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The Tri-Partite Relationship in the 21st Century

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ABA Formal Opinion 01-421 (2001) describes “[t]he tripartite relationship among defense lawyer, insured, and insurer” as “a delicate balance of rights and duties.” The role of insurance defense counsel in Washington has long been defined by *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), which addressed the question of who is the client of insurance defense counsel and examined associated conflicts. Similarly, WSBA Advisory Opinion 195, which was originally issued in 1999, spoke to lawyer confidentiality in the insurance defense context.

Although *Tank* and Advisory Opinion 195 remain touchstones for insurance defense counsel, the past decade has seen important developments in all three areas they embrace. In this column, we’ll survey those developments in all three.

Who Is the Client?

Tank clearly defined the client of insurance defense counsel: the insured. *Tank* described the carrier involved as a third-party payor only. As the Supreme Court put it: “Both retained defense counsel and the insurer must understand that only the *insured* is the client.” (105 Wn.2d at 388 (emphasis in original).)

The Supreme Court reaffirmed both points in *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013)—and then went a step farther. *Stewart Title* involved a legal malpractice claim by a carrier against an insurance defense counsel, arguing that the defense counsel had mishandled a case for the carrier’s insured. The carrier acknowledged that, under *Tank*, it was not the defense counsel’s client. The carrier instead argued that it nonetheless had standing to pursue a malpractice claim because it was an intended beneficiary of the defense counsel’s work under an exception to the “privity” requirement for malpractice claims articulated by *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). The Supreme Court in *Stewart Title* squarely rejected that argument—holding that the relationship of third-party payor did not create an independent duty of care. The Supreme Court reiterated this analysis in *SMI Group XIV, LLC v. Chicago Title Insurance Company*, 186 Wn.2d 58, 375 P.3d 651 (2016). The Court of Appeals, citing *Stewart Title*, reached similar conclusions in *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 324 P.3d 743 (2014), and *Doctors Co. v. Bennett Bigelow & Leedom, P.S.*, 2015 WL 3385264 (Wn. App. May 26, 2015) (unpublished).

Conflicts

Although *Tank* clearly answers the “who is the client?” question in most instances, conflicts can still lurk.

In *Arden v. Forsberg & Umlauf, P.S.*, 189 Wn.2d 315, 402 P.3d 245 (2017), defense counsel had represented an insured under a carrier’s reservation of rights. The carrier eventually funded the settlement of the underlying matter but the Ardens sued the law firm anyway for breach of fiduciary duty. Although the law firm had advised the Ardens that it was not providing them with coverage advice (and the Ardens had their own coverage counsel), the law firm had not informed the Ardens that it also did other unrelated coverage work for the carrier that had issued the reservation. The Ardens later claimed that the law firm had a conflict under RPC 1.7(a)(2), which governs “material limitation” conflicts, based on its relationship with the carrier. The Supreme Court unanimously affirmed the dismissal by the lower courts based on the plaintiffs’ lack of damages since the carrier had funded the settlement and paid for the defense of the underlying case. A five-member majority then went beyond this unremarkable result to suggest that when an insurance defense firm does other coverage work directly for a carrier—and, therefore, is also a client of the firm—the firm may need to disclose that to the insured and obtain a conflict waiver. The majority, however,

did not resolve that question on the facts before it because the parties had offered dueling expert opinions on that point. A four-member concurrence characterized the detour into conflicts as “dicta” and concluded that the lack of damages was dispositive. *Arden* injects a degree of uncertainty into the defense of cases under a reservation of rights and, at least as a matter of risk management, counsels that a law firm should consider obtaining a conflict waiver from the insured if the firm represents the carrier directly in other matters or has other significant economic relationships with the carrier.

The *Arden* majority’s use of the term “dual representation” as the basis of potential conflicts raises two other nuances.

First, defense firms that also do coverage work need to carefully define the entities that they are representing in the coverage work. Insurance carriers often have multiple affiliates and subsidiaries. In *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. April 22, 2016) (unpublished), for example, a carrier in an Oregon coverage case had defined itself broadly to include essentially its entire corporate family in a set of case-handling guidelines provided to the law firm involved. The law firm was later disqualified in a Washington coverage case when it appeared representing an adversary of one of the carrier’s affiliates.

Second, Washington lawyers and firms with multi-state practices need to remember that not all states share Washington’s “one client” approach to insurance defense. Oregon, for example, generally uses a “two client” approach to insurance defense—with both the insured and the carrier considered the lawyer’s clients—under a series of Oregon State Bar ethics opinions (OSB Formal Opinions 2005-30, 2005-77 and 2005-121). A Washington firm might, therefore, trigger a “dual representation” conflict under *Arden* in Washington if it is handling work in Oregon where the carrier that issued a reservation in the Washington case is also classified as a client.

Confidentiality

WSBA Advisory Opinion 195 cautions that because an insurance defense counsel’s only client under *Tank* is the insured, the lawyer’s duty of confidentiality runs solely to the insured. Similarly, the Supreme Court in *Stewart Title* noted (178 Wn.2d at 569) that although an insurance contract between the insured and the carrier normally includes an authorization permitting defense counsel to keep the carrier informed of case developments, the defense lawyer must do so “within the bounds of the attorney-client privilege and the duty of confidentiality[.]”

Ordinarily, communications between an insurance defense counsel and the carrier involved are cloaked within the “common interest” doctrine. The

Washington Supreme Court described this evidentiary concept generally in *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010): “The ‘common interest’ doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group.” Federal courts in Washington have recognized the common interest doctrine in similar terms, with, for example, the federal district court in Seattle in *Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F. Supp.2d 1199, 1202 (W.D. Wash. 2007), noting: “The ‘common interest’ or ‘joint defense’ privilege is an exception to the general rule that the voluntary disclosure of a privileged attorney-client or work-product communication to a third party waives the privilege.”

Most communications between insurance defense counsel and a carrier’s claims staff on case developments and strategy usually fall squarely within the common interest doctrine. WSBA Advisory Opinion 195, however, discusses situations—such as third-party bill audits—where a disclosure may put privilege at risk because it does not go to the defense of the case. In that circumstance, the client would need to provide informed consent for any disclosure and the opinion discusses the considerations involved. ABA Formal Opinion 01-421 (2001) includes a similar discussion from a national perspective. As I write this,

the WSBA Committee on Professional Ethics is also reviewing this area further for a possible advisory opinion in the context of employer-provided insurance coverage—such as a doctor being defended under an insurance policy obtained by the doctor’s hospital employer.

Summing Up

Most insurance defense representations are handled without event. The developments over the past decade illustrate, however, that lawyers need to remain attentive to conflict and confidentiality wrinkles that can arise even with long-established arrangements like the tri-partite relationship.

ABOUT THE AUTHOR

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