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Malpractice Claims Against Defense Counsel: Preventing and Recognizing Potential Claims

I. The Tripartite Relationship

Insurance defense attorneys face potential legal malpractice claims not only from their clients, but also from the insurance carriers that hire them on behalf of their clients and even from excess insurance carriers with whom the insurance defense attorney may have no direct relationship. Insurance defense attorneys face such claims because they have duties not only to their clients but also to the insurance company whose financial interests they are representing. Such duties arise in the context of what is called the tripartite relationship: the relationship between the (1) attorney, (2) insured/client, and (3) insurance carrier.

The duties of the parties to the tripartite relationship were well explained in the California case, *Kroll & Tract v. Paris & Paris,* 72 Cal.App.4th 1537, 86 Cal.Rptr.2d 78 (1999), which stated:

> In the usual tripartite insurer-attorney-insured relationship, the insurer has a duty to defend the insured, and hires counsel to provide the defense. "So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured." (*National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1727 [1 Cal.Rptr.2d 570].) The insurance defense attorney is placed in a position of conflict, however, when issues of coverage are asserted by the insurer through a reservation of rights. Addressing this problem, the court in *San Diego Federal Credit Union v. Cumis Ins. Society, Inc., supra,* 162 Cal.App.3d 358, held that an insurance company must pay for independent counsel for its insured when there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights to deny coverage under an insurance policy. This holding was codified in Civil Code section 2860 in 1987.

> The *Cumis* doctrine requires "complete independence of counsel" (*State Farm Fire & Casualty Co. v. Superior Court* (1989) 216 Cal.App.3d 1222, 1226 [265 Cal.Rptr. 372]), who represents "solely the insured" (*Employers Ins. of Wausau v. Albert D. Seeno Const.* (N.D.Cal. 1988) 692 F.Supp. 1150, 1157). "Since it is almost unavoidable that, in the course of investigating and preparing the insured's defense to the third party's action, the insured's attorney will come across information relevant to a coverage or similar issue, it is quite difficult for an attorney beholden to the insurer to represent the insured where the insurer is reserving its rights regarding coverage ...." (*Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78, 87 [38 Cal.Rptr.2d 25].)

II. Conflicts of Interest

Conflicts of interest in the tripartite relationship do not only arise because of a reservation of rights by the insurance carrier; there are many ways conflicts can arise between the parties to the tripartite relationship.

In the New York case, *Kaufman v. Medical Liability Mut. Ins. Co.,* 121 A.D.3d 1459, 995 N.Y.S.2d 807 (3d Dep't 2014), the client brought a legal malpractice action against his assigned counsel on the grounds that there was a conflict of interest in the assigned attorney's representation of all defendants to the action.

In another New York case, *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.,* 13 A.D.3d 172, 787 N.Y.S.2d 15 (1st Dep't 2004), assigned defense counsel was sued by an excess liability insurer. The excess carrier alleged that the defense attorney failed to bring a third-party action against a liable party because one of the other insurers involved in the defense insured the would-be third-party defendant.

In the Michigan case, *Triad Mechanical Inc. v. Rhodes,* 2008 WL 942267 (2008), defense counsel's client alleged that defendant's dual representation of it and the Worker's Compensation insurance carrier constituted a conflict of interest because the Workers' Compensation insurance carrier wanted to settle the action, but it did not. The plaintiff alleged that the attorney "pushed" it to accept the settlement, and "settled the claim despite full knowledge of Plaintiff's discontent with that outcome."

In the Washington State case, *Arden v. Forsberg & Umlauf, P.S.,* 189 Wash.2d 315, 402 P.3d 245 (2017), the clients brought a legal malpractice action against their assigned defense counsel alleging that the attorneys failed to advise them of settlement negotiations and that the attorneys took settlement directions from the insurance carrier.

III. Standing to Sue

Privity requirements vary between states and as a result, an insurance carrier may have standing to sue its assigned defense counsel for legal malpractice in one state, but not in another.

> In some jurisdictions, an attorney retained by a carrier has been held to have a lawyer-client relationship only with the insured (*see e.g. Barefield v. DPIC Companies,* 215 W.Va. 544, 558, 600 S.E.2d 256, 270; *In re Rules of Professional Conduct,* 299 Mont. 321, 333, 2 P.3d 806, 814; *Atlanta Intl. Ins. Co. v. Bell,* 438 Mich. 512, 475 N.W.2d 294; *First Am. Carriers, Inc. v. Kroger Co.,* 302 Ark. 86, 90, 787 S.W.2d 669, 671; *Cont. Cas. Co. v. Pullman, Comley, Bradley and Reeves,* 929 F.2d 103, 108 [2d Cir.]; *see also Jackson v. Trapier,* 42 Misc.2d 139, 247 N.Y.S.2d 315). In others, the attorney-client relationship may, under certain conditions—including the absence of a conflict of interest—extend to the carrier as well (*see e.g. General Sec. Ins. Co. v. Jordan, Coyne and Savits, LLP,* 357 F Supp 2d 951 [E.D.Va.]; *Spratley v. State Farm Mut. Auto. Ins. Co.,* 78 P.3d 603 [Utah]; *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon and Gladstone,* 79 Cal.App.4th 114, 125–127, 93 Cal.Rptr.2d 534, 542–543; *Pine Is. Farmers Coop v. Erstad & Riemer, P.A.,* 649 N.W.2d 444 [Minn.]; *cf. Paradigm Ins. Co. v. Langerman Law Offices, P.A.,* 200 Ariz. 146, 24 P.3d 593).

Shaya B. Pacific, LLC v. Wilson, Elser, et al., 38 A.D.3d 34, 42, 827 N.Y.S.2d 231, 237 (2d Dep't 2006).

Some states permit insurance carriers to maintain a legal malpractice action not based upon privity between the carrier and the attorney, but rather under the doctrine of equitable subrogation. In this regard, it has been held:

> Equitable subrogation has been described as a "legal fiction" that permits one party to stand in the shoes of another. The doctrine is eminently applicable under the facts of this case. A rule of law expanding the parameters of the attorney-client relationship in the defense counsel-insurer context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting. Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances.

Atlanta Intern. Ins. Co. v. Bell, 438 Mich. 512, 521-522, 475 N.W.2d 294,298 (1991); *see also, Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.,* 100 So.3d 453 (Miss. Ct. App. 2012); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Insurance Company of North America,* 955 S.W.2d 120 (Ct. App. Tx. 1997).

IV. Preventing Malpractice Claims

Malpractice for an insurance defense attorney can arise at any stage of the representation, from the initial retention right through to trial and appeal.

A. Retainer Agreement

In *Shaya B. Pacific, LLC v. Wilson, Elser, et al.,* 38 A.D.3d 34, 827 N.Y.S.2d 231 (2d Dep't 2006), plaintiff alleged that its assigned defense counsel failed to put its excess carrier on notice of the claim, which resulted in a disclaimer of coverage by the excess insurance carrier. Although the defendant argued that putting the excess carrier on notice of the claim was outside the scope of its representation, whether such representation was outside the scope of the representation was held to be a question of fact. A well written and detailed retainer agreement advising the client of certain matters outside the scope of the attorneys' representation, such as identifying excess insurance or putting potentially liable insurance carriers on notice of the claim, can help prevent legal malpractice claims in this regard.

B. Answer

In *Billiard Balls Management, LLC v. Mintzer Sarowitz, et al.,* 54 Misc.3d 936 (Sup. Ct. N.Y. Cty. 2016), defense counsel was retained to represent a defendant in a personal injury action. The firm obtained a stipulation extending defendant's time to answer, but the insurance company then disclaimed coverage and directed the firm to take no further action for defendant. The firm took no further action and the defendant then defaulted. Cases like this demonstrate why it is always necessary for an attorney to properly withdraw from the representation, either by motion to be relieved as counsel or a written consent to change attorney or as otherwise permitted.

In the North Dakota case, *McGrath v. Everest National Ins. Co.,* 2010 WL 567301 (2010), defense counsel's strategy not to answer for a misnamed defendant resulted in a default judgment against the client. This case should remind defense counsel to always get the carrier's approval for any significant strategy decisions.

Malpractice cases also arise against defense counsel in the context of Answers when an attorney fails to raise necessary affirmative defenses. *Atlanta Intern. Ins. Co. v. Bell,* 438 Mich. 512 475, N.W.2d 294 (1991) (failure to raise comparative fault as an affirmative defense in a wrongful death action). *Unigard Ins. Group v. O'Flaherty & Belgum,* 38 Cal.App.4th 1229, 45 Cal.Rptr.2d 565 (1995) (failure to raise exclusive remedy of Workers' Compensation as an affirmative defense). It is easy to overlook routine matters in the context of drafting Answers or in any other aspect of litigation. Simple measures, such as using checklists (*i.e.,* a list of commonly used affirmative defenses) can help defense attorneys avoid simple errors.

C. Discovery

In *Allied Waste North America, Inc. v. Lewis, King, Krieg & Waldrop, P.C.,* 93 F.Supp.3d 835 (M.D. Tennessee 2015), malpractice claims were asserted against defense counsel on the grounds that

they, among other things, failed to timely disclose witnesses. All significant dates on any case, including deadlines must be calendared. According to the most recent ABA statistics, 6.51% of all legal malpractice actions arise from an attorney's failure to calendar properly.

In the Texas case, *National Union Fire Ins. Co. of Pittsburgh v. Ins. Co. of North America,* 955 S.W.2d 120 (1997) where there had been a $3.6 million demand, but ultimately a $6.0 million verdict, the excess carrier sued defense counsel alleging insufficient discovery. In order to help avoid such errors, defense attorneys should implement a system for file reviews at important times in each case, such as the completion of discovery.

In *Sunset Ins. Co. v. Gomila,* 834 So.2d 654, (La.App. 5 Cir. 2002), the insurance carrier sued its assigned defense counsel because the attorney stipulated that the named insured's subsidiary was a named insured with UM coverage on its vehicle when, in fact, it was not. This case demonstrates that it is important for the insurance defense practitioner to always (1) confirm coverage issues with the carrier and (2) get the carrier's approval for significant strategy decisions.

D. Depositions

Defense counsel sued by insured/client for allegedly telling the insured/client to lie at his deposition, which exposed him to greater liability. *Blain v. The Doctors Co.,* 222 Cal.App.3d 1048, 272 Cal.Rptr. 250 (1990). While it may be important for defense attorneys to zealously represent their clients, they should not do anything that might lead to disciplinary issues.

E. Experts

In the New York case, *Transcare New York, Inc. v. Finkelstein, Levine & Gittlesohn & Partners,* 23 A.D.3d 250, 804 N.Y.S.2d 63 (1st Dep't 2005), after verdict was returned well in excess of the insurance policy limits, defense counsel was sued for failing to have an independent medical examination of the plaintiff. Similarly, *Great American E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.,* 100 So.3d 453 (Miss. 2012) (failure to timely retain expert); *State & County Mut. Fire Ins. Co. v. Young,* 2007 WL 2220504 (W.V. 2007) (failure to timely designate expert). These cases are a reminder to calendar all important dates associated with a case, including discovery deadlines.

In *Allied Waste North America, Inc. v. Lewis, King, Krieg & Waldrop, P.C.,* 93 F.Supp.3d 835 (M.D. Tennessee 2015), malpractice claims were asserted against defense counsel on the grounds that they, among other things, retained an expert witness that was not licensed in the state. Experts must be thoroughly investigated before they are retained.

F. Motions

Defense attorney failed to oppose motion for summary judgment with supporting evidence. *Minnesota Lawyers Mut. Ins. Co. v. Baylor & Jackson, PLLC,* 531 Fed.Appx. 312 (4th Cir. 2013). Significant documents, like motions, should be reviewed by a supervisor or a second set of eyes.

Malpractice alleged against defense counsel on the grounds that, among other things, defense counsel should have sought a new independent medical examination since the original doctor was indicted. *Perkins v. American Transit Ins. Co.,* 2013 WL 174426 (S.D.N.Y. 2013). Defense counsel should seek authority of the carrier to pursue all necessary investigation, otherwise defense counsel may be held liable for decisions they made on their own.

G. Trial

In the New York case, *Transcare New York, Inc. v. Finkelstein, Levine & Gittlesohn & Partners,* 23 A.D.3d 250, 804 N.Y.S.2d 63 (1st Dep't 2005), insured/client sued insurer and assigned defense counsel for malpractice alleging, among other things, that defense counsel failed to introduce at trial evidence of plaintiff's medical condition, evidence of plaintiff's quality of life, and that defense counsel failed to call its own medical expert at trial. A key component to avoiding error is to properly and thoroughly prepare.

In *Gurski v. Rosenblum,* 48 Conn.Supp. 226, 838 A.2d 1090 (2003), the client alleged that defense counsel failed to attend a pre-trial conference, which resulted in a default judgment being entered against the client in the amount of $152,000. Some proactive measures that can be taken to avoid missing dates is to calendar all important dates; use two calendars; implement procedures as to how and when dates must be entered on the office calendar; implement a procedure where a calendar clerk or secretary follows-up with the attorney for any dates following every court appearance.

H. Appeals

In *St. Paul Fire and Marine Ins. Co. v. Speerstra,* 63 Or.App. 533, 666 P.2d 255 (1983), insurer brought legal malpractice action against its assigned defense counsel for the alleged failure to timely file a Notice of Appeal. Calendar all important deadlines; there should be supervision over every file to protect against oversight and supervisors should be familiar with all significant developments in the case.

I. Settlement

In the New York case, *Feliberty v. Damon,* 72 N.Y.2d 112, 527 N.E.2d 261, 531 N.Y.S.2d 778 (1988), a doctor who had been sued for medical malpractice sued his insurance carrier and his assigned defense counsel alleging that his practice was damaged by publicity surrounding settlement of the medical malpractice action, to which he did not consent. A number of cases against defense counsel have arisen due to counsel's alleged failure to obtain the insured/client's consent to settle. *See, Teague v. St. Paul Fire and Marine Ins. Co.,* 10 So.3d 806 (La.App. 1 Cir. 2009); *Lieberman v. Employers Ins. of Wausau,* 84 N.J. 325, 419 A.2d 417 (1980). Confirm if the client's consent to a settlement is required under the policy. Send a copy of each report to the client, not just to the carrier.

In the New York case, *New York Cent. Mut. Fire Ins. Co. v. Hildreth,* 40 A.D.3d 602, 835 N.Y.S.2d 409 (2d Dep't 2007), it was alleged that a release issued in one case prevented third-party action in related action. Similarly, in *Barney v. Aetna Casualty & Surety Co.,* 185 Cal.App.3d 966, 230 Cal.Rptr. 215 (1986), the insured/client sued the insurer and assigned defense counsel on the

grounds that the settlement of the case with prejudice precluded his own personal injury action. It is always important to communicate with your clients; to know if they have their own claims/actions arising from the same incident; if so, to coordinate the cases with their personal counsel; and to consolidate or join related actions.

In the New York case, *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae,* 243 A.D.2d 168, 674 N.Y.S.2d 280 (1st Dep't 1998), an excess insurance carrier sued its insured's defense counsel on the grounds that counsel failed to obtain the excess carrier's consent to the settlement. All interested parties should be kept advised of all developments in an action and no settlement can be made without the carrier's consent (and the client's consent, if the insurance policy so requires).

In *Knudsen v. Volpe,* 1995 WL 235046 (Super. Conn. 1995), the insurer commenced a legal malpractice action against assigned defense counsel alleging that the firm failed to accept offer of judgment when they were authorized to do so. Similarly, in *White Mountains Reinsurance Co. of America v. Borton Petrini, LLP,* 221 Cal.App.4th 890, 164 Cal.Rptr.3d 912 (2013), defense counsel was alleged to have failed to accept a policy limit demand within set 30 day time limit. *See also, Korman v. John W. Hill & Associates, Inc.,* 2007 WL 1519784 (Cal. 2007) (failure to settle for policy limits). Lessons to be learned include: do not procrastinate; proactively handle your cases; make use of your resources (delegate).

In *St. Paul Fire and Marine Ins. Co. v. Speerstra,* 63 Or.App. 533, 666 P.2d 255 (1983), insurer brought legal malpractice action against assigned defense counsel alleging that the firm failed to convey a settlement demand. *See also, Jolley v. Marquess,* 393 N.J.Super. 255, 923 A.2d 264 (2007). Regular reporting is essential to the tripartite relationship. All significant developments should be reported and all settlement demands must be reported.

V. Recognizing Potential Malpractice Claims

Claims representatives deal with their assigned defense counsel on a daily basis and in such dealings, claims representatives may be able to identify certain "red flags" that can indicate a problem with the case and that assigned defense counsel might have made an error in handling the case.

If defense counsel is non-responsive to a claims representative's phone calls or emails or if it appears that the attorney is otherwise avoiding the claims representative on a particular file, this could be an indicator that defense counsel is neglecting the file and neglected files result in errors and malpractice. An attorney's non-responsiveness can also be indicative that a mistake has been made in the handling of the case and, as a result, the attorney is avoiding the claims representative because the attorney is trying to fix an error before he/she speaks with the claims representative or that he/she is trying to devise an explanation for the error before speaking with the claims representative. If defense counsel is non-responsive, it may become necessary for a claims representative to contact the handling attorney's supervisor.

Most carriers require regular reporting from defense counsel. If defense counsel has stopped reporting on the case or if there is a prolonged delay between reports, this too could be an indicator that defense counsel is neglecting the file or that an error has already occurred and the

attorney does not know how to deal with it. If defense counsel is failing to report or if there are prolonged delays in reporting, the assigned claims representative should follow-up with defense counsel and review the case to ensure nothing is falling through the cracks.

Similarly, if reports being sent by defense counsel are deficient, cursory, vague, or if they simply reiterate information previously provided to the carrier, this could be an indication that the file is being neglected (since there are no developments) and neglected files lead to errors. The failure to substantively report on the file could also indicate that there is a problem with the file that the attorney does not want to address. Any such deficient reporting should provide the claims representative an opportunity to follow-up with the assigned attorney to ensure there ae no problems that are not being addressed and if there are any problems that they get addressed.

One way for a claims representative to better keep abreast of defense counsel's actions and the status of the case is to request all significant documents from defense counsel, such as the Answer, Bill of Particulars or Interrogatory responses; deposition transcripts, and substantive motions, such as dispositive motions. A claims representative's review of significant documents in the case enables him/her to gain firsthand knowledge of the case and ensures that the claims representative's knowledge of the case is not being filtered by defense counsel.

Another way for a claims representative to keep informed of defense counsel's actions in the case is to review the firm's invoices. Reviewing defense counsel's bills can provide insight into what work is being performed by the attorney that might not necessarily be reported. An attorney's actions reflected in an invoice that do not correspond with what is being reported on the case by the attorney could be an indication of a problem with the case that is not being reported.

Claims representatives should pay close attention to defense counsel's settlement recommendation. A defense attorney who has made a mistake over the course of an action could try to cover the error by settling the case thinking that if the case goes away, the error goes away. Accordingly, claims representatives should make their own evaluation of any potential settlement. If the recommended settlement does not seem to make sense, further investigation may be necessary in order to confirm that the settlement is not being made simply to cover an error by the defense attorney.

Claims representatives should see themselves as partners with their defense counsel and keep advised of the status of the case and be involved in the significant decisions made in the case. A claims representative's active involvement in the case not only acts as supervision over defense counsel, but the claims representative's active involvement provides a second set of eyes on the case, which can go a long way to helping defense counsel avoid errors on a file.

VI. Insurance Considerations

Many attorneys do not realize that they are personally liable for their own acts of negligence and for the acts of negligence of those that they supervise; they are not afforded protection simply because the firm is a corporation or similar entity. For this reason, for their own protection, and for the protection of their supervisors, attorneys should be encouraged to

report any potential error to their supervisor. Attorneys are often reluctant to admit to their supervisors that they made a mistake, but failing to notify a supervisor of a potential error prevents the potential error from being reported to the firm's professional liability insurance carrier and the failure to timely notify the insurance carrier of a potential claim against the firm could jeopardize coverage as most insurance policies contain a notice provision that requires the firm to provide it with timely notice of any potential claim once the potential for a claim becomes known. If an attorney hides an error, he/she could be jeopardizing his/her own coverage, the coverage of his/her supervisor, and the coverage for the firm. For this reason, firms should encourage attorneys to report any potential errors to their supervisors and foster an environment where an attorney does not feel intimidated or feel that he/she will lose her job by notifying the supervisor of a potential error.