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**The Tripartite Relationship and
Joint Defense Agreements:
Benefits and Pitfalls**

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Introduction

The unique relationship created among an insurer, its insured and the attorney retained by the insurer to defend a lawsuit against its insured commonly is referred to as a tripartite relationship.² Jurisdictions vary on whether the defense attorney's client is only the insured or whether the insured is considered a dual client along with the insurer.³ Either way, the defense attorney has legal, ethical and professional duties and obligations to both and must interact and communicate with both throughout the course of the litigation.

The potential conflicts and complications that these duties present are increased another degree in the context of complex litigation involving insured parties. In such complex litigation, attorneys for the various insured defendants often enter into a joint defense agreement. The insurer-appointed attorney in a case involving a joint defense agreement has duties and obligations not only to the insured he was retained to represent, and to the insurer whose policy covers the insured, but also to the defendants and their counsel who entered into the joint defense agreement. The duties and obligations owed to the joint defense agreement parties add another dimension to the traditional tripartite relationship.

To be sure, the duties and obligations owed to the insured will not necessarily be the same as those owed to the insurer and the other parties to a joint defense agreement. Nonetheless, counsel representing an insured that is a party to a joint defense agreement must be aware of the added legal, fiduciary, ethical and professional duties that are involved and the potential conflicts that could arise.

This article will address the general framework of the tripartite relationship and the additional duties and obligations owed by insurance defense counsel who enter into joint defense agreements.

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² See Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 266 (1994).

³ See, e.g., Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1584-89 (1994) (citing authorities endorsing both views).

I. The Tripartite Relationship

A. Contractual Duties

The tripartite relationship among an insurer, insured and defense counsel is the product of two separate contracts: the insurance contract between the insurer and insured, and the retainer agreement between the insurer and defense counsel.⁴ The relationship is formed only after an insurer retains counsel to defend against claims asserted against its insured. Prior to counsel entering into a retainer agreement with an insurer, only a bilateral relationship exists between the insurer and its insured as a result of the insurance policy, which does not directly bind defense counsel or establish his professional and contractual obligations.⁵

The retainer agreement, on the other hand, directly binds defense counsel and establishes his professional obligations to the insurer and insured, including the scope, nature and content of the relationship with both.⁶ Many cases and commentators focus exclusively on the insurance policy's role in regulating the contractual obligations within the tripartite relationship and ignore the role of the retainer agreement. However, the retainer agreement arguably is more significant in determining the contractual duties counsel owes a client in a tripartite relationship because many of these duties can be defined by the retainer agreement, whereas the insurance policy ordinarily does not address such issues.⁷

While courts may treat the retainer agreement as an afterthought in determining the scope of the contractual duties in the tripartite relationship, in practice the retainer agreement should stand as a complete agreement separate from the insurance policy and should provide counsel with all of the contractual terms by which he was retained by the insurer.⁸ At a minimum, most insurers will structure the retainer agreement to require counsel to fulfill its obligations to the insured, but also ensure that its financial stake is protected in any claim asserted against the insured.⁹ The insurer can accomplish this second goal by ensuring that the retainer agreement allows it to exercise fully all of its rights and powers listed within the insurance policy, such as the authority to supervise the litigation or settlement process, the terms on which counsel may be dismissed, and the ability to approve all fees and expenses.¹⁰

The insurance policy typically requires the insurer to provide its insured with counsel to defend against claims for damage covered by the policy and within the policy's monetary limits.¹¹ Most insurance policies permit the insurer to: (1) select the defense counsel; (2) manage or supervise

⁴ Charles Silver & Ken Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 270 (1995).

⁵ *Id.* at 269.

⁶ *Id.* at 270.

⁷ *Id.* at 270-71.

⁸ *Id.* at 272-73.

⁹ *Id.* at 271.

¹⁰ *Id.* at 271-72.

¹¹ See Richmond, *supra* note 2, at 266.

the litigation process; (3) require the insured's cooperation with counsel and the insurer in defending the claim; and (4) reserve the right to settle the claim within the policy limits.¹²

B. Ethical Duties

The ABA Model Rules (or state equivalent) and the Restatement (Third) of the Law Governing Lawyers ("Restatement") govern the ethical duties of counsel in a tripartite relationship. Counsel also should consult individual state professional responsibility rules (most states have adopted the ABA Model Rules)¹³ and state ethics opinions.¹⁴

1. Model Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4 [communication with client], shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Under Rule 1.2(a), the client has ultimate authority concerning the objectives of the litigation, including the decision to settle. However, many insurance contracts expressly reserve the right of the insurer to settle claims within the policy limits.¹⁵ If the insurer and insured are unable to resolve their disagreement over whether to settle, Rules 1.2 and 1.16 (declining or terminating representation) together require counsel to withdraw or permit the insured to reject the insurer's defense and terminate counsel. Depending on the terms of the insurance policy and the jurisdiction, termination or withdrawal of counsel may result in the insured assuming the risk and cost of its defense, or may require the insurer to provide and pay for the costs of independent counsel.¹⁶ Rule 1.2(c) allows counsel to limit the scope of representation, which is usually accomplished at the outset of the litigation through a letter to the insured specifying the terms

¹² *Id.*; see also Silver & Syverud, *supra* note 4, at 264-65.

¹³ For a listing of jurisdictions that have adopted the ABA Model Rules, see the ABA homepage, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html. California has not adopted the ABA Model Rules. *Id.*

¹⁴ See, e.g., Laura A. Foggan, *The Tripartite Relationship: Insurer Issues in Selection and Supervision of Defense Counsel*, 690 PLI/LIT 579, 583-88 (2003) (state survey of cases regarding whether the insured, insurer, or both are clients); Michael Aylward et. al., *A Survey of State Ethics Opinions Concerning the Tripartite Relationship*, DRI ETHICS TASK FORCE (2002).

¹⁵ See *supra* note 12.

¹⁶ See, e.g., *U.S. Specialty Inc. Co. v. Burd*, No. 6:09 Civ. 231, 2011 WL 2433502, at *3 (M.D. Fla. June 14, 2011); *Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 519-20 (E.D. Cal. 2010); *Lifestar Response of Ala. Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 216-17 (Ala. 2009).

and limits of the representation.¹⁷ At a minimum, the limits specified in the letter should mirror the limits set forth by the insurer in the retainer agreement.¹⁸ Establishing such limitations from the beginning can help avoid future conflicts and decrease the possibility that the insured will claim that it misunderstood the scope of representation.

2. Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).¹⁹

Most insurance policies permit the insurer to supervise and control the defense and require the insured to cooperate with the insurer and counsel in handling the claim. Accordingly, counsel can share routine case information with the insurer and the insured in furtherance of the defense under the implied authorization of Rule 1.6.²⁰ Likewise, counsel can provide the insurer with status reports, billing statements, and other administrative information.²¹ However, counsel must obtain the insured's informed consent before disclosing any information to the insurer that could have an adverse material effect on the insured, especially information that could result in a coverage dispute.²² The insurer's right to control the defense and select counsel is not a blanket waiver of the insured's interest in preventing the disclosure of materially adverse information.²³

3. Model Rule 1.7: Conflict of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

¹⁷ See ABA Committee on Ethics and Professional Responsibility, Formal Op. 96-403 ("ABA Formal Op.").

¹⁸ Silver & Syverud, *supra* note 4, at 289.

¹⁹ R. 1.6(b) lists six exceptions to the non-disclosure provision, including preventing death or substantial bodily harm, preventing the client from committing crime or fraud or damage to property or financial interests, securing advice about compliance with the Model Rules, establishing a claim or defense on behalf of the lawyer against the client, or complying with a court order or other laws.

²⁰ See also Silver & Syverud, *supra* note 4, at 345-46.

²¹ See R. 1.6 (implied authorization); see also ABA Formal Op. 01-421.

²² ABA Formal Op. 01-421; see also Jill B. Berkeley, *Tripartite Ethics*, 16 SPG FRANCHISE L.J. 22, 26 (1997). Confidentiality issues in coverage disputes are beyond the scope of this article.

²³ See Berkeley, *supra* note 24, at 27.

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Conflicts of interest among parties to a tripartite relationship are governed primarily by Rule 1.7. Similarly, the Restatement defines a conflict of interest as “a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”²⁴ If counsel cannot obtain the insured’s informed consent to waive an actual conflict, or if the conflict is prohibited from being waived, then counsel must terminate the representation.²⁵ Conflicts of interest in a tripartite relationship often arise when the insurer issues a reservation of rights to deny coverage partially or fully, when claimed damages exceed coverage, when the insurer attempts to limit the costs of the defense to reduce expenses, or when the insurer and insured disagree over whether to settle or litigate the claims.²⁶

4. Model Rule 1.8: Conflict of Interest – Specific Rules

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6 [confidentiality of information].

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client.

Along with Rule 1.6 regarding confidentiality, Rule 1.8(b) reaffirms that counsel may not disclose information that would harm the client, whether it be the insured or insurer.

²⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) (“RESTATEMENT”).

²⁵ See R. 1.7; R. 1.16 (termination); RESTATEMENT § 122 (informed consent from all affect clients can waive a conflict of interest).

²⁶ See Richmond, *supra* note 2, at 272-83.

Compliance with Rule 1.8(f)(2) may require that counsel disregard or disagree with the insurer's instructions regarding the litigation or settlement strategy if it would impede on counsel's independent professional judgment.²⁷

5. Model Rule 5.4: Professional Independence of a Lawyer

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer . . . to direct or regulate the lawyer's professional judgment in rendering such legal services.

Rule 5.4, like parts of Rule 1.8 and Restatement § 134 concern the requirement that counsel's independent professional judgment not be directed by the insurer or any other person or entity.²⁸ Counsel must be able to exercise independent professional judgment and provide competent, candid and uninhibited advice to their clients. As noted above, an insurer's right to control the direction of the defense does not constitute a right to interfere with counsel's judgment and strategy. If necessary, counsel may have to decline an insurer's instructions regarding the defense of a claim if it impedes his ability to exercise independent professional judgment.

C. Who Is the Client?

This vexing question is fundamental to understanding the tripartite relationship. Whether the tripartite relationship establishes one or two clients, i.e., the insured alone or both the insurer and insured, is the subject of endless debate – with commentators often reaching opposite conclusions about the answer to this question.²⁹ The authors have no intention of trying to resolve this perpetual controversy. However, several observations about the “one-client”/“two-client” controversy should be noted in order to provide a basis from which to guide further discussion of the tripartite relationship in the context of joint defense agreements.

First, the insured has a justifiable expectation that it is the client in a tripartite relationship because it purchased the insurance policy, pays the policy premiums, is the named defendant against whom the plaintiff's claims are asserted and, therefore, has a large financial and reputational interest in the litigation. The insurer, however, has a justified expectation that it is also the client because it selects and retains defense counsel assigned to the matter, pays the costs

²⁷ *Id.* at 285.

²⁸ Restatement section 134 provides that counsel's “professional conduct on behalf of a client may be directed by someone other than the client if: (a) the direction does not interfere with the lawyer's independence of professional judgment; (b) the direction is reasonable in scope and character . . . ; and (c) the client consents to the direction under the limitations and conditions provided in § 122 [informed consent].”

²⁹ *See, e.g.,* Silver, *supra* note 3, at 1584-89 (citing authorities endorsing both views); compare Michael M. Marick & Karen M. Dixon, *The Insurer's Contract “Right” to Defend the “Tripartite” Relationship Reconsidered*, 39 TORT TRIAL & INS. PRAC. L.J. 1119, 1124 (2004) (“Historically, most courts have concluded that insurance defense counsel routinely and necessarily represents two clients: insured and insurer.” (citations, alterations, and quotation marks omitted)) with FEDERATION OF DEFENSE & CORPORATE COUNSEL, *THE TRIPARTITE RELATIONSHIP: GUIDEBOOK FOR DEFENSE LAWYERS* 3 (2002) (“There is now a general consensus that, in the context of the tripartite relationship, the insured is the defense attorney's client. Whether the insurance company is also the attorney's ‘client’ remains a subject of chronic debate.”).

of the defense, pays the settlement or judgment and typically has vast experience in monitoring and handling the defense of the type of claims alleged.

Second, the ABA Model Rules of Professional Conduct, which forty-nine states, the District of Columbia and the Virgin Islands currently have adopted,³⁰ are silent on this important question. Moreover, the ABA Standing Committee on Ethics and Professional Responsibility expressly declined to answer the question in a formal ethics opinion, but stated that defense counsel may represent the insured alone, together, or together but only for certain limited purposes.³¹ The Model Rules' lack of clear guidance will continue to lead to inconsistent decisions among courts dealing with this question.

Third, the Restatement is clear that "a lawyer designated to defend the insured has a client-lawyer relationship with the insured" and the "insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer."³² The Restatement does not prohibit the insurer from also being designated as a client, but the insurer is not deemed a client automatically.³³ Instead, a factual determination is made according to the Restatement's rules governing the formation of a client-lawyer relationship.³⁴ A growing number of courts and commentators regard the Restatement's view, i.e., the insured as the definite client with the insurer as a possible client under certain circumstances, as the "modern view."³⁵

Fourth, the ABA Model Code of Professional Responsibility added to this controversy because under the Model Code, defense counsel's primary client is the insured and the insurer's interests are considered secondary.³⁶ No state follows the Model Code any longer, with New York, which was one of the last states to follow the Model Code, having switched to the Model Rules in 2008.³⁷

Fifth, many two-client states allow dual representation *only in the absence of a conflict*.³⁸ Once a conflict occurs, many two-client states require that defense counsel represent only the insured's interests and some states further permit or require that independent counsel be appointed to represent the insured, usually at the insurer's expense.³⁹

Courts are obviously split regarding whether defense counsel's client is solely the insured or jointly the insured and the insurer. The most reasonable rule, however, is that counsel represents

³⁰ See *supra* note 13.

³¹ ABA Formal Op. 96-403; see also ABA Formal Op. 01-421 (reaffirming ABA Formal Op. 96-403).

³² RESTATEMENT § 134 cmt. f, at 408.

³³ *Id.*

³⁴ *Id.* (citing RESTATEMENT § 14 for guidance on the client-lawyer relationship).

³⁵ See, e.g., Marick & Dixon, *supra* note 29, at 1126 and n.24 (citing authorities).

³⁶ James E. Fitzgerald, *Working Towards a Favorable Resolution: The Insured-Insurer-Defense Counsel-Independent Counsel Relationship*, 584 PLI/LIT 145, 154 & n.2 (1998) (citing Model Code references).

³⁷ See List of ABA Model Rules Jurisdictions, *supra* note 13.

³⁸ See *supra* cases cited in note 16.

³⁹ *Id.*

the insured and the insurer unless a conflict of interest arises,⁴⁰ but counsel should consult state case law and ethics opinions to determine the local rule.⁴¹

II. Adding a Joint Defense Agreement to a Tripartite Relationship

When parties in a tripartite relationship enter into a joint defense agreement with other defendants, counsel owes duties not only to the insured and insurer in the tripartite relationship, but also to the defendants and their counsel who entered into the joint defense agreement. These additional duties, responsibilities, potential conflicts and privilege implications must be considered carefully before entering into a joint defense agreement.

A. Joint Defense Agreements⁴²

Joint defense agreements are becoming increasingly common in complex, multi-party litigation. Judges often encourage cooperation among defense counsel to promote judicial efficiency. Joint defense agreements are entered into by defendants who share a common interest; most often they all were sued for similar alleged wrongs that create a natural common interest. A party may decide to enter into such an agreement for a host of reasons, including combining and sharing resources and strategy, maintaining attorney-client and work product privileges among all defendants and their counsel, reducing litigation costs, and projecting a united front to plaintiffs, the court and the jury.

While a joint defense agreement can be oral or implied, the better practice is to put the agreement in writing, signed by counsel on behalf of their clients.⁴³ The party seeking to prove the existence of a joint defense agreement – usually to invoke the joint defense privilege, discussed below – bears the burden of proving that a valid joint defense agreement is in place, and a written agreement increases the chance that the court will find such agreement to be valid.⁴⁴ A written agreement also helps identify and define the exact terms of the agreement, especially concerning the common interest at issue, the rights and obligations of the parties, and the scope of the confidentiality of communications and documents exchanged among the parties. Before entering a joint defense agreement, counsel in a tripartite relationship should review the joint defense agreement with the insured and insurer to make certain that both are aware of the benefits and risks of entering such an agreement and explain the additional duties and responsibilities that attach.

⁴⁰ See Brooke Wunnicke, *The Eternal Triangle: Redux*, FOR THE DEFENSE 29 (June 1999).

⁴¹ See *supra* note 14.

⁴² The joint defense agreements discussed in this article only refer to agreements among one or more defendants with separate attorneys, not agreements where multiple parties are represented by the same attorney.

⁴³ See *United States v. Stepany*, 246 F. Supp. 2d 1069, 1079 n.5 (N.D. Cal. 2003) (noting that written joint defense agreements are not required, but “[t]he existence of a writing does establish that defendants are collaborating, thus guarding against a possible finding that a particular communication was made spontaneously rather than pursuant to a joint defense effort” and “also protects against misunderstandings and varying accounts of what was agreed to by the attorneys and their clients.”); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) (recognizing oral joint defense agreement for purposes of joint defense privilege).

⁴⁴ See *United States v. Weissman*, 195 F.3d 96, 99-100 (2d Cir. 1999) (affirming trial court’s holding that defendant failed to show the existence of a valid implied joint defense agreement).

B. Joint Defense Privilege

One of the primary reasons for entering a joint defense agreement is for multiple defendants and their respective attorneys to maintain attorney-client and work product privileges for confidential communications and documents exchanged among themselves. The joint defense privilege (also known as the common interest privilege, rule or doctrine) is considered an extension of the attorney-client privilege, which “serves to protect the communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.”⁴⁵

The joint defense privilege only protects communications made in the course of and in furtherance of the common effort or strategy among the parties to the joint defense agreement.⁴⁶ The nature, timing, and degree of “commonality” required to assert the joint defense privilege differs among jurisdictions and discussion of the various differences of the commonality requirement is beyond the scope of this article other than to note that a well-drafted joint defense agreement should specify the purported common interest of the parties because courts will find the agreement and privilege invalid if no legitimate common interest exists.⁴⁷ To that end, counsel in a tripartite relationship should ensure that the joint defense agreement reflects the common interests of both the insured and insurer and insist that any other counsel to the agreement who is also in a tripartite relationship do the same.

The joint defense privilege does not create any additional privilege protections for the parties to the agreement. The standard elements of the attorney-client and work product privileges still must be met and the party asserting the joint defense privilege has the burden of proving its applicability.⁴⁸ The joint defense privilege merely extends the attorney-client and work product privileges to communications among parties to the agreement in furtherance of the joint defense effort; the privileges otherwise would be waived as communications made to third parties.

C. Duties Owed Under a Joint Defense Agreement

Among the most important duties owed among the parties to a joint defense agreement are those associated with maintaining confidentiality of communications. This requirement of confidentiality applies to maintaining the confidentiality of the attorney-client communications and work product documents, and communications among parties to the agreement in the course of and in furtherance of the common defense effort.⁴⁹ Failure to adhere to these requirements

⁴⁵ *Schwimmer*, 892 F.2d at 243; see also *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000); RESTATEMENT § 76 (“If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons.”).

⁴⁶ *Schwimmer*, 892 F.2d at 243; RESTATEMENT § 76.

⁴⁷ See, e.g., *Schwimmer*, 892 F.2d at 243 (joint defense effort or strategy must be undertaken); *Carey-Canada, Inc. v. Aetna Cas. & Sur. Co.*, 118 F.R.D. 250, 251 (D.D.C. 1987) (rejecting claim that common interest existed because there was an “atmosphere of uncertainty as to the scope of any identity of interest shared by” the insurer and insured).

⁴⁸ *Schwimmer*, 892 F.2d at 244.

⁴⁹ *Id.* at 243.

could result in a waiver of the joint defense privilege by all parties to the agreement for the communication at issue. For example, communication with a party outside the joint defense agreement would not be privileged. Even a communication with a party to the joint defense agreement would not be protected if it were not intended to further the common interest of the parties. Hence, the joint defense privilege does not provide blanket protection to all communications made by parties to the joint defense agreement. Accordingly, “trust” among the parties and their counsel is an essential, practical element of any joint defense agreement.

In addition to the duties required to maintain the joint defense privilege, counsel may owe attorney-client duties or fiduciary duties to the other parties to the agreement. Counsel in a tripartite relationship involving a joint defense agreement represents his insured client and possibly the insurer. Thus, the only situation where courts might find that counsel has a direct attorney-client relationship with the other defendants to a joint defense agreement is when defendants elect a “common counsel” (also called “Liaison Counsel” or “Lead Counsel”) to expressly or impliedly represent the group.⁵⁰ However, many courts have found that a joint defense agreement can create implied attorney-client relationships or fiduciary relationships among counsel and defendants depending on the nature of any confidential information exchanged.⁵¹

In *United States v. Henke*, the Ninth Circuit found that a joint defense agreement among three criminal defendants who were former company executives and their attorneys created an implied attorney-client relationship among themselves because of confidential information discussed.⁵² Prior to trial, one of the defendants accepted a plea agreement and became a government witness.⁵³ The attorneys for the two remaining defendants moved to withdraw because their duty of confidentiality to the defendant who accepted the plea agreement prevented them from cross-examining him on matters learned as a result of confidential information discussed in accordance with the joint defense agreement.⁵⁴ The Ninth Circuit held that the privileged information that the attorneys learned as a result of the joint defense agreement caused a disqualifying conflict of interest because it impaired defense counsel’s ability to defend their clients.⁵⁵ Similar to *Henke*, the Seventh Circuit found that a fiduciary duty or implied professional relationship exists “[w]hen information is exchanged between co-defendants and their attorneys in a criminal case,

⁵⁰ *City of Kalamazoo v. Mich. Disposal Serv. Corp.*, 125 F. Supp. 2d 219, 238 (W.D. Mich. 2000).

⁵¹ See, e.g., *Henke*, 222 F.3d at 637 (finding that a joint defense agreement establishes an implied attorney-client relationship among counsel and defendants); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (fiduciary duty); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (fiduciary relationship exists among counsel and parties to a joint defense agreement); *In re Gabapentin Patent Litig.*, 407 F. Supp. 2d 607, 615 (D.N.J. 2005) (finding implied attorney-client and fiduciary relationships among counsel and parties to a joint defense agreement); *Kalamazoo*, 125 F. Supp. 2d at 234 (recognizing with approval courts that found implied attorney-client relationships as a result of a joint defense agreement); *Essex Chem. Corp. v. Hartford Accident & Indem. Co.*, 993 F. Supp. 241, 252 (1998) (noting that a joint defense agreement could create implied attorney-client or fiduciary relationships under certain conditions); *GTE North, Inc. v. Apache Prods. Co.*, 914 F. Supp. 1575, 1581 (N.D. Ill.1996) (fiduciary relationship created).

⁵² See *Henke*, 222 F.3d at 637 (citing *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he represented in the criminal case.”⁵⁶

A New Jersey district court found that a joint defense agreement created implied attorney-client and fiduciary relationships among counsel and defendants and that two attorneys who had represented a defendant party to the joint defense agreement, but who then joined a law firm that represented an adverse party in the pending litigation, were personally disqualified, as was their new law firm.⁵⁷ In its ruling, the court relied on New Jersey’s ethics rules, which mirror the ABA Model Rules. The court found that the two attorneys who had switched sides were “without question” personally disqualified under Rule 1.9, which prohibits attorneys from representing a client in the same or substantially related matter in which that client’s interests are materially adverse to the interests of a former client.⁵⁸ Further, the court imputed the disqualification to the attorneys’ new firm under Rule 1.10, which concerns the imputation of conflicts of interest to law firms, despite the firm having conducted ethical screenings.⁵⁹ Although the new firm obtained a waiver of the conflict of interest from the firm where the attorneys previously worked, the waiver did not cure the disqualification of the new firm because Rule 1.7 requires informed consent from “each affected client,” and therefore, the court held that consent was required from each of the parties to the joint defense agreement because of the implied attorney-client and fiduciary duties owed to each of the parties to the agreement.⁶⁰

Accordingly, courts most likely would view parties to a joint defense agreement as more than mere third parties and will find that a joint defense agreement often creates implied attorney-client or fiduciary relationships among the parties to the agreement and their counsel, usually as a result of confidential information having been exchanged. Therefore, if counsel obtains confidential information from parties to the joint defense agreement, he (and possibly his law firm) could be disqualified from later representing a client in a matter adverse to a party to that agreement.

III. Potential Conflicts and Complications That Could Arise in a Tripartite Relationship After Entering Into a Joint Defense Agreement

Parties in a tripartite relationship who have entered into a joint defense agreement with other defendants should derive an overall net benefit from the arrangement because in theory all parties are harmoniously pursuing a common interest: the successful defense and resolution of the claims asserted against them. In reality, however, the individual interests of each of the parties may take priority over the common interests and could veer the unified strategy of the group off course. The conflicts inherent in an ordinary tripartite relationship stemming from the duties counsel owes to both the insured and insurer are magnified when the parties enter into a

⁵⁶ *Westinghouse Elec. Corp.*, 580 F.2d at 1319 (citing *Wilson P. Abraham Const. Corp.*, 559 F.2d at 253).

⁵⁷ *In re Gabapentin Patent Litig.*, 407 F. Supp. 2d at 615.

⁵⁸ *Id.* at 611 (citing N.J. RULE OF PROFESSIONAL CONDUCT R. 1.9, which is substantially similar to ABA R. 1.9).

⁵⁹ *Id.* at 611-12 (citing N.J. R. 1.10, which is substantially similar to ABA R. 1.10).

⁶⁰ *Id.* at 611-16.

joint defense agreement because the pressure to adhere to the group's overarching goal may conflict with the individual interests and needs of certain parties to the agreement. Counsel often is caught in the middle of such conflicts and must determine whether the conflict can be resolved, and if so, how to do so while representing the interests of the client(s), furthering the group's common interest, and adhering to all his professional and ethical obligations. This section addresses some of the common conflicts of interest that could arise when parties in a tripartite relationship enter into a joint defense agreement.

A. Conflicts Arising from the Joint Defense Privilege

The risks of sharing information under the joint defense privilege in a tripartite relationship are much greater after the tripartite parties have entered into a joint defense agreement with other defendants. In a typical tripartite relationship, unless a coverage issue is anticipated or ensues, counsel often exchange information freely back and forth between the insurer and insured out of necessity because the insurer typically has a duty to defend and indemnify its insured and control the litigation, the insured has a duty to cooperate with the insurer and counsel, and all three share a common goal of successfully resolving the asserted claims.⁶¹ After the tripartite parties enter into a joint defense agreement with other defendants, counsel must be more cautious of the information provided to the group because counsel's clients are only the insured that he was retained to represent and the insurer that retained him – not the other defendants in the joint defense agreement (even though all parties have a common interest in resolving the claims and can exchange confidential information in accordance with the joint defense privilege). Under Model Rule 1.6 and 1.8(b), counsel cannot provide, without informed consent, information to the group that would be materially adverse to his client, i.e., the insured or insurer.

One would assume that counsel would not intentionally send to the group information adverse to his client; however, with insureds and insurers often included in emails and correspondence to the group, the possibility certainly exists that adverse or unwanted information could be sent to the group inadvertently. For instance, counsel and the client must be careful not to send information to the group that could suggest that the client is liable for a larger share of the damages than the other defendants, or that could trigger cross-claims or indemnity and contribution claims. Counsel also must not share with the group unwanted personal, sensitive or proprietary information of the client in order to protect the client's privacy and because the other defendants (including their insurers) could be competitors. Of course, the possibility exists that this type of information and any other information could be disclosed to plaintiffs pursuant to a court order if the court were to find that the joint defense privilege was waived by any of the defendants in the joint defense agreement.

Further, counsel should inform the client that information exchanged with the group under the joint defense privilege may not be privileged in a subsequent controversy between defendants.⁶² Therefore, information provided to the group could be used against the client in a later suit

⁶¹ See Robert C. Heist, *The Tripartite Relationship and the Insure[r]'s Duty to Defend Contrasted with Its Desire to Manage and Control Litigation Through the Introduction of the Legal Audit*, 602 PLI/LIT 221, 229 (1999).

⁶² See, e.g., *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 855 (7th Cir. 1974) (applying Ohio law); *N. River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518, 1995 WL 5792, at *2 (S.D.N.Y. Jan. 5, 1995).

between defendants who were parties to the agreement. The greater the number of parties to the joint defense agreement, the greater these conflicts become a distinct possibility.

B. Reinsurance Issues

The waiver of the joint defense privilege in subsequent litigation between defendants to that agreement does not apply to a reinsurer, unless the reinsurer was a party to the joint defense agreement. The attorney-client privilege and joint defense privilege were examined in the context of coverage litigation between a reinsured and reinsurer in *North River Insurance Co. v. Philadelphia Reinsurance Corp.*⁶³ The district court upheld the reinsured's claim of privilege over documents reflecting communications between the reinsured and its counsel bearing on the reinsured's decision to abandon an appeal of an arbitrator's decision concerning underlying asbestos lawsuits.⁶⁴ In doing so, the court rejected the reinsurer's contention that it was entitled to its reinsured's privileged communications pursuant to the common interest doctrine.⁶⁵ In related litigation, another district court reached a similar conclusion, noting that in the reinsurance context, the interests of the ceding insurer and the reinsurer may be antagonistic in some respects and compatible in others.⁶⁶ For this reason, "a common interest cannot be assumed merely on the basis of the status of the parties."⁶⁷

In both of these cases, the reinsurer did not retain and had no involvement with the attorney when the privileged documents were created. In these circumstances, the reinsurer was deemed outside the attorney-client relationship and could not access privileged materials, even though the insurer and reinsurer may have had a common desire to succeed in the underlying lawsuit and despite a standard access-to-records provision in the reinsurance contract.

C. Attorney or Law Firm Disqualification

Depending on the terms of the joint defense agreement and the nature of the confidential information exchanged, under Model Rule 1.9 a court may disqualify counsel involved in a joint defense agreement from representing a new client in the same or substantially related matter if the new client's interests are materially adverse to those of a former client in the same agreement.⁶⁸ In such a situation, counsel's new firm also could be disqualified under Rule 1.10 even if the firm ethically screens the newly joined counsel, unless the firm obtains a conflict of interest waiver from each of the affected clients as required under Rule 1.7.⁶⁹ Moreover, if counsel was in a tripartite relationship when a joint defense agreement was signed, the new firm would have to obtain waivers not only from each defendant party to the joint defense agreement, but also from the former insurer client that counsel represented (assuming the case is pending in

⁶³ 797 F. Supp. 363 (D.N.J. 1992).

⁶⁴ *Id.* at 367-68.

⁶⁵ *Id.* at 367.

⁶⁶ *N. River Ins. Co.*, 1995 WL 5792, at *4.

⁶⁷ *Id.*

⁶⁸ *See In re Gabapentin Patent Litig.*, 407 F. Supp. 2d at 611.

⁶⁹ *Id.* at 611-12.

a two-client jurisdiction) and from the insurer clients of any other counsel in tripartite relationships who were part of the same agreement.

The potential for disqualification increases when parties to a joint defense agreement are also parties to a tripartite relationship because more clients are involved, and consequently, the number of conflict of interest waivers needed increases as does the likelihood that one of the affected clients will refuse to provide a waiver. Therefore, a law firm that is contemplating hiring an attorney under the circumstances described above (or an attorney contemplating joining such a firm) must understand that the attorney will be personally disqualified from representing a client of the firm that is adverse to the attorney's former client and the disqualification likely would be imputed to the new firm unless the firm obtains all of the necessary waivers.

D. Conflicts Arising from the Joint Defense Strategy

1. Settle or Litigate?

One of the most common and contentious conflicts that arises over the joint defense strategy in a tripartite relationship is whether to settle or litigate. While this decision is complicated in an ordinary tripartite relationship when there is disagreement between the insurer and insured on the issue of settlement, it is even more complicated after these parties enter into a joint defense agreement.

A number of reasons exist why the insurer's and insured's interests may diverge over whether to settle or litigate. Insureds usually are most interested in avoiding personal liability, which is the primary reason they purchased the insurance policy. Therefore, insureds have a financial interest in having the insurer settle the claims as long as the settlement amount is within the policy limits. However, some insureds (often medical doctors) may resist settlement, even when it is in their best financial interests, because they are more concerned with their reputation (i.e., settlement may be viewed by others as conceding liability), principle (i.e., they believe they are not liable and seek vindication by the court), or business purposes (i.e., settlement may encourage more lawsuits).⁷⁰ On the other hand, the insurer's decision on whether to settle or litigate may be driven by its interest in reducing defense costs, maintaining relationships with defense counsel, defeating a particular plaintiff or obtaining a particular precedent that could benefit the insurer in other cases.⁷¹ While these considerations by both insurer and insured are valid and understandable, they sometimes conflict.

A conflict between an insurer and insured on whether to settle or litigate could affect a joint defense agreement if the group has determined its joint position on whether to settle or litigate. Ultimately, if the conflict concerning settlement cannot be resolved with the other defendants, counsel has two options: (1) withdraw the client from the joint defense agreement; or (2) terminate the representation, which would allow the client to be represented by a new attorney who would withdraw the client from the joint defense agreement.⁷² Failure to withdraw from the

⁷⁰ See Silver & Syverud, *supra* note 4, at 266-67.

⁷¹ *Id.* at 267.

⁷² See R. 1.2, 1.16.

joint defense agreement when a conflict cannot be resolved could jeopardize the joint defense privilege due to a resulting lack of common interest and could violate ethical rules.⁷³ Thus, counsel's ethical duties in a tripartite relationship with a joint defense agreement are relatively clear when an unresolvable conflict of interest arises over the joint defense strategy.

2. Damages Could Exceed Coverage

When potential damages could exceed coverage, a conflict could arise not only among the insurer, insured and counsel on whether to settle or go to verdict, but also among each of them and all the other joint defendants. Usually the amount that counsel reasonably believes a jury could award is the number that drives the decision on whether to settle or litigate.⁷⁴ Conflicts may arise when one or more of the parties in a tripartite relationship (with or without a joint defense agreement) would like to try the case with the intent of obtaining a low verdict while another party would prefer to settle within policy limits if possible.⁷⁵ Therefore, the insured has a strong incentive to have the insurer settle the claims within policy limits if counsel reasonably believes that a verdict could exceed the policy limits and subject the insured to personal liability. The insured's incentive to settle would be especially strong if the case could be settled within policy limits and punitive damages were alleged because punitive damages may be uninsured or uninsurable as a matter of public policy.⁷⁶

E. Avoiding Conflicts in Multiparty Litigation

One of the most important ways to avoid conflicts in a tripartite relationship involving a joint defense agreement is to prepare a well-drafted, comprehensive joint defense agreement. The requirements of a joint defense agreement will vary depending on the goals and interests of the parties to the agreement and the facts and nature of the case, but most agreements include several common provisions.

The agreement should specify in detail the common interest of the parties (as long as no confidential information is revealed, unless the agreement itself is privileged in the particular jurisdiction) because confidentiality is required to maintain the joint defense privilege. The agreement should include provisions that will help to ensure that the joint defense privilege is maintained and explain how confidential information is to be handled. For example, the agreement should provide that any communication or document that would be protected independently by the attorney client or work product privileges remains privileged when exchanged among defendants and their respective attorneys to the agreement.

⁷³ See R. 1.2, 1.7(a), 1.8(f)(2), 5.4; see also RESTATEMENT §§ 121 & 134.

⁷⁴ See Richmond, *supra* note 2, at 278.

⁷⁵ *Id.*

⁷⁶ *Id.* at 282 n.97; see also, e.g., *PPG Indus. Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 657 (Cal. 1999) (California's and Colorado's public policy prohibits indemnification of punitive damages); *Home Ins. Co. v. Am. Home Prods. Corp.*, 550 N.E.2d 930, 932 (N.Y. 1990) (New York's public policy prohibits indemnification of punitive damages).

The agreement also should provide that each defendant reserves the right to settle the claims against it independently and that any party may withdraw from the agreement provided that sufficient notice is given to all defendants and their attorneys. The agreement should provide that information exchanged under the agreement remains privileged after the master litigation has ended and also that any defendant that settles or is dismissed before the litigation has ended must maintain the privilege. It should identify all known conflicts of interest and establish procedures for handling future conflicts that may arise. All counsel should represent that they have conducted conflict checks to prevent vicarious disqualification. The agreement also could provide certain conflict of interest waivers, such as waiving the right to seek disqualification of counsel to the agreement in the instant litigation or any other litigation based on access to confidential information learned as a result of the agreement. A template joint defense agreement is attached to this article.

Conclusion

Joint defense agreements are becoming more commonplace in multiparty litigation involving insured defendants. Counsel in a tripartite relationship must understand the risks, benefits and obligations associated with entering a joint defense agreement and communicate them to the clients before entering into such an agreement.

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