



# Conflicts of Interest: Defense Counsel and Carrier Perspectives

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# Part I: Conflicts of Interest from a Defense Counsel Perspective

# Conflicts of Interest: Current Clients

- A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
- A concurrent conflict of interest exists if:
  - (a) the representation of one client will be directly adverse to another client;  
or
  - (b) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

*Rule 1.7, ABA Model Rules of Professional Responsibility*

- Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if:
  - the lawyer reasonably believes that he/she will be able to provide competent and diligent representation to each affected client;
  - the representation is not prohibited by law;
  - the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - each affected client gives informed consent.

*Rule 1.7, ABA Model Rules of Professional Responsibility*

# Waivable vs. Non-Waivable Conflicts

- Non-Waivable Conflicts
  - If the lawyer cannot reasonably conclude that the lawyer is able to provide competent and diligent representation to each affected client.
  - Representation is prohibited by applicable law.
  - Representation involves assertion of a claim by one client against another client in the same litigation or proceeding.

# Informed Consent

- Each affected client must be aware of the relevant circumstances and the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.
- Under some circumstances, it may be impossible to make the disclosure necessary to obtain consent.

A lawyer must consider:

(a) The likelihood that a conflict exists or will exist in the future;

(b) If a conflict exists, will it adversely affect the lawyer's independent professional judgment in considering alternatives or courses of action that reasonably should be pursued on behalf of the clients; and

(c) Is the conflict one that is not waivable.

# What Duties Does a Lawyer Owe to Former Clients?

- A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated represented a client:
  - Whose interests are materially adverse to that person; and
  - About whom the lawyer had acquired protected information.

Unless the former client gives informed consent in writing.



# What Duties Does a Lawyer Owe to Former Clients? (con't)

- A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - Use information relating to the representation to the disadvantage of the former client except as the Rules would permit or require with respect to a client, or when the information has become generally known; or
  - Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

*Rule 1.9, ABA Model Rules of Professional Responsibility*

# Hypothetical Situation 1

- Person A and B are a driver and passenger, respectively, in a vehicle. Person C is a driver in a second vehicle. Both Person A and C disregard a stop sign at a four-way intersection and their cars collide.
- Should a lawyer accept representation of both Persons A and B? What about Persons A and C? Why or why not? What must the lawyer consider before making a decision?
- If a potential conflict exists, is it one that is waivable by the client?

# Hypothetical Situation 1 (con't)

- Now, taking the same factual situation, assume that Person B is the spouse of Person A. Accordingly, Person B will not assert any claim (e.g., negligence) against Person A.
- How does this change the analysis?

# Hypothetical Situation 2

- Law firm of ABC has been sued for legal malpractice. The carrier has appointed John Peace to defend the firm and the three lawyers. The case is assigned to John just before the answer date so John prepares an answer and files it promptly on behalf of the firm and the three lawyers. John then investigates the underlying case and discovers that only A and B had worked on the matter. C had no contact/involvement in the matter at all.
- Finding this out, C announces he is leaving the firm and demands that John file a motion for summary judgment on his behalf. But A and B insist that John not pursue a motion for summary judgment because they want “deep pockets” to remain in the case. The damage claim may exceed policy limits.

# Hypothetical Situation 2 (con't)

- Assume A, B, and C cannot work out their differences, but C stays at the firm.
- What should John Peace do?
- Is there now a non-waivable conflict between A, B, and C? How does that affect John Peace's role as attorneys for all three individuals.
- What if C leaves the firm? How does that affect the analysis?
- Should John have prepared a joint representation and waiver letter? If so, what provisions should have been included in the letter? How would that have changed the analysis?

# Hypothetical Situation 2 (con't)

- Now assume that Attorneys A and B admit that C had no involvement with the underlying matter which is the subject of the legal malpractice suit. In fact, A and B are willing to testify to this very same fact. Nonetheless, C insists that there is a non-waivable conflict and demands separate counsel.
- Does a conflict exist? Why or why not?
- How should John handle the situation?

# Hypothetical Situation 3

- Attorney Martin has represented Client Suzanne for numerous years in transactional matters. At some point, Martin leaves Firm Red for Firm Blue. Thereafter, Suzanne sues Martin and Firm Blue for malpractice. But the majority of the disputed matters were handled while Martin was with Firm Red.
- The carrier appoints Attorney John Peace to represent Firm Blue and Martin. It appears the damages in the case could exceed policy limits. John notes that Firm Blue wants to settle within policy limits. But Martin wants to fight the allegations given his otherwise spotless career.

# Hypothetical Situation 3 (con't)

- What options does John have?
- What if Firm Blue and Martin do not reach an agreement as to case handling?
- Does the carrier have any options in this situation to resolve the conflict?
- Should John have issued a joint representation and waiver letter when he was retained? Would it have made a difference in a situation like this? If so, what language should the joint representation letter have contained?



# The Importance of Running Conflict Checks Cannot Be Understated

- It is not uncommon for law firms to be sued, or lawyers reprimanded, for failing to detect a conflict with a past or current client during joint representation.

# Screening to Protect from Conflict Challenges

- Conflicts of interest can arise because of lawyer mobility. As an attorney moves from one firm to another, it is possible that a client from the old firm could be an adverse party to a client at the new firm.
- The confidences and secrets of a client should be preserved, attorneys need to always exercise independent professional judgment, and attorneys should guard against even the appearance of professional impropriety.
- Will ethical walls, when properly and timely constructed, destroy the presumption of sharing of information?
- *What are the best practices for utilizing ethical walls?*

# Summary

- Defense counsel should ask themselves the following questions:
  1. Who is the client?
  2. Is there a conflict?
  3. Have I checked my current and former client lists for potential conflicts, including those matters where I jointly represented entities or individuals?
  4. Can I represent the client despite the conflict?
  5. What possible conflicts may arise during the representation, and how can I proactively prepare for same?
  6. How should I go about obtaining informed consent?

# Part II: Conflicts of Interest from a Carrier Perspective

# The Tripartite Relationship May Cause Conflicts

- A “tripartite relationship” arises when an insurer appoints an attorney to represent an insured with respect to a matter which is covered or potentially covered under an insurance policy between the carrier and the insured.
- Therefore, both the insurer and insured have an interest in the outcome of the dispute.
- An oft-cited concern by some clients is that defense counsel may cater his/her actions to the wishes of the insurer, who pays the bills and sends business to the attorney.

# The Tripartite Relationship May Cause Conflicts (con't)

- Courts have found that the tripartite relationship can be severed or strained in situations when a conflict arises between the interests of the insured and the interests of the insurer.
  - For example, in a particular matter, the insurer may want to settle and the insured may want to take the case to trial.

# The Tripartite Relationship May Cause Conflicts (con't)

- A carrier's exercise of various rights may strain a tripartite relationship. For example:
  - The right to control the defense,
  - The right to audit the legal expenses of the attorney,
  - The right to give directions pertaining to the defense of the insured,
  - Where the alleged/proposed damages exceed insurance coverage, and
  - Defense under a reservation of rights.

# Dual Client Doctrine

- Both insurer and insured are considered clients of the attorney.
- Insurer, as a client, has a fundamental interest in how appointed counsel handles the defense.
- Contractual rights of carrier to control defense must be weighed against interest of the insured who is considered the primary client in the tripartite relationship.
- In most non-*Cumis* jurisdictions, insurer may select defense counsel while defending under a reservation of rights.



# Single Client States

- A minority of states, such as Texas, do not recognize the dual client doctrine.
- In these states, attorneys have only one client, but the client has a contractual obligation not to compromise the defense that the carrier has a right to control.
- What challenges arise with these jurisdictions?

# *Cumis* Counsel

- Traditionally, a liability insurer with a duty to defend could fulfill its contractual duties by selecting counsel to represent the policyholder in an underlying suit.
- In *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.* (1984), a California court rejected this theory and held that an insurer is required to pay for a policyholder's independent counsel when the insurer reserves the right to challenge coverage at a later date.
  - Other states have also recognized an insured's right to *Cumis* counsel.

# Entitlement to *Cumis* Counsel – Jurisdictional Differences

- **There are decisions from several state courts which suggest that a insured may be entitled to independent counsel if the potential conflict can affect coverage. These decisions typically require a fact-specific determination and they do not establish a red-line rule.**
  - For example, see *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 797 (S.D. Ind. 2005) (analyzing whether there was a “substantial risk” of a conflict of interest based on a policy defense).
  - California, Hawaii, Indiana, Louisiana, Minnesota, New Jersey, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Washington
- **Other state courts suggest that a reservation of rights always entitles an insured to independent counsel.**
  - Arkansas, Georgia, Massachusetts, Mississippi, New York
- **Finally, a sub-set of state courts suggest that a reservation of rights never entitles an insured to independent counsel.**
  - Alabama, South Dakota

***Be advised to check the specifics of your state’s court rulings for the most updated information!***

# Hypothetical Situation A

- Retained attorney John Peace is defending an insured who is being provided a defense under a reservation of rights. John believes he can file a motion for summary judgment which will, more likely than not, result in the dismissal of all potentially covered claims.
- Should John file the motion?
- What, if anything, must John do before filing the motion?
- What should John's course of action be if the carrier and/or the insured disagree as to the proposed defense strategy?

# Hypothetical Situation B

- Retained counsel John Peace is defending an insured under a reservation of rights and is apprised by the carrier that the insured has issued a letter to the insurer raising issues concerning John's defense strategy.
- In the same letter, the insured advises the carrier that John's conduct is inconsistent with the carrier's obligation to provide a defense under the policy and infers that the carrier is at risk for bad faith. The insurer asks John to respond to the issues raised by the insured.

# Hypothetical Situation B (con't)

- Can and should John respond to the allegations asserted by the insured at the insurer's request?
- Can and should John continue to participate in the defense on behalf of the insured?
- If so, what courses of action should John take with regard to the stated discontent and future representation of the client?

# Hypothetical Situation C

- Retained counsel John Peace is defending an insured under a reservation of rights. Prior to a settlement conference, the carrier advises the insured that it expects the insured to contribute toward a settlement due to the existence of coverage issues.
- Can retained counsel provide advice to either the insured or the insurer with respect to either party's allocation?
- Why or why not?

# Any questions?

*The purpose of this presentation is to provide information, rather than advice or opinion. It is accurate to the best of the speakers' knowledge as of the date of this presentation. The contents of this presentation are solely the interpretations and/or opinions of the speakers themselves.*