

RESERVATIONS and CONFLICTS:

ETHICAL AND LEGAL ISSUES WHEN COVERAGE IS IN QUESTION

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TRIPARTITE RELATIONSHIP

- The “Eternal Triangle” Between:
 - The Insurer;
 - The Insured; and
 - The Appointed Defense Counsel;
- Like Nearly All Three Way Affairs:
 - Suspicion; Perceived Betrayal;
 - “Alleged Conflict;”



TRIPARTITE RELATIONSHIP

- It is Claimed The Insurer Has a Conflict of Interest With Its Insured When Appointed Defense Counsel’s Representation of Insured Will Be Materially Limited By:
 - Counsel Representation of Insurer;
 - Counsel’s Responsibilities to Insurer;
 - Counsel’s Personal Interests.



PRAHAM v. RUPP,
277 N.W.2D 389 (Minn. 1979)

- Coverage Issue Brought into the Liability Case by Insured's Third Party Action Against Carrier;
- Court Syllabus: "When An Insurer Is Obligated To Defend Its Insured And Contests Coverage In The Same Suit, The Insurer Must Pay Reasonable Attorneys' Fees For Its Insured Rather Than Conduct The Defense Itself." (Emphasis Added.)

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PRAHAM v. RUPP,
277 N.W.2D 389 (Minn. 1979)

- "We Recognize That **Requiring** Great American To Defend The Suit Against Rupp Creates A Conflict Of Interest For Great American Because It Would Be Required To Take Opposing Positions At Trial To Defend Rupp Against Plaintiffs' Claim And, At The Same Time, To Defend Itself On The Coverage Question." Id. at 391 (Emphasis Added).

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PRAHAM v. RUPP,
277 N.W.2D 389 (Minn. 1979)

- "This Conflict Of Interest Does Not Relieve Great American Of Its Duty To Defend, But Rather Transforms That Duty Into The Duty To Reimburse Rupp For Reasonable Attorneys' Fees Incurred In Defending The Lawsuit." Id. at 391.

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PRAHAM v. RUPP,
277 N.W.2D 389 (Minn. 1979)

- **Take-Away:**
 - “Actual Conflict;”
 - In the Same Suit;
 - Converts Right and Duty to Defend Into Duty to Reimburse Defense Expenses;
- **Unanswered:** Why Can’t Appointed Defense Counsel Be Utilized?

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- Milk Route Hauler’s Contract Terminated;
- Sued Insured for Slander (Second Suit);
- Insurer Reserved Rights, Yet Provided Instructions to Appointed Defense Counsel to Provide Status Reports Such Insured Claims the Information Provided Might Be Used to Pursue Coverage Denial Declaratory Judgment Action;

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- Insured Rejected Appointed Defense Counsel and Demanded Insurer Pay for Its Own Counsel;
- Insurer Declined, Stating Would Only Pay for Appointed Defense Counsel;
- Suit Settles Without Payment by Insured;
- Appellate Issue: Is Carrier Required to Pay Insured’s Personal Counsel’s Fees?

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- **Court Syllabus:**
 - “1. Absent A **Showing Of A Conflict Of Interest**, An Insurer Is Not Obligated To Pay The Attorney Fees Of Counsel Selected By The Insured.
 - “2. The Evidence Presented To The Trial Court Is Insufficient, As A Matter Of Law, To Show A Conflict Of Interest Existed **Between The Insured And Defense Counsel Selected By The Insurer.**”

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- “Problems Can Arise When An Insurer Defends Under A Reservation Of Rights. While The Insured Seeks To Avoid Liability On All Claims And The Insurer Shares That Desire, The Insurer Has An Additional Interest That If Liability Is Found, That It Be Found On Claims For Which There Is No Coverage. **Some Courts Find That This Duality Of Interests Creates A Conflict.**” Id. at 368 (emphasis added).

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- “A Further Concern Is That Counsel Selected By The Insurer Will Have A **Compelling Interest In Protecting The Rights Of The Insurer Rather Than The Rights Of The Insured Because Of Counsel's Closer Ties With The Insurer.**” * * * The Majority View Appears To Be That The Long-Standing Ties Between Defense Counsel And The Insurance Industry **Will Influence The Conduct Of The Case By The Insurer's Selected Counsel.**” Id. at 368 (Emphasis Added).

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- “To Alleviate This Concern, Some States Allow The Insured To Select Defense Counsel; The Insurer Must Pay The **Reasonable Fees** Of The Insured's Selected Counsel. The Rule Is Based On The Idea That An Attorney Who Looks Out For The Insured's Interests Rather Than The Insurer's Interests **Will Never Work For The Insurer Again.**” Id. at 368 (Emphasis Added).

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- “Minnesota Has Never Adopted The Extreme Position Taken By The *Bogard* And *Cumis* Courts, **And We Decline To Do So Here.** We Believe The More Reasoned Approach To Be That Before An Insured Will Be Entitled To Counsel Of Its Own Choice, An **Actual Conflict Of Interest, Rather Than An Appearance Of A Conflict Of Interest, Must Be Established.** Id. at 368 (Emphasis Added).

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474 N.W.2D 365 (Minn. Ct. App. 1991)

- “A Conflict Of Interest Will Not Be Established Simply By Showing That The Insurer Wished To **Remain Fully Informed** Of The Progress Of The Litigation In The Main Action While Also Litigating A Declaratory Judgment Action.” Id. at 368-69 (Emphasis Added).

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MUT. SERV. CAS. INS. CO. v. LUETMER,
474 N.W.2D 365 (Minn. Ct. App. 1991)

- “A Finding Of Conflict Of Interest Must Rest On More Substantial Evidence, Such As Actions Which **Demonstrate** A Greater Concern For [Carrier’s] Interests Than Respondents’ Interests. * * * The Underlying Litigation In This Matter Provided Almost No Opportunity For Manipulation Of Liability Toward Non-Covered Claims.” **Id.** at 369 (Emphasis Added).



TRIPARTITE RELATIONSHIP

- Original Statement:
 - Does Insurer Have a Conflict of Interest With Its Insured When Appointed Defense Counsel’s Representation of Insured Will Be Materially Limited By:
 - Counsel’s Representation of Insurer;
 - Counsel’s Responsibilities to Insurer;
 - Counsel’s Personal Interests.




TRIPARTITE RELATIONSHIP

- Why Doesn’t the Question Take Into Consideration Counsel’s Ethical Duties?
 - Does The Insurer’s Right to Control the Litigation While Also Reserving Coverage Defenses Impair Appointed Defense Counsel’s Ability to Represent the Insured Because of:
 - 1) Counsel’s Representation of Insurer;
 - 2) Counsel’s Responsibilities to Insurer;
 - 3) Counsel’s Personal Interests.




**1) COUNSEL'S
REPRESENTATION OF INSURER**

- Jurisdictions Vary on Whether the Appointed Defense Counsel Represents the Insurer as a Co-Client;
 - Issue Traditionally Turns on Contract, and Conduct (Tort) Principles;
 - Engagement Letter Confirming Retention to Defend the Insured;

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**1) COUNSEL'S
REPRESENTATION OF INSURER**

- Minnesota “Bright Line” Rule:
 - Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444 (Minn. 2002):
 - “[I]n The Absence Of A Conflict Of Interest Between The Insured And The Insurer, The Insurer Can Become A Co-Client Of Defense Counsel Based On Contract Or Tort Theory If Two Conditions Are Satisfied. * * *

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**1) COUNSEL'S
REPRESENTATION OF INSURER**

- Pine Island, 649 N.W.2d at 452:
 - “First, Defense Counsel Or Another Attorney Must Consult With The Insured, Explaining The Implications Of Dual Representation And The Advantages And Risks Involved. . . . Second, After Consultation, The Insured Must Give Its Express Consent To The Dual Representation.” (Citations Omitted).

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1) COUNSEL'S REPRESENTATION OF INSURER

- “Without Consultation And The Express Consent Of The Insured, The Insured Remains Defense Counsel’s Sole Client.” Pine Island, 649 N.W.2d at 451 (Emphasis Added).

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1) COUNSEL'S REPRESENTATION OF INSURER

- “The Problems Caused By Conflicts Of Interest Are Particularly acute in the insurance defense context, where the potential for conflict exists in every case and actual conflicts are frequent.” Pine Island, 649 N.W.2d at 450.
- Note How This Passage Dovetails into Luetmer:

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MUT. SERV. CAS. INS. CO. v. LUETMER, 474 N.W.2D 365 (Minn. Ct. App. 1991)

- “We Believe The More Reasoned Approach To Be That Before An Insured Will Be Entitled To Counsel Of Its Own Choice, An Actual Conflict Of Interest, Rather Than An Appearance Of A Conflict Of Interest, Must Be Established. Id. at 368 (Emphasis Added).

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1) COUNSEL'S REPRESENTATION OF INSURER

- Pine Island Avoids Issues Seen in Other Jurisdictions Such as:
 - Does Insured Impliedly Give "Consent" to Co-Client Status With the Carrier Because the Policy Gives the Insurer the Right to Control the Defense?
 - There Can Never Be Co-Client Status When There is a Conflict of Interest. Id. at 451-52.

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1) COUNSEL'S REPRESENTATION OF INSURER

- However, Other Issues Remain:
 - Is Insured's Improper Rejection of Co-Client Status Under Pine Island a Breach of Insured's Duty to Cooperate?
 - Co-Client Status Can Never Occur if There is a Conflict of Interest;
 - "Agent" of Insurer Status of Appointed Defense Counsel: Buyse v. Baumann-Furrie & Co. v. St. Paul Fire & Marine Ins. Co., 481 N.W.2d 27 (Minn. 1992)

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1) COUNSEL'S REPRESENTATION OF INSURER

- Client Status is Relevant to Questions of Conflict of Interest:
- **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**
 - a) Except As Provided In Paragraph (b), A Lawyer Shall Not Represent A Client If The Representation Involves A Concurrent Conflict Of Interest. * * *

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) . . . A Concurrent Conflict Of Interest Exists If:
 - (1) The Representation Of One Client Will Be Directly Adverse To Another Client; Or
(Insurer Representation on "Unrelated" Coverage Action?)

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a)[Concurrent Conflict Of Interest Exists If:]
 - (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. (Emphasis Added)

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (b) Notwithstanding The Existence Of A Concurrent Conflict Of Interest Under Paragraph (a), A Lawyer May Represent A Client If:
 - (1) The Lawyer **Reasonably Believes** That The Lawyer Will Be Able To Provide **Competent And Diligent Representation** To Each Affected Client; (Emphasis Added)

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(b) Notwithstanding The Existence Of A Concurrent Conflict Of Interest Under Paragraph (a), A Lawyer May Represent A Client If: * * *

- (2) The Representation Is **Not Prohibited** By Law; (Emphasis Added)

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(b) Notwithstanding The Existence Of A Concurrent Conflict Of Interest Under Paragraph (a), A Lawyer May Represent A Client If: * * *

- (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 (Praha If Defense Counsel Also Defended Coverage Action)

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(b) Notwithstanding The Existence Of A Concurrent Conflict Of Interest Under Paragraph (a), A Lawyer May Represent A Client If: * * *

- (4) Each Affected Client Gives **Informed Consent**, Confirmed In Writing (Emphasis Added)

Only Reach Rule 1.7(b) If A Concurrent Conflict Of Interest Exists Under Rule 1.7(a)

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) . . . A Concurrent Conflict Of Interest Exists If:
 - (1) The Representation Of One Client Will Be Directly Adverse To Another Client; Or

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RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a). . . A Concurrent Conflict Of Interest Exists If:
 - (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. (Emphasis Added)

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2) COUNSEL'S RESPONSIBILITIES TO INSURER

- Appointed Defense Counsel May Have Few, If Any, Responsibilities to Insurer if Insurer is Not a Co-Client;
- Exceptions:
 - Litigation Management Guidelines;
 - Directions in Retention Communication;
 - Periodic Reporting;
- Temper By Counsel's Ethical Responsibilities to Client;

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RULE 1.6: CONFIDENTIALITY OF INFORMATION


(a) Except When Permitted Under Paragraph (b), A Lawyer Shall Not Knowingly Reveal Information Relating To The Representation Of A Client.

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RULE 1.6: CONFIDENTIALITY OF INFORMATION

(b) A Lawyer May Reveal Information Relating To The Representation Of A Client If:

(1) The Client Gives Informed Consent; Or


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RULE 1.6: CONFIDENTIALITY OF INFORMATION

(b)(2) the Information Is Not Protected By The Attorney-client Privilege Under Applicable Law,

The Client Has Not Requested That The Information Be Held Inviolable, And

The Lawyer Reasonably Believes The Disclosure Would Not Be Embarrassing Or Likely Detrimental To The Client; Or

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RULE 1.6: CONFIDENTIALITY OF INFORMATION

(b)(3) The Lawyer Reasonably Believes The Disclosure Is Impliedly Authorized In Order To Carry Out The Representation;

[Q: Is Disclosure Impliedly Authorized When The Carrier Has The Right To Control Defense?]

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EXAMPLE: RESERVATIONS OF RIGHTS AND NON-WAIVERS

- What is “Confidential” When Coverage Reservations are Asserted?
- Mere Disagreement in Defense Strategy In and Of Itself Should Not Create a Conflict;
- Conflict Rarely Arises When Action Defended by Appointed Defense Counsel Will Not Determine Coverage;

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EXAMPLE: RESERVATIONS OF RIGHTS AND NON-WAIVERS

- Action Defended by Appointed Defense Counsel Impacting Coverage:
 - Intent to Injure Liability Determination;
 - Multiple Claims Asserted and Appointed Defense Counsel Manipulates Exposure to Uncovered Claims;
 - Impact of Meadowbrook Inc. v. Tower Ins. Co., 559 N.W.2d 411 (Minn. 1997);
 - Late Notice Information;

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EXAMPLE: RESERVATIONS OF RIGHTS AND NON-WAIVERS

- Action Defended by Appointed Defense Counsel Impacting Coverage:
 - Much of the Analysis Fails to Recognize the Appointed Defense Counsel's Ethical Obligation to Zealously Represent the Client;
 - "A Lawyer Must Also Act With Commitment And Dedication To The Interests Of The Client And With Zeal In Advocacy Upon The Client's Behalf." Rule 1.3, Comment 1.
 - Safeguard: Malpractice Claim?

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EXAMPLE: INSURED EXPOSURE IN EXCESS OF POLICY LIMITS

- Punitive Damages Exposure and Insurer's Motivation to Defend the Punitive Count;
 - Is Typically in Insurer's Best Interests to Defend Punitive Allegations as Vigorous Defense Generally Reduces Covered Compensatory Damages Exposure;
 - Also Cuts Against Coverage Conflict of Interest Claims;

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EXAMPLE: REPRESENTATION OF MULTIPLE INSURED

- E.g.,
 - Owner and Driver in Motor Vehicle Accident;
 - Employer and Employee;
 - Named Insured and Additional Insured in Construction Case;
- Confidentiality Issues in These Scenarios Often Turn on Learning of Coverage-Impacting Facts From One of the Co-Clients After Representation of Both Clients Has Commenced;

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**AMERICAN BAR ASSOCIATION
FORMAL ETHICS OPINION 08-450**

- “Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters (April 9, 2008):”
 - “Absent . . . The Committee Believes that Whenever Information Related to the Representation Of a Client May Be Harmful To The Client In The Hands Of Another Client Or A Third Person, The Lawyer Is Prohibited By Rule 1.6 From Revealing That Information To Any Person, Including The Other Client And The Third Person, unless” (Footnote Omitted)

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**AMERICAN BAR ASSOCIATION
FORMAL ETHICS OPINION 08-450**

- “The Lawyer May Not Reveal the Information Gained By The Lawyer From Either The [One Client] Or The [Non-Client] Witness, Or Use It To The Benefit Of The Insurance Company, When The Revelation Might Result In Denial Of Insurance Protection For The [One Client].” (Footnotes Omitted)

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**AMERICAN BAR ASSOCIATION
FORMAL ETHICS OPINION 08-450**

- “We Are Mindful That A Typical Liability Insurance Policy Does Not Give The Insured The Right To Choose The Lawyer Retained And Compensated By The Insurance Company. Moreover, The Insured Is Required, As A Condition Of The Insurance Protection, To Cooperate And Assist In The Defense And, Implicitly, To Reveal To The Lawyer All Pertinent Information Known To The Insured. . . .”

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**AMERICAN BAR ASSOCIATION
FORMAL ETHICS OPINION 08-450**

- “None Of That, However, Undermines The Insured’s Right To Expect That The Lawyer Will Abide By Rule 1.6 And Withhold From The Carrier Information Relating To The Representation That Is Damaging To The Insured’s Interests Under The Policy.”

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**3) COUNSEL’S PERSONAL
INTERESTS**

- “Independent” Appointed Defense Counsel:
 - Insurer Desires Insured Represented by Competent Counsel Familiar With the Litigation Subject and Willing to Handle Matter at a Reasonable Rate;
 - Insured Desires Representation Which Will Not Be Influenced by Carrier Interests;
 - Staff Counsel v. Panel Counsel v. Insured’s Personal Counsel;

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**3) COUNSEL’S PERSONAL
INTERESTS**

- “Independent” Counsel Selection Considerations:
 - Independent Counsel Does Not Provide Coverage Advice;
 - To Carrier, of Course; but
 - To Insured as Well?
 - Insurer Should Have Right to Reject “Independent” Counsel Selected by Insured if Rejection is Reasonable;

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3) COUNSEL'S PERSONAL INTERESTS

- “Independent” Counsel Selection Considerations:
 - Insurer Obligated to Pay “Reasonable” Fees:
 - Fee Customarily Charged in Locality for Similar Legal Services (Minn. R. Prof. Conduct 1.5(a)(3); vs.
 - Nature and Length of Professional Relationship With Client (Minn. R. Prof. Conduct 1.5(a)(6)) (May Not Apply Absent Co-Client Status; But See Luetmer Passage);

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MUT. SERV. CAS. INS. CO. v. LUETMER, 474 N.W.2D 365 (Minn. Ct. App. 1991)

- “To Alleviate this Concern, some States Allow the Insured to Select Defense Counsel; the Insurer Must Pay the Reasonable Fees of the Insured's Selected Counsel. The Rule is Based on the Idea That an Attorney Who Looks Out for the Insured's Interests Rather than the Insurer's Interests Will Never Work for the Insurer Again.” Id. at 368 (Emphasis Added).

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3) COUNSEL'S PERSONAL INTERESTS

- “Independent” Counsel Selection:
 - Panel Counsel Can Be “Independent,” And Must Earn the Right to Continue to Be Independent:
 - Communicate, Build Relationship/Trust With Client (Also in Carrier's Best Interests; See e.g., Hawkins, Inc. v. American Int'l Spec. Lines Ins. Co., 2008 WL 4552683 (Minn. Ct. App. 2008));
 - Get Best Results for Client;

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KEY POINTS

- Tripartite Relationship is Workable, Even in Potential Conflict of Interest Situations;
- Encourage Relationship Development Between Appointed Defense Counsel and Insured Client;
- Don't Let Familiarity With Insurers Impede Ethical Obligations With Client;
- Don't Be Dumb! Only You Can Lose Your Privilege to Practice;

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CONCLUSION: "TIP OF THE ICEBERG"



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