

Conflicts of Interest In the Defense of Medical Malpractice Cases

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I.

INTRODUCTION

Much has been written about the potential for conflicts of interest in the tripartite relationship between insurance carrier, insured, and insurance defense counsel.¹ At best, an error of judgment on an conflict which arises can expose an attorney to lost business, disqualification, or becoming a witness. At worst, a lawyer who errs on conflicts questions in the representation of insurance carriers and insureds may be subject to disciplinary proceedings and claims of legal malpractice.

¹See, e.g., Douglas R. Richmond, *Emerging Conflicts of Interest in Insurance Defense Practice*, 32 Tort & Ins. L. J. 69 (Fall 1996); Karon O. Bowdre, *Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel*, 17 Am. J. Trial Advoc. 101 (1993); Charles Silver and Ken Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255 (1995); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 Geo. J. Legal Ethics 475 (1996); Douglas R. Richmond, *Walking A Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 Neb. L. R. 265 (1994); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 Tex. L.Rev. 1583 (1994). This list is by no means exhaustive.

In the context of medical malpractice defense, the tensions between the various competing interests can become quite pronounced due to the visceral nature of medical malpractice cases and the parties involved.² Physicians are generally more sophisticated clients than the average individual insured, not only because they are professionals, but also because they deal with legal issues and insurance companies, in some respect, on a regular basis. More than the typical individual insured, medical professionals generally have substantial insights into the business, insurance and legal issues involved in the defense of medical malpractice claims. Even though there are many corporate and some individual insureds who possess the same sensitivity to the issues associated with insured claims, doctors as professionals have a much greater stake in medical malpractice claims because their reputations are jeopardized by medical malpractice claims. This is because the medical community is small and malpractice claims must be reported to state regulatory agencies, the National Practitioners Data Bank, and various licensing and credentialing bodies. Moreover, doctors who are sued often react very emotionally to the entire process. While the typical corporate or individual insured may have no great personal stake in the outcome for these reasons, doctors do, and as a result often have a tendency to consider a medical malpractice lawsuit both a personal and professional affront. Finally, a medical malpractice claim that goes bad can go very bad, resulting in the possibility of excess exposure, media exploitation, and even licensing problems for the physician defendant.

Given the inherent nature of medical malpractice suits, insurance defense counsel who represent medical professionals must be extra diligent so that when conflicts of interest do occur, they are recognized and ameliorated in an appropriate and timely fashion. This paper will discuss what various courts have had to say on the subject of conflicts of interest in the defense of medical malpractice cases, will identify some areas in which such conflicts might occur, and will provide a practical analysis which might assist counsel in the avoidance of ethical difficulties or, at the very least, a reduction in any negative impact on the clients and attorneys involved.

II.

CASE REVIEW

There are numerous potential sources of conflicts of interest in the representation of physicians in medical malpractice cases. In fact, some of the leading cases on conflicts of interest in the context of insurance defense litigation arise out of medical malpractice defense. One of those cases is an Illinois case, *Rogers v. Robson, Masters, Ryan, Brumund and Belom*.³

²Some of these issues are discussed in Richard H. Underwood, *The Doctor and His Lawyer: Conflicts of Interest*, 30 Kan. L. Rev. 385 (1982) and Francis M. Hanna, *When Medical Malpractice Becomes Legal Malpractice: The Dangers Inherent In Representing Professional Malpractice Defendants*, 12 Miss. C. L. Rev. 73 (Fall 1991). See also Gregory G. Sarno, *Legal Malpractice in Handling or Defending Medical Malpractice Claims*, 78 A.L.R.4th 725 (1991).

³ *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 392 N.E.2d 1365 (Ill. App.

Dr. Rogers was sued for medical malpractice. His insurance company retained the Robson Masters firm to defend the action. Early on, Dr. Rogers informed his lawyers that he did not and would not consent to a settlement of the claim.⁴ Prior to trial, Dr. Rogers= carrier and his counsel settled the malpractice claim on a covenant not to sue. The settlement provided that Dr. Rogers did not admit liability. Dr. Rogers had not consented to the settlement, and he was not advised until afterward that a settlement was even contemplated.⁵

Dr. Rogers= malpractice policy contained the following provision with respect to settlement:

1979).

⁴ *Id.* at 1368.

⁵ *Id.*

The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages and the company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and with the written consent of the insured such settlement of any claim or suit as it deems expedient, but the company shall not be obligated to defend any suit after the applicable limits of the company=s liability has been exhausted . . . **nor shall the written consent of a former insured be required before the company may make any settlement of any claim or suit even if such claim or suit was made, proffered or alleged while such former insured was an insured under this policy.**⁶

Thus, while Dr. Rogers= consent to settlement would have been required if he continued to be an insured, his consent was not required under the policy if he became a former insured. Dr. Rogers filed suit against his attorneys for wrongfully settling the underlying medical malpractice case. The attorneys moved for summary judgment on the basis that under the foregoing policy provision, Dr. Rogers, as a former insured, had no right to object to any settlement.⁷ The trial court granted the motion.

Dr. Rogers appealed. The Appellate Court of Illinois determined initially that the insurance contract indeed provided for and authorized the carrier to settle the underlying medical malpractice claim without Dr. Rogers= consent.⁸ However, the Court=s inquiry did not end there, because Dr. Rogers also argued that his attorneys breached their own duties to him, separate and apart from the insurer=s obligations to Dr. Rogers under his policy.⁹

⁶ 392 N.E.2d at 1369 (ellipse in original) (emphasis added).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1371.

The Appellate Court discussed who an attorney represents in the insurance defense context, and concluded that an insurance defense attorney represents both the insured and the insurer in furthering the interests of each.¹⁰ This might be considered the dual representation rule.¹¹ With respect to the insured, the Appellate Court stated, “The attorney client relationship between the insured and the attorney imposes upon the attorney the same professional obligations that would exist had the attorney been personally retained by the insured.”¹² The fact that an attorney also represents the insurer does not alter his obligations and responsibilities to the insured.¹³

The Appellate Court also discussed the fact that there is nothing inherently wrong with such an arrangement, and that even if conflicts do arise, counsel need not necessarily withdraw:

Ordinarily, since the interests of insurer and insured are harmonious, there is no conflict and the attorney is able to exercise independent judgment for both clients. Therefore, in the usual instance, there is nothing improper or unethical about representing the interests of both. . . . However, situations can arise where those interests may become conflicting. . . . When a conflict does arise, serious ethical considerations prohibit an attorney from continuing to represent both the interests of the insured and the insurer. . . . However, the attorney does not necessarily have to withdraw from the case. In many situations, if, after full and frank disclosure, the clients are willing to consent to the attorney’s continued representation on their behalf, ethical considerations are satisfied and the attorney may continue to

¹⁰ *Id.* at 1370 (citing *Allstate Insurance Co. v. Keller*, 17 Ill.App.2d 44, 149 N.E.2d 482; *Maryland Casualty Company v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24; American Bar Association Ethics Opinion No. 1822; *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406; *Henke v. Iowa Mutual Casualty Company*, 249 Iowa 614, 87 N.W.2d 920; Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 Ins. Couns. J. 244 (1978)).

¹¹ Some jurisdictions follow a single representation rule, under which the attorney’s ethical obligations are owed to the insured, not the carrier. See *Who is the Client?*, Part IV, infra.

¹² *Id.* (citing *Allstate Insurance Co. v. Keller*, 17 Ill.App. 2d 44, 149 N.E.2d 482; *American Mutual Liability Insurance Co. v. Superior Court*, 38 Cal.App. 3d 579, 113 Cal. Rptr. 561; *Ivy v. Pacific Auto Insurance Co.*, 156 Cal.App. 2d 252, 320 P.2d 140; *Newcomb v. Meiss*, 263 Minn. 315, 116 N.W.2d 593, 598). See also *Hartford Accident and Indemnity Company v. Foster*, 528 So.2d 255, 268 (Miss. 1988) (“A contract which authorized any dilution of the ethical obligation of an attorney to the client would be void as against public policy”).

¹³ *Id.* at 1371 (citing *Parsons v. Continental National American Group*, 113 Ariz. 223, 550 P.2d 94; *Imperiali v. Pica*, 338 Mass. 494, 156 N.E.2d 44).

represent the conflicting interests.¹⁴

The Appellate Court gave some direction on the nature of the disclosure which must be made in order for an attorney to continue to represent an insurer and an insured in the face of conflicting interests. The extent of such a disclosure must be determined on a case by case basis, but the attorney must disclose all facts and circumstances which in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make a free and intelligent decision regarding the representation.¹⁵

The Appellate Court also discussed the need to keep a client who is an insured of another client fully informed, apart and aside from the requirement that a lawyer involved in a conflict situation disclose all material facts:

¹⁴ *Id.* (citations omitted).

¹⁵ *Id.* (citing *Lysick v. Walcom*, 258 Cal.App. 2d 136, 65 Cal. Rptr. 406).

Any attorney-client relationship includes the duty [of] the attorney to advise the client of the progress in a case or controversy, and this duty is not altered by the presence of a third party insurer whom the lawyer also represents. An insured must be informed of any settlement offers that affect him so that the insured may take proper steps to protect his own interests.¹⁶

The Appellate Court took particular issue with the fact that before the settlement, Dr. Rogers informed his attorney that he did not want the case to be settled. His lawyer in fact told him the case would be defended. Notwithstanding, the lawyer effectuated a settlement of the case without Dr. Rogers' knowledge, much less his consent. The Appellate Court stated:

Apart from any considerations arising from the insurance policy, we believe that when defendant became aware that a settlement was imminent because of the preferences of the insurance company, and that their own client, the plaintiff, did not want the case settled, a conflict arose and defendant could not continue to represent both without a full and frank disclosure of the circumstances to its clients. Furthermore, the general duties of the defendant in representing plaintiff were strengthened by the defendant agreeing, if it did, to defend the case rather than settle. Having continued representing both the insurer and the insured without the requisite disclosure, defendant breached its duty to plaintiff. When an attorney attempts dual relationships without making full and frank disclosure required of him, he is liable to the client who suffers loss caused by the lack of disclosure.¹⁷

The Appellate Court also thought that his counsel's conduct precluded Dr. Rogers from making fundamental informed decisions about the representation. The Appellate Court held that summary judgment in favor of the attorneys was improper, stating:

¹⁶ *Id.* at 1372 (citations omitted).

¹⁷ *Id.* (citation omitted).

By failing to inform plaintiff of the proposed settlement, defendant foreclosed plaintiff from alternatives that were available to him. Plaintiff could have consented to continued representation by the defendant at the expense of the insurance company with the accompanying likelihood that the case would be settled without his consent, for, as we have held, the insurance company by virtue of the contract could settle without plaintiff=s consent. If plaintiff believed such a course of action was not in his best interests, he could release the insurance company from its obligation under the policy, select different counsel, defend the action at his own expense and bear the risk of an adverse decision. Having failed to provide plaintiff with the proper disclosure of the facts and then obtaining plaintiff=s consent to continued representation, defendant breached a duty which, if damages and proximate cause are established, will make defendant liable to plaintiff for the loss caused by the lack of disclosure.¹⁸

The Court thus drew a clear distinction between an insured=s rights under an insurance contract and his entitlement to fidelity by his attorneys, even if hired pursuant to a contract of insurance. ANotwithstanding the defendant=s assertion that it had no duty toward the plaintiff because of the policy provision eliminating the requirement of the consent, we are unable to agree that such provision offers any justification for abrogating duties defendant owed plaintiff as the plaintiff=s attorney.¹⁹

The Supreme Court of Illinois granted Robson Masters= petition for leave to appeal, and affirmed the judgment of the Appellate Court.²⁰ The Supreme Court agreed that both Dr. Rogers and his carrier were clients of the lawyer defending the case.²¹ The Court also held that Dr. Rogers Awas entitled to a full disclosure of the intent to settle the litigation without his consent and contrary to his express instructions.²² As the Court stated:

Defendants=s duty to make such disclosure stemmed from their attorney-client relationship with plaintiff and was not affected by the extent of the insurer=s authority to settle without plaintiff=s consent. We need not and therefore do not consider the question whether

¹⁸ *Id.*

¹⁹ 392 N.E.2d at 1373.

²⁰ *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 407 N.E.2d 47 (Ill. 1980).

²¹ 407 N.E.2d at 49 (citing *Thornton v. Paul* (1978), 74 Ill.2d 132, 23 Ill.Dec. 541, 384 N.E.2d 335; *Maryland Casualty Co. v. Peppers* (1976), 64 Ill.2d 187, 355 N. E.2d 24).

²² *Id.*

plaintiff's insurance carrier was authorized to settle the malpractice action without his consent.²³

²³ *Id.*

Rogers thus stands for the propositions that: 1) an insurance defense attorney has an attorney-client relationship with both the insurer and the insured; 2) insurance defense counsel's duties to the insured are ethical duties separate and distinct from the insured's contract rights; and 3) insurance defense counsel who settles a case against the insured's wishes breaches his obligations to his client.²⁴

In a New Jersey case, *Lieberman v. Employers Insurance of Wausau*, a physician sued his medical malpractice liability insurer for breach of contract, and sued his attorney for violation of the attorney-client relationship for settling a claim without his consent.²⁵ Dr. Lieberman was sued for the allegedly negligent administration of an arteriogram. Dr. Lieberman was insured by a medical malpractice policy which contained a clause which permitted the carrier to negotiate and, with Dr. Lieberman's written consent, settle any claim the company deemed expedient.²⁶ At the time of the claim, the New Jersey Medical Society had a program in place which provided for a premium surcharge for Achargeable claims.²⁷

Dr. Lieberman's carrier retained an attorney to defend him. New Jersey's Medical Review and Advisory Committee determined that the claim should be settled, and Dr. Lieberman's carrier

²⁴ But see *Sharp v. Howell*, 629 So.2d 314 (Fla. App. 1993). In *Howell*, a legal malpractice action with allegations of professional negligence and conflict of interest, as a matter of law there was no causal connection between counsel's conduct and alleged canceled insurance, where settlement of the claim and cancellation of insurance were within the carrier's contractual authority. *Id.* at 314-15.

²⁵ *Lieberman v. Employers Insurance of Wausau*, 407 A.2d 1256 (N.J.Super. 1979).

²⁶ 407 A.2d at 1258.

²⁷ *Id.*

obtained Dr. Lieberman=s consent to do so. The attorney was notified.²⁸ Subsequent to giving his consent to settle, Dr. Lieberman learned facts which indicated the patient might have been malingering or engaged in fraud. Therefore, Dr. Lieberman advised his carrier that he thought the case should be tried and revoked his consent.²⁹ Dr. Lieberman made it very clear to the carrier and to his attorney that he did not want the claim settled, but his carrier advised him that his consent could not be revoked.³⁰

²⁸ *Id.*

²⁹ *Id.* at 1259.

³⁰ *Id.*

Dr. Lieberman called his attorney and explained that he did not want to settle the case. The attorney told him that he would try the case if the doctor wanted it tried, and in fact, prepared the case for trial. However, the attorney did not advise Dr. Lieberman of ongoing settlement negotiations.³¹ Dr. Lieberman was placed Aon call@ for trial by his counsel, and at a settlement conference with the Court which did not include Dr. Lieberman, the matter was settled.³²

Dr. Lieberman sued his carrier and the attorney for recovery of the premium surcharges assessed against him as a result of a chargeable claim. The trial court granted the motion to dismiss filed by the insurance company, but denied the attorney=s motion to dismiss. The Court entered judgment in favor of Dr. Lieberman, and the attorney appealed.³³

The Superior Court of New Jersey first disposed of the issue of Dr. Lieberman=s attempted withdrawal of consent, stating that Ain the absence of the policy provision that the consent, once given, may not be withdrawn, or of proof that the insurer has acted upon such consent to its detriment, we discern no sound reason for holding the consent to be irrevocable. . . .@³⁴

The Court also dismissed the attorney=s argument that he was just a Amessenger boy@ and an agent of the insurer. The Court felt that Athe attorney completely misconceive[d] the import of the action brought against him and his responsibility to the plaintiff.@³⁵ As in *Rogers*, the *Lieberman* Court observed that A[a]n attorney provided by an insurance company to represent an insured defendant owes that person the same unswerving allegiance that he would if he were

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1258.

³⁴ 407 A.2d at 1260.

³⁵ *Id.* at 1261.

retained and paid by the defendant himself.³⁶ The *Lieberman* Court also appears to have adopted a dual representation rule in holding that Awhile [an attorney] owes to both [an insured and insurer] a duty of good faith and due diligence in the discharge of his duties, the rights of one cannot be subordinated to those of the other.³⁷ The Court also correctly pointed out that if an attorney believes that the discharge of his duties to the insured would conflict with the discharge of his duties to the carrier, he cannot represent both.³⁸

The Appellate Division affirmed the trial court, stating:

³⁶ *Id.* (citing *Newcomb v. Meiss*, 263 Minn. 315, 116 N.W.2d 593, 598 (Sup.Ct. 1962); *Jackson v. Trapier*, 42 Misc.2d 139, 247 N.Y.S.2d 315, 316 (Sup.Ct. 1964)).

³⁷ *Id.* (citing *Imperiali v. Pica*, 338 Mass. 494, 156 N.E.2d 44, 47 (Sup.Jud.Ct. 1959)).

³⁸ *Id.* (citing *Hammett v. McIntyre*, 114 Cal.App.2d 148, 249 P.2d 885 (D.Ct.App. 1952); *Reynolds v. Maramorosch*, 208 Misc. 626, 144 N.Y.S.2d 900 (Sup.Ct. 1955)).

[The lawyer=s] representation of plaintiff in the malpractice lawsuit obligated him to advise the physician of the implications and possible consequences of the dispute with the insurer over the revocation of the settlement authorization, including the probability of a conflict of interest which would either require McDonough to withdraw from the case or, at least, to advise Dr. Lieberman to retain other counsel to represent him with respect to that controversy. To this end, McDonough should have disclosed to Dr. Lieberman all facts and circumstances which, in his judgment, were necessary to enable his client to make an intelligent decision in the matter. . . . Furthermore, there could be no doubt that McDonough should have told Dr. Lieberman on the scheduled trial date that a settlement was imminent, solicited his views with respect to it and also discussed with him the courses of action which were opened to him if he persisted in objection to the settlement. In the latter case, we think that McDonough was duty bound to bring the matter to the attention of the trial judge and seek a continuance so as to enable Dr. Lieberman to take such action as he might deem appropriate in the circumstances.³⁹

Although the Appellate Division agreed with the trial court that the attorney breached the duties imposed upon him by the attorney-client relationship, the case was reversed and remanded for a new trial on damages.⁴⁰

All the parties appealed, and with respect to Lieberman=s claims against his counsel, the Supreme Court of New Jersey decided two issues: 1) whether an attorney retained by an insurance carrier to represent an insured may settle the claim contrary to the wishes of the insured; and 2) the measure of damages.⁴¹ The Supreme Court agreed with the Appellate Division that the Aconsent of the insured to authorize the insurer to affect a settlement is revocable in the absence of a contrary provision.⁴²

With respect to the identity of the client, the Court muddied the waters a bit by stating that Ainsurance defense counsel routinely and necessarily represent two clients: the insurer and the insured,@ but also suggested that Athe loyalty to the insured may actually even be paramount since that defense is the sole reason for the attorney=s representation.@⁴³ Regardless, the Court readily

³⁹ *Id.* (citations omitted).

⁴⁰ *Id.* at 1263.

⁴¹ *Lieberman v. Employers Insurance of Wausau*, 419 A.2d 417, 422 (N.J. 1980).

⁴² 419 A.2d at 423.

⁴³ *Id.* at 424 (quoting Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 *Ins. Couns. J.* 244 (1978)).

acknowledged that the relationship between the insured and insurance defense counsel is an attorney-client relationship.⁴⁴

The Court discussed the fact that there are always latent conflicts between an insured and an insurer. However, it was when an actual conflict over settlement arose that Lieberman's attorney breached his duties to Dr. Lieberman. The Supreme Court was even more critical of the attorney than the Appellate Division was:

McDonough's proper course of action, though difficult, was clear. It was dictated by the paramount duty of singular loyalty and professional self-abnegation owed every client by an attorney. Where the insurer has refused to accede to the legitimate demand of the insured that the claim not be settled, McDonough, by continuing to represent Lieberman without informing him of the existence of this ethical dilemma, clearly violated his duty to advise the client fully, frankly, and truthfully of all material and significant information.

⁴⁴ *Id.*

. . . The attorney=s professional dereliction here was twofold. It first consisted of his failure to inform Lieberman of the clear conflict of interest and his subsequent failure either to withdraw from the case completely or to terminate his representation of either the insured or the insurer. It also consisted of McDonough=s active participation thereafter in the actual settlement of the claim against the wishes of his client, the insured. This serious breach of duty constitutes actionable professional negligence or malpractice by the attorney.⁴⁵

The Supreme Court affirmed the judgment of the Appellate Division, but modified with respect to the determination of damages on re-trial.⁴⁶

It does not appear that Dr. Lieberman=s attorney did any of the things necessary to protect Dr. Lieberman=s interests in the matter. With the knowledge that Dr. Lieberman did not want the matter settled, he failed to inform Dr. Lieberman of settlement discussions. Nor was Dr. Lieberman informed that a conflict of interest might exist, and it was never suggested that he seek independent counsel.⁴⁷ These failures directly resulted in liability to the client.

A Missouri case, *Arana v. Koerner* concerns some of the same issues, and also outlines what types of other claims might be made against attorneys sued for legal malpractice arising out of their representation of insureds.⁴⁸

⁴⁵ *Id.* at 425 (quoting *In Re Loring*, 73 N.J. 282, 290, 374 A.2d 466, 470 (1977)).

⁴⁶ *Id.* at 426.

⁴⁷ *Id.*

⁴⁸ *Arana v. Koerner*, 735 S.W.2d 729 (Mo.App. 1987) (Partially overruled on other grounds, *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1987) (AProof of an attorney=s intent is not required to establish breach of fiduciary duty or constructive fraud@).

In *Arana*, Dr. Arana=s medical malpractice carrier and his insurance defense counsel allegedly settled a medical malpractice case without his knowledge or consent.⁴⁹ Dr. Arana sued his attorneys for breach of contract, negligence, and willful conduct. The breach of contract claim was based on a provision of his insurance policy which provided that his carrier would not settle any claim against him without his consent. With respect to a negligence count against the lawyers, Dr. Arana alleged that they breached their duties to him because they 1) settled the claim without his consent, 2) placed the carrier=s interest above his, 3) failed to adequately investigate the underlying medical malpractice action, and 4) failed to advise him of the conflicts of interest in their representation of him and the carrier.⁵⁰ The trial court initially dismissed Dr. Arana=s complaint, but thereafter allowed him to file an amended complaint on the negligence claim. In addition to the above allegations, Dr. Arana alleged that the attorneys failed to provide him with an opportunity to seek independent counsel and failed to seek a protective order to keep the settlement of the underlying medical malpractice claim confidential. Actual and punitive damages were requested based on Areckless indifference,@ but the trial court dismissed this claim.⁵¹ In the interim, Dr. Arana sued his insurance carrier, The Medical Protective Company (AMedical Protective@), for breach of contract and other claims arising out of the settlement of the malpractice suit. That case was settled.⁵²

The Court of Appeals first dealt with the attorneys= claims that Dr. Arana=s suit should have been dismissed because he gave Medical Protective a general release and because the disposition of the claim against the carrier was *res judicata*. In doing so, the Court found that there was a lawyer-client relationship between Dr. Arana and the attorneys hired by the carrier:

It is upon this [attorney/client] relationship that Arana=s claim against defendants is based, not upon the insurance policy or

⁴⁹ 735 S.W.2d at 731.

⁵⁰ *Id.* at 732.

⁵¹ *Id.*

⁵² *Id.*

defendants' actions as agents of Medical Protective. The obligations of an attorney to his client are in no way abridged by the fact that an insurer employs him to represent an insured. . . . The attorney owes the insured the same obligation of good faith and fidelity as if the insured had retained the attorney personally and at his own expense. . . . By allegedly ignoring Arana's instructions to litigate rather than settle the Elam suit, and by not informing plaintiff of their conflict of interests, defendants breached their duty to Arana as his attorney, not as agents of Medical Protective.⁵³

⁵³ *Id.* at 733 (quoting *Betts v. Allstate Ins. Co.*, 154 Cal.App. 3d 688, 201 Cal. Rptr. 528, 545 (1984) (citing *Betts*, 201 Cal. Rptr. at 545; *Lieberman v. Employers Insurance of Wausau*, 84 New Jersey 325, 419 A.2d 417, 424 (1980); *Rogers v. Robson, Masters, Ryan, Brumund, and Belom*, 81 Ill.2d 201, 407 N.E.2d 47 (1980)).

The Court of Appeals also discussed Dr. Arana=s claim that his attorneys= conduct was willful, wanton, and malicious.⁵⁴ The Court held that there is no cause of action for Aintentional legal malpractice,@ but that Awhen an attorney intentionally commits an act of misconduct in representing his or her client=s interest, such as plaintiff has alleged, an action in tort may lie for breach of fiduciary duty or constructive fraud.@⁵⁵ Dr. Arana was granted leave to amend his claim for intentional conduct to assert breach of fiduciary duty or constructive fraud.⁵⁶

With respect to Dr. Arana=s claim for punitive damages, the Court of Appeals reversed the trial court=s dismissal of that claim for determination on the merits:

The amended petition states that defendants did not adequately investigate and evaluate the *Elam* suit, but instead defendants knowingly settled in order to favor their business relationship with Medical Protective over their duty to plaintiff. Arana further alleges that defendants knew that their Aimproper@ settlement of the *Elam* suit would result in injury to plaintiff. . . . We find that Arana has sufficiently alleged, and should be allowed to try to prove, that defendants were not merely negligent in settling the *Elam* suit, but knew or had reason to know that their settlement of the *Elam* suit without Arana=s consent or knowledge was highly likely to result in injury to Arana=s reputation.⁵⁷

Thus, at least under *Rogers*, *Lieberman*, and *Arana*, an insurance defense attorney who fails to adequately advise his or her insured client concerning conflicts of interest breaches independent duties to the client and may be charged with negligence, breach of fiduciary duty, and constructive fraud. Both compensatory and punitive damages may be awarded.

A different result was reached in *Mitchum v. Hudgens*, a case from Alabama.⁵⁸ In that case,

⁵⁴ *Id.* at 735.

⁵⁵ *Id.* (citations omitted).

⁵⁶ *Id.* at 736.

⁵⁷ *Id.* at 736 - 7.

⁵⁸ *Mitchum v. Hudgens*, 533 S.2d 194 (Ala. 1988).

Dr. Mitchum, an obstetrician, was sued by the parents of a baby born with multiple birth defects. Dr. Mitchum was covered by a medical malpractice liability policy which contained the following clause:

We=ll defend any suit brought against you for damages covered under this agreement. We=ll do this even if the suit is groundless or fraudulent. We have the right to investigate, negotiate and settle any suit or claim if we think that=s appropriate.⁵⁹

Just prior to trial, the underlying medical malpractice case was settled within the policy limits.⁶⁰

Dr. Mitchum sued the attorney hired by his carrier to defend the medical malpractice case for fraud and negligence. Dr. Mitchum alleged that his counsel=s fraud and negligence in settling the medical malpractice suit without his consent caused Dr. Mitchum to lose his liability coverage then in effect and jeopardized his ability to obtain medical malpractice insurance from another insurer. Dr. Mitchum also alleged that the settlement damaged his professional reputation and that he lost business as a result. The sum and substance of Dr. Mitchum=s allegations were that the settlement of the medical malpractice case without his consent Adamaged him professionally.⁶¹

Dr. Mitchum=s attorney moved for summary judgment on the grounds that as insurance defense counsel, he owed no duty to Dr. Mitchum concerning settlement because Dr. Mitchum=s consent was not required pursuant to his insurance contract.⁶² Thus, his attorney argued, nothing he did with respect to the settlement could have proximately caused Dr. Mitchum any damages.

In response, Dr. Mitchum argued that the obligations owed to him by his attorney were separate and distinct from any obligations owed to him by his insurance company:

Dr. Mitchum argues that an attorney has no authority to settle a case on behalf of his client without that client=s express consent and that

⁵⁹ 533 S.2d at 196.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

the duty an attorney owes to his client with respect to settlement of a client=s case is separate and distinct from any rights or obligations that arise under the contract between an insured and his liability insurance carrier. . . . Dr. Mitchum=s position is that regardless of the terms of his insurance contract with St. Paul, defendant Hudgens, as his attorney, was under a duty not to settle the *Scott* case without his express permission to do so.⁶³

⁶³ *Id.* at 196, 197.

The Supreme Court of Alabama approached the case just as in *Rogers, Lieberman, and Arana*, but reached a different conclusion. The Court adopted a dual representation rule, holding that when an insurer hires counsel to defend a claim brought against an insured, the attorney must represent both the interests of the insured and insurer in furthering the interests of each.⁶⁴ As the Court stated:

In the insured-insurer relationship . . . the attorney has two clients whose primary, overlapping and common interest is the speedy and successful resolution of the claim and litigation. Conceptually, each member of the trio, attorney, client-insured, and client-insurer has corresponding rights and obligations founded largely on contract, and as to the attorney, by the rules of professional conduct as well. The three parties may be viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim or litigation against the insured.⁶⁵

The Court also discussed the fact that the relationship between the insured and his attorney is an attorney-client relationship, that usually an attorney cannot settle a client's case without the client's consent, and that conflicts of interest with respect to settlement can arise.⁶⁶ The Court analyzed *Rogers*, and although it agreed with the principles stated therein, it did not believe that there was a conflict of interest when Dr. Mitchum told his attorney he did not want to settle the case. As the Court stated:

We believe that the insurance contract does affect the attorney-client relationship with respect to settlement of an action brought against an insured. If the insured has contracted away the right to require his

⁶⁴ *Id.* at 198.

⁶⁵ *Id.* (quoting *American Mut. Liability Ins. Co. v. Superior Court for Sacramento County*, 38 Cal.App. 3d 579, 591-92, 113 Cal. Rptr. 561, 571 (1974)).

⁶⁶ *Id.* at 199-200.

consent prior to a settlement of a claim against him, no real conflict of interest exists between the insured and the insurer, at least where the claim or settlement is within policy limits and there has been no reservation of rights by the insurer.⁶⁷

This was because Dr. Mitchum had no direct financial stake in the litigation, as there was no reservation of rights by St. Paul and the Scotts= original claim, as well as their settlement offers, were within the limits of available insurance coverage, and there was no deductible.⁶⁸

While the Court was clear that insurance defense counsel must advise the insured of all developments in a case, including settlement negotiations, the failure to do so does not give rise to a cause of action for damages:

⁶⁷ *Id.* at 201.

⁶⁸ *Id.* at 202.

We hold that if the insured objects to a settlement of a claim, the attorney is not thereby precluded from negotiating a settlement at the direction of the insurer where the insurer has, by the terms of the policy, the exclusive right to settle or compromise claims against its insured. We hold further that an attorney who does so cannot be held liable to the insured for legal malpractice for failing to obtain the consent of the insured to settle the claim, because the insured, by contracting away the right to require such consent, has thereby impliedly consented to the settlement of claims against him, within policy limits, by appointed counsel at the direction of the insurer. It is for this very reason that Hudgens could not have proximately caused any of the damage Dr. Mitchum has alleged that he suffered as a result of the settlement of the *Scott* suit without his consent.⁶⁹

Thus, under *Mitchum*, in the absence of excess exposure, personal exposure, or a reservation of rights, no damages can result from a settlement if the insured's consent is not required.

III.

LIKELY CONFLICTS OF INTEREST

There is nothing inherently ethically wrong in the representation of insureds on behalf of insurance companies, and this applies to the defense of medical malpractice cases as well as other insurance defense work. Counsel must be very mindful, however, of the areas in which conflicts can arise in the defense of these special cases in order to recognize them in a timely fashion and act to protect the interests of the client, whomever that may be. While the interests of the client are of course paramount, counsel who are sensitive to the conflicts issues involved in defending physicians can also help ensure against disqualification, malpractice, and disciplinary actions.

In the context of medical malpractice defense, there are three prime areas where potential conflicts of interest are most likely to arise. The most likely area is in the context of the settlement of claims. The two other areas are when counsel represents more than one defendant, or there are claims outside the insured's coverage.

Settlement Conflicts

As long as the insured and insurer are in agreement about the settlement of a claim, there is no conflict of interest and counsel can continue to fully represent the interests of both. As the foregoing cases illustrate, however, it is not unusual for a medical malpractice insurer and a physician insured to differ on whether a particular claim should be settled. Regardless of the merits of a particular case, the carrier might have an economic interest in seeing a case settled, both to

⁶⁹ *Id.* at 202. See also *Sharp v. Howell*, 629 So.2d 314 (Fla. App. 1993).

avoid exposure and to limit costs and fees. A physician-insured, however, may take a dim view of settling what is perceived to be a meritless claim, especially in light of the state and federal reporting requirements. A doctor who feels his or her skill has been personally attacked may strongly desire vindication, even at the risk of an adverse judgment.

Conversely, a medical malpractice carrier might have an interest in trying, rather than paying, an individual claim, because it is defensible, because plaintiff wants too much in settlement, or because the carrier is simply cash-strapped and wants to delay the payment of claims, even if it ultimately results in a premium being paid as a result of any eventual settlement or judgment. At the same time, the defendant doctor might not care a wit about what claims are charged to him, but may be very concerned about the effect a three- or four-week jury trial might have on his or her patients and practice. Such a doctor may insist that the case be settled, even though it is winnable and he or she might not have a contractual right to demand a settlement. In this case, defense counsel might be found in the position of trying to convince the carrier to settle a case it thinks should be tried, simply to satisfy the desires of the insured.

These inherent conflicts are compounded by the issue of consent. All medical malpractice insurance policies have provisions which control whether the carrier must obtain the insured's consent before entering into the settlement of a claim within policy limits. Some policies require the physician's consent, some do not. Others, as we have seen, might require consent only while the doctor continues to be an insured.

If the insured's consent is not required, a carrier strongly in favor of settlement might attempt to settle the case without even informing the physician, much less obtaining permission. If consent is required, the carrier that desires to settle a case might pressure the insured to give it. Or, counsel might be asked, implicitly or explicitly, to pressure the insured to settle, even though the insured does not want to settle for valid reasons and it might not be in his or her interests to do so. Worse, counsel might be asked to effectuate a settlement without informing the insured, even with the knowledge that the insured is against settlement. Similarly, a physician opposed to a settlement the carrier desires might withhold consent if he has the right to do so. Counsel is then placed in the position of litigating a case against the wishes of the carrier.

In any of these instances, insurance defense counsel is caught directly in the middle of two conflicting interests and wishes: Those of the insurance carrier who pays for and directs the defense of the case at issue, and perhaps many other cases as well, and those of the person defended who is quite clearly a client and has a very personal stake in the outcome.

Multiple Representation

It is not unusual in the context of medical malpractice defense to represent more than one defendant. This usually occurs when both an individual physician and the practice group are named. Sometimes, insurance defense counsel is asked to represent more than a single physician in a case. A conflict of interest is unlikely in a lawsuit where a practice group is named to answer for the physician on a theory of respondeat superior or agency. Sometimes, however, the physician is named as a defendant because of his or her individual care, and the practice group is named to answer for an employee of the group other than the physician whose failure is imputable to the group. This is usually a nurse, technologist, or administrator.

When medical malpractice defense counsel are asked to defend more than one physician, the

co-defendants are usually partners. Occasionally, however, doctors who do not even practice together or in the same fields may be defended by the same attorney. Whether a practice group or multiple individual physicians are involved, there is no inherent conflict of interest as long as all of the various clients' interests remain the same. If counsel truly believes that there is no liability on any client's part, none of the individual clients have any criticism of the care given by another defendant, and all clients agree on the approach to defending the case, there is no conflict of interest and the lawyer can continue to represent them all.

When counsel comes into possession of facts which indicate any divergence between clients' interests regarding the defense or settlement of a matter, however, there is a conflict of interest. Discovery might show that one doctor has different relative liability than a co-defendant. One physician might want to settle, and one might not. Although doctors are generally supportive of one another's care, even partners can disagree. Surgeons and internists do not always agree with the performance of emergency room personnel. Nurses and administrators employed by the practice group might become critical of the doctor, or the doctor might develop a problem with what a technologist did or did not do. In any of these situations, the lawyer now represents clients with conflicting interests.

Uncovered Claims

As in every insurance defense case, in medical malpractice there exists the potential for claims which, for a variety of reasons, fall outside of the insured's coverage. If there are no facts which indicate to counsel that there might be uncovered claims, and when no such allegations have been raised, there is no conflict of interest.

There are, however, several particular types of uncovered claims conflicts likely to occur in the context of medical malpractice defense. The list of uncovered claims in medical malpractice cases includes, of course, cases where there is the potential for excess damages. Excess damages are not uncommon given the catastrophic results which can occur from medical malpractice. There is also the possibility of intentional conduct and civil fraud claims in medical malpractice cases. Doctors must necessarily touch their patients in order to treat them, so there is always the possibility for battery claims. This is compounded by the requirement that patients must give informed consent to be treated. Gynecologists, dentists, and psychiatrists are particularly susceptible to claims of sexual misconduct. Moreover, given the evolution of the health care industry over the last decade and the growth of federal participation in and regulation of the market, there is also the possibility that criminal claims involving insurance or Medicare/Medicaid fraud might arise.

If these uncovered claims do occur, defense counsel is necessarily in a position of conflict between the interests of the carrier and those of the physician. Excess claims have a huge impact on settlement issues. Moreover, it is in the carrier's economic interest to only defend and pay covered claims and to be able to assert available policy defenses.

IV.

WHAT TO DO?

The first step in fostering the interests of physician-insureds is to be ethical and responsible

and remain sensitive to potential conflicts of interest. Beyond that, counsel must be thoughtful to determine the best way to avoid advocacy of opposite interests when conflicts do arise. Once counsel has determined that there might be conflicting interests in the defense of a medical malpractice suit, the various clients and their respective interests must be discerned, and a solution fashioned.

Who is the client?

There is no question that the relationship between the insurance defense attorney and the insured is that of attorney and client. The relation is a fiduciary one, and the attorney has an ethical obligation to promote his client's interests. However, the carrier might also maintain an attorney/client relationship with the attorney. When the interests of the insurer and insured diverge, counsel must first determine the nature of his or her relationship with the carrier.

Some courts have adopted a single representation rule, where only the insured is a client, and some follow a dual representation rule, where both the carrier and the insured are clients.⁷⁰ Some commentators have even observed that neither is necessarily appropriate in every case.⁷¹

In some cases, the idea that insurance defense counsel has no attorney-client relationship with the carrier makes sense. Insurance defense counsel are retained to prepare the case and try to win it on behalf of the insured. Carriers are generally sophisticated, and are perfectly capable of representing their own interests in the underlying case and in relations with their insureds. Moreover, there may be instances where the relationship between carrier and defense counsel is a distant one, without any long-standing business relationship between the carrier and counsel. Counsel might even be retained at the specific request of the insured, but still be paid by the carrier. In these cases, it is easy to support the idea that the insured's interests are paramount for insurance defense counsel.

Given the economic realities of insurance defense litigation, however, dual representation is probably a better approach in most, although not necessarily all, cases. The carrier authorizes the choice of counsel, pays for the defense, and bears all costs of the litigation and any judgment or

⁷⁰ See generally Scott L. Machanic, *Insurance Defense Counsel: Who is the Client?*, 43 Fed'n Ins. & Corp. Couns. Q. 45 (1992).

⁷¹ Charles Silver and Ken Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L. J. 255, 273-80 (1995) (suggesting that blind adherence to either rule is inappropriate and should be determined on a case by case basis by reference to the retainer agreement).

settlement. The insurance company thus has a huge financial stake in the outcome of the litigation. Moreover, insurance defense counsel often has a long-standing relationships with an insurance carrier, and that relationship is a source of significant income to counsel. Insurance defense counsel might even represent the carrier in direct actions, coverage opinions, and business and regulatory affairs. It is disingenuous to suggest that there is not an attorney-client relationship in such a case.

Analysis Under the Model Rules of Professional Conduct

Whether counsel has an attorney-client relationship with the carrier affects the nature of the obligations imposed by the Model Rules of Professional Conduct. If there is no attorney-client relationship with the carrier, diverging interests do not give rise to conflicts of interests because counsel's ethical obligation is owed only to the insured. Rule 1.8 requires, in such a case, that counsel not accept compensation by someone other than the client unless the client consents, the party paying for the representation does not interfere with the representation, and the client's confidences are protected.⁷² Thus, even in a single representation case, the insured must still be advised that his defense is being paid for by another, and counsel must not let the carrier influence his advice to the insured. Indeed, in such a case, counsel must be guided by unfailing loyalty to the insured. Rule 5.4 provides that, AA lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.⁷³

The Lawyers Manual on Professional Conduct, at least, adopts this view in the context of insurance defense matters, and states that, AA lawyer hired by an insurance company to represent an insured must represent the insured as his client with undivided loyalty.⁷⁴ The acceptance of payments from a non-client third party for services rendered to a client is generally acceptable with client consent, and usually Acause barely a swell on the sea of legal ethics.⁷⁵ Moreover, Amost insurance representations involve third party payments. They are acceptable under the ethics rules if there is client consent.⁷⁶

⁷² Model Code of Professional Responsibility Rule 1.8, Laws. Man. on Prof. Conduct 01:121 (ABA/BNA) (1987).

⁷³ Model Rules of Professional Conduct Rule 5.4, Laws. Man. on Prof. Conduct 01:163 (ABA/BNA) (1995).

⁷⁴ Laws. Man. on Prof. Conduct 51:309 (ABA/BNA) (1993) (citing *Philadelphia Ethics Opinion* 86-108 (1987); *Tennessee Ethics Opinion* 93-F-132 (1993); *Stern, Dilemmas for Insurance Counsel - Coping with Conflicts of Interest*, 65 Mass. L. Rev. 127 (1980); *Carpenter and Williamson, Open Forum - Conflict of Interest Problems in Insurance Practice*, 37 Ins. Couns. J. 497 (1970); *Hawkins v. State Bar*, 591 P.2d 524 (Cal. 1979); *Wong v. Thong*, 593 P.2d 386 (Ha. 1979); *Shelby Mutual Insurance Company v. Kleman*, 255 N.W.2d 231 (Minn. 1977).

⁷⁵ Laws. Man. on Prof. Conduct 51:901 (ABA/BNA) (1995).

⁷⁶ Laws. Man. on Prof. Conduct 51:903 (ABA/BNA) (1995).

The more difficult case is where both the carrier and the insured are clients. Here, the conflicts analysis must proceed under Rule 1.7, which provides, in part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client, to a third person or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.⁷⁷

The Supreme Court of Mississippi described the approach for counsel in such a situation as follows:

Where the interests of the two parties are in some manner antagonistic to one another, before any lawyer is authorized to assume dual representation . . . he must first satisfy himself that there is no objective reason why he cannot, despite such divergence of interest, faithfully represent them both. If this cannot be met, the lawyer should not accept employment in the first place (or terminate it, if begun). Secondly, even if the lawyer reasonably (and from an objective point of view) believes he can faithfully represent dual parties with adverse interests, he still must fully explain all implications of the advantages as well as the risks of his representation to both parties, and assure himself that they both have given knowing and informed consent.⁷⁸

Resolution of Settlement Conflicts

⁷⁷ Model Rules of Professional Conduct Rule 1.7, Laws. Man. on Prof. Conduct 01:117(ABA/BNA)(1987).

⁷⁸ *Hartford Acc. & Indem. Co. v. Foster*, 528 So.2d 255, 268 (Miss. 1988).

Although the subject of the greatest amount of litigation, settlement conflicts are in many respects the easiest to rectify. If both the carrier and insured are clients, counsel must satisfy his obligations to both to keep both fully and completely informed. Rule 1.4 of the Model Rules of Professional Conduct provides that, AA lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.⁷⁹ With respect to settlement specifically, the official comment to Rule 1.4 provides, AA lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.⁸⁰ Therefore, regardless of whether the insured has the right to consent to settlement, insurance defense counsel must still keep the insured informed and give him the opportunity to take whatever action he or she deems necessary.

Once each client has been fully informed about the status of settlement, counsel should determine each=s views after providing an honest evaluation. If both clients agree, there is no conflict of interest. Even if one client wants to settle and one does not, it is unlikely that the divergence of interests will be so great that the continued representation of either or both of them is impermissible. In such a case, however, counsel must fully inform both the carrier and the insured of the conflict, and give them enough information to enable them to consent to the continued representation of both. If both consent, counsel can continue to give unfettered advice to each on settlement. If one of the clients does not consent to the representation, counsel must withdraw from the case.

Even if both clients consent to the continued representation, in spite of a conflict over settlement, insurance defense counsel should consider limiting the representation of one of the clients, again after explaining fully the risks and benefits of doing so and providing each client with the opportunity to consent. Rule 1.2 of the Model Rules of Professional Conduct permits such limited representation, and provides that, AA lawyer may limit the objectives of the representative if the client consents after consultation.⁸¹ The official comment to Rule 1.2 mentions insurance defense specifically, and provides:

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer=s services are made available to the client. For example, a retainer may be for a specifically defined purpose. . . . When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to

⁷⁹ Model Rules of Professional Conduct. Rule 1.4(B), Laws. Man. on Prof. Conduct 01:109 (1996).

⁸⁰ *Id* at 01:110.

⁸¹ Model Rules of Professional Conduct. Rule 1.2, Laws. Man. on Prof. Conduct 01:106 (1996).

matters related to the insurance coverage.⁸²

In this case, the insurer and insured could agree to limit the scope of counsel's representation to discovery and preparing a matter for trial, with both the carrier and the insured seeking independent counsel with respect to each's rights and obligations on settlement issues. The view that insurance defense counsel has a limited obligation to the carrier and insured was suggested by the *Foster* court:

⁸² *Id* at 01:107.

[I]n the event of a settlement offer withing policy limits . . . our view is that the attorney, after accurately informing each client of its terms, should advise the insured that he cannot offer him any legal advice as to the offer other than it is obviously to his monetary advantage that the offer be accepted, and that he should promptly inform the carrier what he wants the carrier to do regarding the offer. If there is any objective reason for the insured to have additional legal counseling, defense counsel should promptly advise him to go an seek it. Any doubt on this question should be resolved in favor of recommending independent advice. . . . As to the carrier, the attorney should make it clear that the company is presented with a conflict of interest, and has a legal duty to carefully protect the interest of the insured to the same extent as its own. Beyond this, [counsel] may very well have an ethical obligation to refrain from any recommendation, especially if his recommendation places his insured client in peril.⁸³

Resolution of Multiple Representation Conflicts

Conflicts of interest which arise out of multiple representation are fairly common, and their resolution is not as straightforward as the resolution of settlement conflicts. The representation of multiple parties is prohibited under the Model Rules if the representation is directly adverse to another client under Rule 1.7(A) or if the representation may be materially limited by counsel=s responsibilities to another client.⁸⁴ If a conflict of interest does develop, at a minimum, the lawyer will be required to withdraw from the representation of one of them. A withdrawal for one client under those circumstances, however, may also necessitate withdrawal from representing both clients.⁸⁵ According to the Lawyers Manual on Professional Conduct=s

⁸³ *Foster*, 528 So. 2d at. 272-3.

⁸⁴ Mode Rules of Professional Conduct Rule 1.7, *supra* at note 77.

⁸⁵ *See, e.g.,* Laws. Man. on Prof. Conduct 53:303 (ABA/BNA) (1993) (citing *Picker International v. Varian Associates*, 869 F.2d 578 (Fed.Cir. 1989); *Harte Biltmore Ltd. v. First Pennsylvania Bank*, 655 F.Supp. 419 (B.C.S.FL. 1987); *H. G. Galimore, Inc. v. Abdula*, 652 F.Supp.. 437 (D.C.N.IL. 1987); *Civil Service Commission v. Superior Court*, 209 Cal. Rptr. 159, 167 (Cal.Ct.App. 1984).

Practice Guide:

[T]he rules and law are clear that a lawyer may [represent two or more different clients in the same case or transaction] only under very limited circumstances, namely, where the lawyer reasonably believes the multiple representation will not adversely affect any one of the clients, and all the clients consent after full disclosure of the implications of the multiple representation. These limitations thus make it very unlikely, and perhaps impossible, for a lawyer to ever represent . . . multiple parties to the same transaction whose interests or positions are fundamentally antagonistic. But they do make it permissible for a lawyer to represent multiple parties whose interests are generally aligned. . . . However, should it become evident during the multiple representation that the lawyer cannot adequately represent the interests of each party, or should any party revoke consent, the lawyer must withdraw and may not thereafter represent one party against another on the same matter.⁸⁶

Resolution of Uncovered Claims Conflicts

Conflicts of interest which arise under excess claims are the easiest of the uncovered claims conflicts to avoid and resolve. When a demand in excess of policy limits is made, or when there is a likelihood that any judgment will exceed the insured's limits, both the insured and the insurer must be advised of the demand and should be provided with an honest and careful evaluation of the likelihood of an excess judgment. Counsel can continue to give both clients candid advice about trial strategy, discovery, witnesses, and the range of potential outcomes.

When the wishes or objectives of the carrier and the insured diverge, however, this conflict must be resolved under Rule 1.7. Each must be fully informed of the nature of the conflict and given the opportunity to consent to the continued representation of both. If both clients consent, counsel can continue to advise each on all issues in the litigation. If either does not consent, counsel must withdraw. Regardless, both the insured and the insurer should be advised to seek independent counsel on excess claims issues, and counsel should consider limiting the scope of the representation to merely covered claims.

By far the most worrisome conflicts of interest are those conflicts which involve coverage issues or policy defenses, especially if the carrier is unaware of them. These conflicts occur when the plaintiff alleges, or counsel has become aware of facts which show, some claims outside an insured's coverage. A suspicion or possibility of uncovered claims or policy defenses is not sufficient to create a conflict of interest. If the carrier is aware of the uncovered claim and is defending under a reservation of rights, counsel cannot represent both. In such a case, the attorney must represent only the interests of the insured, and the carrier should be so advised. Counsel must also explain to the insured the implications of

⁸⁶ Laws. Man. on Prof. Conduct 53:301(ABA/BNA) (1993).

the reservation of rights and to seek independent counsel to protect his interests with respect to the uncovered claims. The insured should also be given the opportunity to consent to limiting the scope of the representation to merely the covered claims.

If there is no reservation of rights, or if counsel knows of uncovered claims but they are not alleged by the plaintiff, counsel is in an extremely precarious position. On one side is a client whose primary interest is staying inside his coverage and being fully defended and indemnified. On the other side, counsel represents a client who might be completely off the hook if the claim is not covered. Counsel certainly cannot advise the carrier that the claim is not covered and cannot reveal any confidences of the insured. However, neither can counsel hide from the carrier-client facts which may give the carrier defenses against the insured.

Counsel in this conflict cannot readily withdraw from representing the insured without tipping off the carrier. Nor can the attorney in good conscience continue to only represent the insured, knowing full well that the carrier might have valid policy defenses. In such a case, insurance defense counsel may well have to withdraw from the representation of both. He cannot help his carrier client without severely damaging the insured, but he cannot protect the insured's interests without doing a grave disservice to the insurance company with whom counsel has a long-standing relationship. Perhaps the only way to avoid such a conflict of interest is to limit the scope of the representation of the carrier at the outset of the case and agree with the carrier that counsel does not and will not represent the company with respect to any uncovered claims or policy defenses.

V.

CONCLUSION

Unfortunately, there are no easy answers to the conflict of interest questions which can arise in the context of the defense of medical malpractice claims. As the Mississippi Supreme Court stated in *Foster*, "[T]he ethical dilemmas thus imposed upon the carrier-employed defense attorney would tax Socrates, and no decision or authority we have studied furnishes a completely satisfactory answer."⁸⁷ However, the thoughtful and careful insurance-defense lawyer will at least be aware of how conflicts of interest are likely to develop and have some understanding of how to handle them in the best interests of each client involved.

⁸⁷ *Foster*, 528 So.2d at 273.