel

Who Controls The Defense

- Policy Language Grants Insurer Exclusive Right to Control Defense
 - Insuring Agreement
 - Supplementary Payments Clause
 - Cooperation Conditions
 - Voluntary Payments/Obligations Condition

Notice Requirements

Insured Held to Have Read and Understood Policy

- Failure to Comply Can Be Costly**

Voluntary Payment Risk

- *Perini/Tompkins Joint Venture v. Ace American Ins. Co., 2013 WL 6570947 (4th Cir. Dec. 16, 2013)*
 - \$900 Million Construction Project
 - PTJV GC / Insured with ACE OSIP
 - PTJV sued for \$79 million / Owner sued for 65 million
 - PTJV settled and then sought coverage

Gaylord Hotel and Convention Center



Gaylord Hotel and Convention Center



Withdraw of Defense

- Reservation of Rights
- Notice Requirement
- Estoppel
- Detailed Explanation
- Timing



Tripartite Trouble

Four Main Conflicts

1. Who controls the defense
2. Who controls the information

Control of Information

- Can Affect Coverage
- Privileges
 - Work / Product
 - Attorney / Client
- Attorney Obligations
 - Disclosure of Information
 - Refrain from Coverage Opinions
 - Maintain Confidentiality



Lawyer Liability

- Colorado Ethic's Opinion 91:

Lawyer cannot ethically provide a coverage opinion and defend insured in a related tort case

Case Examples

- Permissive Driver
- DUI
- Employer / Employee
- Negligent Entrustment

Tripartite Trouble

Four Main Conflicts

1. Who controls the defense
2. Who controls the information
3. Reasonableness of attorney's fees and expenses / controlling costs

Attorney Fees

- Duty To Defend Includes Reimbursement of Counsel for Fees
- Financial Implications Failure to Defend
- Billing Guidelines
- Restrictions On Work Performed
- Reimbursement by Insured

Tripartite Trouble

Four Main Conflicts

1. Who controls the defense
2. Who controls the information
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Disagreement on Settlement

1. **Excess Exposure**
2. **Risk / Ready to Be Done**
3. **Multiple Plaintiffs /
Competing Claims**

Oops, Didn't We Tell You?



Case Example

Swiss Reinsurance Am. Corp. v. Roetzel & Andress, Ohio 2005

- Excess Exposure
- Risk / Ready to Be Done
- Bad Faith Potential
- Ultimate Damage to Insurer

Swiss Reinsurance

Examination of Adjuster:

Q: But here's what I want to get to, that's a conflict, though, isn't it? The insured wants to settle, insurance company doesn't want to settle; that's a conflict isn't it?

A: Yes. I would assume that's a – characterize it as a conflict.

Swiss Reinsurance, 837 N.E.2d at 1222.

Swiss Reinsurance

Examination of Adjuster:

Q: You did not see Treadon as having more expertise than you did in strategy about how to try a case, am I correct about that?

A: Correct.

The above questioning succinctly states Frontier's position throughout the litigation: Frontier felt that it could override the wishes of its insured and the advice of counsel when they did not agree with the advice

Swiss Reinsurance, 837 N.E.2d at 1222.

Swiss Reinsurance

Carrier paid \$2,200,000

Sought reimbursement of
\$1,000,000 from reinsurer

Reinsurer said must mitigate
damages and sue underlying defense counsel

Ultimate holding, carrier lacked standing to sue for
malpractice because it was not the client



Mediation

- Conflicts
 - Scope of Duty to Defend
 - Unresolved Issue Regarding Indemnity
- Who Holds Consent
- Input of All Participants

Underlying Concern

The word "BEWARE..." is rendered in a bold, red, 3D blocky font with a slight shadow, giving it a warning or comic-book style appearance.

BAD FAITH

Why Do We Care

- Justice is a concept of moral rightness based on ethics, rationality, law, natural law, religion, equity and fairness
- Every business is dependent on effective ethical communication

Codes of Ethics

- Provide set, agreed-upon guidelines for the behavior of those who adhere to them
- Examples:
 - American Institute for CPCU
 - NAIW / IWOD
 - CPIW/M
 - ABA Model Rules

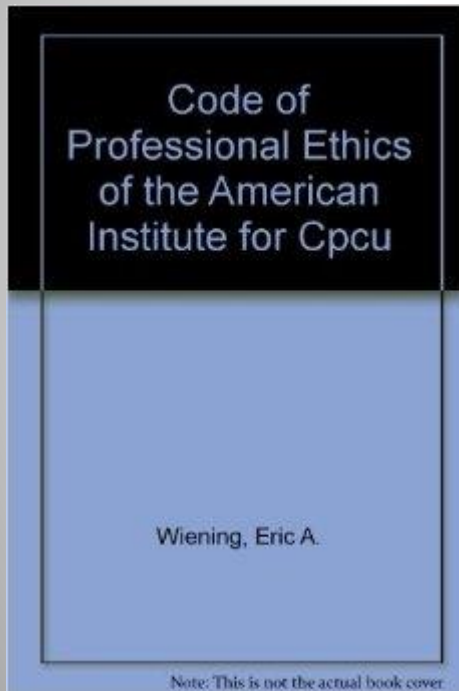
American Institute for CPCU

Ethical behavior is crucial to preserving not only the trust on which insurance transactions are based, but also the public's trust in our industry as a whole. The Institutes' ethics learning modules were designed specifically for insurance practitioners and use insurance-based case studies to outline an ethical framework."

"Ethical behavior is crucial to preserving not only the trust on which insurance transactions are based, but also the public's trust in our industry as a whole."

CPCU Code of Professional Conduct
Code Includes Canons and Rules
regarding ethical standards of conduct

Code of Professional Conduct



- Designed specifically for insurance practitioners
- Insurance based case studies
- Canons followed by one or more rules
- Rules are mandatory and enforceable
- **Rules absolute minimum level of ethical conduct required**
- Advisory Opinions

CPCU Canons

- Canon 1: Endeavor at all times to place the public interest above their own
- Canon 2: Continually seek to maintain and improve their professional knowledge, skills, and competence

CPCU Canons

- Canon 3: Obey all laws and regulations and should avoid any conduct or activity which would cause unjust harm to others
- Canon 4: Diligently perform their occupation duties and continually strive to improve the functioning of the insurance mechanisms

CPCU Canons

- Canon 5: Assist in maintaining and raising professional standards in the insurance business
- Canon 6: **Strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance practitioners and with members of other professions**

CPCU Canons

- Canon 7: Assist in improving the public understanding of insurance and risk management
- Canon 8: Honor the integrity of the CPCU designation and respect the limitations placed on its use
- Canon 9: Assist in maintaining the integrity of the Code of Professional Ethics

NAIW / IWOD / IAIP

- Provides professional education
- Insurance Ethics Course
 - Fulfills state requirement for adjusters
 - Basics of Ethics
 - Need for Insurance Regulation
 - Good Faith Nature of Relationship