Take My Wife - Please!
When Harmony of the Tripartite Relationship Turns to Dissonance

When an injured plaintiff asserts a claim against a defendant with liability insurance, the relationships among a liability insurer, its policyholder, and their common lawyer can be complex. The insurer-policyholder relationship arises from the policy of insurance plus insurance regulations and law. A policy contract agrees to pay a judgment on behalf of the policyholder which binds the insurer even though the insurer is not a party to the plaintiff's lawsuit. The policy also agrees to pay for a lawyer to manage the lawsuit.

The attorney-client relationship among the insurer, the policyholder, and their common lawyer (here described as **de**pendent counsel) is governed by contract and Canons of Ethics. Dependent counsel is engaged and paid by the insurer to defend the policyholder who may be viewed as an alliance directed toward a common goal and purpose. The insurer as financier, the policyholder as witness, and attorney as warrior, together can form a harmonious defense team which occupies one side of the litigation arena against the injured plaintiff. So long as no conflicts of interest cleave the insurer from the policyholder, dependent counsel may harmoniously represent both, even though these lawyers are utterly dependent insurers for virtually all of their business and yield to the direction of the insurers.

When conflicts of interest arise, even an optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his/her efforts in the interests of his real client - the one who is paying his fee and from whom he hopes to receive future business - the insurance company. No man can serve two masters. While technically representing the interests of both, dependent counsel may be tempted to favor the interests of the insurer over those of the policyholder. If any conflicts of interest emerge, the common lawyer must comply with Canons of Ethics that bar the representation of clients with conflicting interests. It is the lawyer, not the client who bears the burden of analyzing and resolving potential conflicts of interest in three steps: 1) analyze potential conflicts of interest; 2) make written disclosure to the policyholder; and 3) if an actual conflict of interest exists, obtain both clients' informed written consent. Dependent counsel may not give conflict analysis short shrift. The policyholder has no corresponding duty to anyone to analyze conflicts of interest. Both dependent counsel and the insurer share the duty to advise the policyholder of conflicts of interest and the right to independent counsel.

If the policyholder does not waive conflicts of interest in writing, dependent counsel must quit and the insurer must pay for **in**dependent counsel who is selected and directed by and loyal to the policyholder, only.

When potential conflicts of interest emerge, the battlefield resembles three-dimensional chess in which one checkerboard represents a venue where the injured plaintiff fights the policyholder, the next checkerboard represents a venue where the insurer fights the policyholder, and the final checkerboard represents a venue where the dependent counsel fights the policyholder. Because the players may move freely among the venues, alternately supporting or opposing each other, their relationships are far more complex than may appear at first glance. [For legal authority supporting the views expressed in this Post, see, *The Tripartite Relationship: When Harmony Turns to Dissonance* at DutytoDefend.com]