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## CONSENT TO SETTLE? A NEW TWIST IN THE TRI-PARTITE RELATIONSHIP

*David F. Tavella*

The tri-partite relationship between insurers, insureds, and retained counsel has existed for decades, but has often been marked with conflicts and pressure.<sup>1</sup> Overall, however, the system works. Pursuant to the terms and conditions of the policy, insurers provide a defense to its insureds. In order to accomplish this, the insurer retains defense counsel with which it usually has a longstanding relationship. One of the primary reasons for this arrangement is to control defense costs and to protect the insurer's financial interests.<sup>2</sup> One of the key elements of this relationship is that the insurer controls the litigation. The insured is the client of the retained counsel. However, the most significant aspect of any litigation, whether to settle, is controlled by the insurer pursuant to the terms of the policy of insurance.<sup>3</sup>

This system has been hampered by the introduction of the revised Model Rules of Professional Conduct, which are being adopted by more and more states.<sup>4</sup> The Model Rules place the decision to settle squarely and exclusively with the attorney's client, the insured. This can create a significant conflict for defense counsel in any litigation that is being defended pursuant to a policy of insurance, and may create difficulty for plaintiffs who wish to settle a case. Most significantly, defense counsel may face ethical charges because of what is common practice: settling a case on instruction of the insurance carrier.

The typical commercial general liability (CGL) policy provides coverage to millions of individuals, small businesses, and large businesses throughout the country. The language of the policy governs the obligations of the insurer and insured.<sup>5</sup> Most attorneys are familiar with an insurer's duty to defend, a duty that arises directly out of the language of a typical CGL policy.<sup>6</sup> The typical policy provides that the insurer has "the right and duty" to defend an insured against any suits seeking damages. Of course, the same paragraph continues by stating: "We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."<sup>7</sup>

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1. The terms "insurer" and "carrier" are often used interchangeably by courts, and both will be used in this article to represent the entity that provides the policy of insurance to its insured.

2. *Ottaviano v. Genex Co-Op, Inc.*, 790 N.Y.S.2d 791 (N.Y. App. Div. 2005).

3. *Feliberty v. Damon*, 517 N.Y.S.2d 632 (N.Y. App. Div. 1987).

4. Illinois is the latest state to adopt the Model Rules, effective January 1, 2010.

5. *Johnson v. Travelers' Ins. Co.*, 199 N.E. 637, 640 (N.Y. 1936).

6. *Servidone Constr. Corp. v. Sec. Ins. Co.*, 477 N.E.2d 441 (N.Y. 1985).

7. See typical CGL policy, such as ISO form CG 00 01 07 98, at Section 1 – Coverage A Bodily Injury And Property Damage Liability (1)(a).

Thus, the same paragraph that creates the duty to defend gives the insurer the absolute right to settle any case, regardless of the wishes of its insured.

### **INSURED-RETAINED DEFENSE COUNSEL RELATIONSHIP**

The relationship between attorney and client had been addressed in Disciplinary Rule 7-101: The attorney is to represent a client zealously.<sup>8</sup> In vague terms, the Rule simply states that a lawyer shall not intentionally fail to seek the lawful objectives of the client.<sup>9</sup> There was no specific language regarding settlement. However, the Model Rules of Professional Conduct directly addresses the question of settlement. Model Rule 1.2 states: “A lawyer shall abide by a client’s decision whether to settle a matter.”<sup>10</sup> Thus, in clear and unequivocal language, the Model rules require an attorney to abide by the client’s wishes, regardless of what the client’s insurer may wish, and notwithstanding the language of the policy.

This article examines the interplay between the insured’s right to consent to settle a case within the context of the Model Rules and an insurer’s right to settle without the insured’s consent. This article also analyzes potential issues that may arise regarding settlement. Finally, this article examines an attorney’s ethical duty to the client.

### **INSURED-INSURER RELATIONSHIP**

The relationship between an insurance carrier and its insured is governed by the policy, various statutes that address this relationship, and court decisions which interpret policies. Fundamentally, however, an insurance policy is a contract and the relationship between the parties, the insurer and insured, is governed by its terms and conditions.<sup>11</sup>

The basic terms and conditions of any CGL policy provide, with few variations, as follows:

#### **SECTION I - COVERAGES**

#### **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

8. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101 (1980). Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . .

9. *Id.*

10. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

11. *Johnson v. Travelers' Ins. Co.*, 199 N.E. 637, 640 (N.Y. 1936); *N.J. Citizens United Reciprocal Exch. v. Am. Int'l Ins. Co.*, 913 A.2d 821, 824 (N.J. Super. Ct. App. Div. 2006); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 125 (Ohio 2006); *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895 (Minn. 2006).

## 1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.<sup>12</sup>

Thus, the right of an insurance company to settle a case goes hand in hand with its duty to defend. This situation was analyzed over twenty years ago in *Feliberty v. Damon*.<sup>13</sup> In *Feliberty*, an insurer settled a case brought against its insured, a physician. The policy did not have a consent to settle clause and expressly permitted the insurer to settle the case.<sup>14</sup> After the insurer settled the case, the insured brought a legal malpractice case against the insurer because the settlement was made without his knowledge. Although the case primarily dealt with whether an insured could hold an insurer liable for legal malpractice of the retained attorneys, the court began by noting that the policy gave the insurer the right to settle the case without the insured’s consent.<sup>15</sup> The court observed that the policy provided that the insurer may make such investigation and settlement of any claim as it deems expedient. As stated by the court, “Such language in the policy gives a carrier the right under that contract to settle an action on behalf of the insured with or without the insured’s consent.”<sup>16</sup> While the court noted that an insurer must respond to inquiries from its insured regarding the status of a case, the court also held that an insurance carrier is not obligated to consult its insured with regard to the settlement.<sup>17</sup> In addition, the court noted that it is certainly not a breach of the insurer’s good faith when an insurer settles a case within the policy limits contrary to the wishes of the insured.<sup>18</sup>

The court examined at least one motivation of the carrier:

Defendant asserts that its decision to settle avoided the possibility of an unfavorable ruling on appeal that might result in a new trial with the unintended risk of a judgment in excess of the previous verdict and the policy limits, thereby exposing their insured (plaintiff) to personal liability. Thus, although we can well

12. ISO form CG 00 01 07 98. Some policies, notably medical malpractice policies, include a consent to settle provision in the policy. However, the typical CGL policy usually does not have a consent to settle provision.

13. 517 N.Y.S.2d 632 (App. Div. 1987).

14. *Id.* at 634. A consent to settle clause gives the insured the ultimate decision whether to settle a case.

15. *Id.*

16. *Id.* at 634.

17. *Id.*

18. *Id.*

appreciate Dr. Feliberty's desire to pursue an appeal to vindicate himself and his professional reputation, MMIA, under the terms of the insurance policy, had an absolute right to settle the action as it deemed expedient, with or without his consent. The exercise of that contractual right obviated the necessity of pursuing any appeal.<sup>19</sup>

Avoiding an appeal or a potential verdict in excess of the demand is one reason a carrier may settle.<sup>20</sup> Another is to avoid excess defense costs.<sup>21</sup> If a case can be settled early in litigation for a nominal amount, thus avoiding tens of thousands in defense costs, it is certainly advantageous to the carrier. Requiring a carrier to defend the case without permitting it to settle the case would place a carrier in an adverse position. It would be in a position of spending tens of thousands of dollars, or even hundreds of thousands of dollars, defending an action as well as being subject to verdicts up to its policy limits based upon the clients refusal to settle, regardless of any good faith basis for the insured's reasoning. Thus, a carrier's right to settle a case is a necessary corollary with its duty to defend.

This is not to say, however, that an insured's refusal to settle cannot be made in good faith. There may be reasons, i.e., personal reputation or a belief that the plaintiff is faking, why an insured may not settle.<sup>22</sup> However, an insured gives up that right vis-à-vis the carrier when it takes out a policy that requires a carrier to defend a case at the carrier's expense.<sup>23</sup>

### INSURER-INSURED-DEFENSE COUNSEL RELATIONSHIP

The new Rules place the retained counsel in a precarious situation. Counsel, although representing its client (the insured), gets paid and takes direction from the carrier. This type of relationship is addressed by the Model Rules of Professional Conduct:

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

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19. *Id.* at 634.

20. *Id.*

21. *Id.*

22. *See* Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988).

23. The right is not absolute. Some states require the settlement to be made in good faith after investigation. *Id.*; Bleday v. OUM Group, 645 A.2d 1358 (Pa. 1994); Shuster v. S. Broward Hospital Dist. Physicians' Prof'l Liab. Ins. Trust, 591 So. 2d 174 (Fla. 1992).

(3) information relating to representation of a client is protected as required by Rule 1.6.<sup>24</sup>

If a carrier wishes to settle a case, but the insured refuses, the retained defense counsel is placed in the middle of the conflict between his client and his source of payment. While the retained counsel could seek to withdraw,<sup>25</sup> any other attorney retained by the carrier would be faced with the same situation.

There have been numerous articles written about the relationship between an insured, an insurer, and the attorney hired by the insurer to defend the insured. These primarily deal with whether the attorney has two clients, the insured and the insurer, and whether the attorney's duty is solely to the insured.<sup>26</sup> For the purposes of this article, it does not make a difference as to whether a dual client relationship is accepted. However, I will address some of the issues involved.

The definitive article regarding this issue was written by Professors Charles Silver and Kent Syverud.<sup>27</sup> This article has been cited no less than 160 times in cases, administrative materials, other law review articles, court documents, and expert testimony. As Silver and Syverud point out, the relationship between the insured and the attorney, in addition to being derived from the policy, is controlled by the retainer agreement.<sup>28</sup> Silver and Syverud argue that the policy and the retainer agreement "bleed" into each other.<sup>29</sup> Silver and Syverud further argue that, depending on the retainer agreement, both the carrier and the insured can be a client.<sup>30</sup>

Silver and Syverud continue by arguing that an attorney's duty to the client is limited to what is specifically set forth by a retainer agreement.<sup>31</sup> This proposition arguably has some support from the case of *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*,<sup>32</sup> a New York case involving the scope of responsibility of defense counsel hired by Shaya B. Pacific's insurance company to defend the insured, Shaya B. Pacific, in a personal injury action. The policy limit was \$1,000,000. The underlying plaintiff was seeking damages of \$52,500,000. A representative of the primary carrier that retained defense counsel wrote to the insured outlining the representation provided by the primary carrier. In that correspondence, the carrier advised the insured that the amount sought in the complaint was in excess of the policy limit, and that the insured may wish to engage counsel of its choice, at its own expense, to act on its behalf regarding any potential excess judgment. The primary carrier also advised the insured to

24. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2010).

25. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

26. See, e.g., *Montanez v. Irizarry-Rodriguez*, 273 N.J. Super 276 (App. Div. 1994); *Rogers v. Robson, Masters, Ryan, Brumund and Belam*, 74 Ill. App. 467 (3d Dist. 1979).

27. Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995). [hereinafter Silver & Syverud article].

28. *Id.* at 270.

29. *Id.* at 309.

30. *Id.* at 289-90.

31. *Id.* at 289; Indeed, Model Rule 1.2 provides that a lawyer may limit the scope of the representation "if the limitation is reasonable under the circumstances and the client gives informed consent."

32. 827 N.Y.S.2d 231, 232 (App. Div. 2d Dep't 2006).

determine if excess coverage was available, and to notify the excess carrier.<sup>33</sup> After summary judgment was awarded to the underlying plaintiff, defense counsel tendered the case to the excess carrier. The excess carrier declined coverage based upon late notice of the action. In the underlying action, the plaintiff obtained a judgment of \$5,694,320, and his wife obtained a judgment on a derivative claim of \$795,000. The insured then commenced a legal malpractice claim against the law firm. The law firm moved to dismiss, arguing that they had no obligation to notify the insured's excess carrier.<sup>34</sup>

The court began by noting that the letter from the primary carrier failed to conclusively establish that the scope of the firm's representation was limited.<sup>35</sup> While the court emphasized that this was in response to a motion to dismiss, not one for summary judgment, the court seemed to imply that a representation letter or retainer agreement can limit the scope of representation by defense counsel.<sup>36</sup>

The court then addressed the central question of the case: "Whether a law firm retained by a carrier has any duty to ascertain whether the insured it was hired to represent has available excess coverage, or to file a timely notice of excess claim on the insured's behalf."<sup>37</sup> In their examination, the court asked whether, under ordinary circumstances, an attorney retained directly by a defendant in a personal injury action has an obligation to investigate the availability of insurance coverage for its client and to see that timely notices of claim are served.<sup>38</sup> An ancillary question was whether, if such an obligation exists, this obligation also binds an attorney who is retained to defend a personal injury action by defendant's carrier.<sup>39</sup>

To answer the first question, the court noted that whether an attorney can be found negligent for failing to investigate insurance coverage would turn primarily on the scope of the agreed representation.<sup>40</sup> The question is whether the attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession regarding this issue.<sup>41</sup> The court, based upon the letter from the primary carrier, could not answer the question as a matter of law, and thus held that it was a question of fact for a jury.<sup>42</sup>

The court then analyzed whether the same duty would apply to a defense counsel hired by a carrier.<sup>43</sup> The court noted that the carrier's main interest was keeping the verdict as low as possible and below the policy limit.<sup>44</sup> The carrier had

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33. *Id.*

34. *Id.* at 233.

35. *Id.* at 234.

36. *Id.* ("In light of these standards, and considering the circumstances of the case and the arguments addressed by the parties, the defendant's law firm would be entitled to dismissal pursuant to CPLR 3211(a)(1), if it could establish either that the letter dated January 25, 2001, conclusively proved that the scope of its representation never encompassed any responsibility with respect to possible excess coverage . . .").

37. *Id.* at 235.

38. *Id.*

39. *Id.*

40. *Id.* at 236.

41. *Id.*

42. *Id.*

43. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

44. *Shaya B. Pacific*, 827 N.Y.S.2d at 237.

no interest in whether excess coverage was available.<sup>45</sup> The court recognized that a conflict may have arisen had the issue concerned the scope or nature of coverage of the primary policy, but because the carrier had no interest in the existence of excess coverage, no conflict existed.<sup>46</sup> The court noted that it was unprepared to say whether, as a matter of law, defense counsel hired by a carrier has a duty to investigate the existence of excess coverage.<sup>47</sup>

On the surface, it appears that *Shaya B. Pacific* supports Silver and Syverud's argument that representation can be limited pursuant to retainer agreement. However, an important distinction to note is that the question in *Shaya B. Pacific* dealt with excess coverage. It did not deal with what may be considered ordinary aspects of litigation, such as settling a case, and performing those functions relating to settlement, such as signing and filing the settlement documents.

Silver and Syverud argue that an attorney's scope can be limited. For example, an attorney's scope of representation can include everything except settlement obligations.<sup>48</sup> This proposition is unworkable in the real world.

First, Silver and Syverud argue that an attorney could do everything to properly defend a case, but when it comes to settlement, the most important part of the case short of trial, they should abandon their client. This would have significant ramifications regarding settlement of cases.

Silver and Syverud argue the insured should get their own attorney to advise about settlement. However, many insureds are individuals or small businesses and one reason why they have insurance is because they cannot afford, or do not want to pay for their own attorney. Under Silver and Syverud's argument, anytime an insured has an issue of settlement, they must pay out of their own pocket in order to merely get advice regarding a proposed settlement. This method is unworkable and goes against the very reason to obtain insurance.<sup>49</sup>

An attorney is often obligated to give advice, and merely giving advice does not necessarily create a conflict of interest. Regarding settlement there is much advice an attorney can give without creating a conflict. Most significantly, while an attorney could be prohibited from advising whether to accept or reject the settlement, the attorney should be able to provide useful advice to the client as to the consequences of not settling. This advice should include the pluses and minuses of the case, possible uninsured exposure, the strength of plaintiff's case, possible defenses, the value of the case, and whether a defense verdict is likely. This can be done without creating a conflict.

Significantly, Silver and Syverud's proposal would essentially prevent the attorney of record from even assisting in settling the case by reviewing the release, and signing the stipulation of discontinuance. Again, when an insured most needs its attorney, Silver and Syverud argue that the attorney should abandon their client

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45. *Id.*

46. *Id.*

47. *Id.* at 236.

48. Silver & Syverud article, *supra* note 27, at 299-300.

49. Indeed, liability insurance has often been referred to as "litigation insurance" because it protects the insured from all aspects of litigation.



to the client's own devices. This is unworkable and unreasonable under the circumstances.<sup>50</sup>

Silver and Syverud recognized that their proposal, particularly dealing with settlement, is controversial and subject to much criticism.<sup>51</sup>

For example, the attorney of record should be encouraged to review the release and settlement documents even if the insured does not want to settle. This would only serve to protect the insured. There is no conflict of interest in assisting the settlement if the carrier insists on settling the case, as it is their right under the policy of insurance. However, this assistance would be prohibited by the newly adopted Model Rules.<sup>52</sup>

If the insurer insists on settling the case, but the client refuses to settle, it is not in the client's best interest to have the insurer settle the case anyway, without the input of the attorney representing the insured. The attorney could merely review the release to ensure his client is thoroughly protected. An insurer has incentive to protect only itself, not its insured, following settlement. Therefore, it is advisable to have the attorney of record be able to review settlement documents, even if the client absolutely refuses to settle, and, at the same time, avoid any ethical problems pursuant to the Model Rules.

A simple recitation of the facts relevant to settlement, or to ensure the insured's protection if the insurer settles without the insured's consent, would not create a conflict. These facts would include: policy and coverage considerations, defenses to the claim, potential damages, the chance of success at trial, and defense costs if the insured insists on continuing the defense without the carrier's input. These are facts, not opinions, and the mere representation of facts would not create a conflict of interest.<sup>53</sup> Ethical considerations, rules, and retainer agreements would not prevent unethical attorneys from acting as such. However, there must be a presumption that attorneys will act ethically when advising their client as to facts.

### POSSIBLE SITUATIONS

When a carrier and an insured are in conflict as to whether to settle, this could create a situation where the attorney is essentially placed in the middle of a tug-of-war between his client (the insured) and the carrier.

There are three potential problems that could arise from the conflict between the Rules and the requirements of an insurance policy. The first problem that could arise is when the carrier settles directly with the plaintiff. The insured has consented to the carrier settling the case by virtue of the policy condition. The settlement would be valid as against the plaintiff.<sup>54</sup> However, the question is the

50. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

51. Silver & Syverud article, *supra* note 27, at 302.

52. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

53. This presumes, of course, that the attorneys would abide by the ethical obligations to accurately state the facts and not distort the facts in favor of the carrier.

54. *Fiese v. Cooke*, 23 Cal. Rptr. 3d 496, 498-99 (2d Dist. Ct. App. 2004); *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1302 (Ind. 1998).

impact the settlement would have on the attorney who was hired by the carrier. Clearly, the insured is the attorney's client. Therefore, the attorney must abide by his client's wishes. However, the attorney is being retained pursuant to a contract between the insured and the carrier. The question is how these relationships interact.<sup>55</sup>

A second possible situation is that the carrier will withdraw from defending the insured, leaving the insured with potential uninsured exposure. If the carrier withdraws, the defense counsel retained by the carrier will most likely also seek to withdraw. Even if defense counsel remains and continues to defend the insured, the insured would have to pay for this defense with its own money.

Also, a question arises as to who would pay any settlement and/or verdict. The insured may be required to pay anything over what a carrier could have settled if they had the insured's consent. Most carriers would probably argue that the insured should pay the entire amount of the verdict because the insured failed to abide by the terms and conditions of the policy, namely the settlement clause. Whatever the ultimate outcome, this issue could delay payment to the injured party and would increase litigation costs on all sides.

The final problem is that of attorney discipline. The insurance contract provides that the insured has given up the right to settle, but that may not impact the attorney's obligation to its client.

For example, if the attorney assists in preparing the closing papers when the carrier settled directly with plaintiff, can the attorney then be disciplined for failing to abide by the client's wishes as to whether to settle? These types of questions must be answered.

### CARRIERS' RIGHT TO SETTLE

The first possible situation is that the carrier will notify the insured that, pursuant to the policy, the carrier has a right to settle. This is a right the insured gives to a carrier in the policy, and has generally been upheld by the courts.<sup>56</sup>

The carrier may settle the case without the involvement of counsel. The carrier can make an agreement directly with the plaintiff, something that is fairly common in "settlement days" where carriers try to settle many low value cases at one time. While the insured may protest, a carrier has the contractual right to settle the case.<sup>57</sup>

Another possible situation is that the carrier will advise the insured that the carrier will no longer defend or pay for defense counsel, and any future settlement and/or jury award will only be paid by the carrier for up to the amount that it could have settled the case. Thus, if the carrier can reach a settlement of \$100,000 early in the litigation, and the verdict returns at \$1,000,000, the insured will face

55. Rogers v. Robson, 392 N.E.2d 1365, 1370-71 (Ill. App. 3d Dist. Ct. 1979).

56. Fiese, 23 Cal. Rptr. 3d at 499.

57. *Id.*

\$900,000 of uninsured exposure.<sup>58</sup> Any court, however, would critically view this situation, and the ultimate outcome may not be satisfactory to either party. Also, how this would impact retained defense counsel remains to be seen.

### CARRIER WITHDRAWS

A carrier may also disclaim coverage based upon the client's failure to cooperate in the defense of the action, or for violation of the settlement clause. This will leave the client facing uninsured defense costs, and uninsured exposure. Whether a carrier can unilaterally withdraw would be looked at closely by courts.<sup>59</sup>

The Model Rules will make settlements more difficult. The Rules will likely increase the number of declaratory judgment actions against carriers, malpractice actions against defense counsel, and supplemental litigation regarding the settlement. While any settlement will likely be affirmed,<sup>60</sup> the subsequent litigation will unequivocally create a conflict between the client (insured) and defense counsel. Innocent defense counsel will be placed in a situation defending its actions, and perhaps attacking its former client. This will likely lead to further litigation and additional costs for all parties concerned.

### ATTORNEY DISCIPLINE

In addition to increased litigation and costs to all parties, defense counsel may face discipline and/or claims of malpractice based upon any settlement reached without the consent of its insured. Two unanswered questions are whether the defense counsel has to affirmatively receive the insured's consent to settle, and whether it would only be considered a violation of the disciplinary rules if the attorney actually goes against the client's affirmative statement that it does not want to settle.<sup>61</sup> The new Rule does not elaborate: it only states that the attorney should abide by the client's decision.<sup>62</sup> Defense counsel must be aware that it may face disciplinary action or malpractice claims if it takes part in a settlement arranged by the carrier against the wishes of the client or if counsel receives no direction from the client.

Decisions on this issue primarily deal with plaintiffs' attorneys settling a case without its clients' consent and are coupled with other disciplinary violations. Most commonly, these include lack of communication and not immediately turning over

58. This would be true regardless of the policy limits. If the insured had a \$1,000,000 policy limit and the insurer could settle the case for \$100,000, the insured may face uninsured exposure for any verdict over \$100,000 if the insured refuses to settle.

59. See generally, *Iacobellis v. A-1 Tool Rental, Inc.*, 885 N.Y.S.2d 293 (App. Div. 2d Dep't 2009); *Great Am. Ins. Co. v. Superior Court*, 100 Cal. Rptr. 3d 258 (Ct. App. 2d Dist. 2009); *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761 (Mo. 2009); *Polarome Int'l, Inc. v. Greenwich Ins. Co.*, 961 A.2d 29 (N.J. Super. Ct. App. Div. 2008); *Providence Washington Ins. Co. v. A & A Coating, Inc.*, 30 S.W.3d 554 (Tex. App. 2000); *Truck Ins. Exch. v. Superior Court*, 59 Cal. 2d 529 (Ct. App. 2d Dist. 1996); *Steadfast Ins. Co. v. Sheridan Children's Healthcare Servs. Inc.*, 34 F. Supp. 2d 1364 (S.D. Fla. 1998).

60. See *Fiese*, 23 Cal. Rptr. 3d at 497.

61. See generally, *Farris v. JC Penney Co.*, 176 F.3d 706 (3d Cir. 1999).

62. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

the settlement funds. Cases addressing disciplinary action against a defense counsel settling a case without a client's consent are difficult to find. Insureds have attempted to bring malpractice and/or bad faith claims against the insurers that settle without consent. These attempts are generally unsuccessful.<sup>63</sup>

A carrier has two good arguments that it can either withdraw from defending an insured that refuses to settle or can settle a matter regardless of the insured's desire.<sup>64</sup> This could greatly impact insureds that did not receive adequate advice, or ignored advice, regarding the potential consequences of withdrawal by the insurer. In addition, carriers can argue that any obligation for defense and indemnity has been waived because of the insured's violation of the settlement clause. Therefore, an insured may face complete uninsured exposure if it takes this route.

The short-term problems will be cases which are more difficult to settle. There will be cases where the carrier wants to settle the case, but the insured refuses. Also, there will be cases where defense counsel does not know the client's decision. Later litigation regarding settlements, or the failure to settle cases, will work its way to the lower courts and appellate courts.

Until such time when the courts give guidance on this issue, attorneys must be aware of these situations and tread lightly. In addition, courts must recognize the potential problems in the early cases arising from these situations. Courts should not overly penalize attorneys who are making good faith efforts to comply with the Rules, the client's wishes, and the carrier's wishes.

Simply put, an attorney may face disciplinary action if it violates disciplinary rules. One of the Model rules requires that an attorney abide by its client's decision on settling. An attorney that does not abide by a client's refusal to settle may face disciplinary action.<sup>65</sup> The specific ramifications remain a mystery.

### **DOES INSURED'S AUTHORIZATION TO INSURER EQUAL PERMISSION TO SETTLE A CASE?**

The new Model Rules require that an attorney abide by its client's direction whether or not to settle the case. As demonstrated throughout this article, this could lead to conflicts between the attorney and client and between the client and the insurance company. However, the client has already given direction regarding settlement. That is, the insured has agreed to permit the insurance company to determine whether to settle a case when the policy is purchased.

The question is whether that agreement could be applicable to the insured-defense attorney relationship. The insured's decision to permit the carrier to decide

63. See *Coats v. Ruiz*, 198 S.W.3d 863, 883 (Tex. App. 5th Dist. 2006); *Bleday v. OUM Group*, 645 A.2d 1358, 1363 (Pa. 1994); *But see*, *Bankr. Estate of Morris v. Copic Ins. Co.* 192 P.3d 519, 527 (Colo. App. 2008).

64. *Hurvitz v. St. Paul Fire & Marine Ins. Co.*, 109 Cal. App. 4th 918, 931 (Ct. App. 2d Dist. 2003); *Marginian v. Allstate Ins. Co.*, 481 N.E.2d 600, 603 (Ohio 1985).

65. See *In The Matter of White*, 663 S.E.2d 21, 28 (S.C. 2008); *In re Belding*, 589 S.E.2d 197, 201 (S.C. 2003); *In re Hauffman*, 883 So. 2d 425, 430 (La. 2004).

makes the settlement valid as against the plaintiff.<sup>66</sup> There is simply no reason not to expand this rationale to retained defense counsel in determining, for ethical considerations, that the client has already made a decision regarding settlement by giving the carrier the option to settle the case.<sup>67</sup>

Generally, a client's decision whether to settle a case is revocable.<sup>68</sup> However, regarding a case being defended pursuant to an insurance policy, the only way to revoke that decision is to revoke the policy. Thus, the defense counsel who is retained by an insurance company would no longer have the obligation to defend the client and could withdraw from the case.

Permitting the insured's decision, giving the carrier the ultimate settlement authority to the insurer to settle to apply to defense counsel's ethical obligations, would remove any obstacle in the way of the attorney assisting in reviewing and filing the settlement documents. Again, as described in detail above, the defense counsel would not give advice regarding whether to settle. However, the decision by the insured to permit the carrier to decide whether to settle the case would insulate the attorney from any ethical problems if the attorney merely assisted in reviewing and submitting the final papers after the carrier has settled the case.

As noted, generally a carrier's decision to settle the case is binding on the insured.<sup>69</sup> An insured can make a decision not to settle the case but would have to repudiate the insurance policy. This would lead the carrier to cease defending the case and, thus, to cease paying defense counsel. The defense counsel could then make a deal wherein the insured would pay them or would seek to be relieved for non-payment. If defense counsel continues to defend the insured, after being paid by the insured, then, of course, the insured would have the ultimate decision to settle the case. If defense counsel withdraws, any potential conflict would cease.

Automatic withdrawal by defense counsel would only place added burdens on the insured, the defendant in the action, to hire its own attorney to merely review whether to settle the case. If a decision is ultimately made to settle the case, this would create additional costs for the defendant and additional delay in the court system. Therefore, it is unrealistic to require defense counsel to either withdraw immediately upon the potential conflict between the carrier and the insured or to remain mute regarding possible settlement.

There will always be conflicts between a defendant and his attorney regarding the strategy and tactics of a case.<sup>70</sup> For example, whether the best trial strategy is to concede liability, or which witnesses should be called will always be a source of

66. Scott v. Randle, 697 N.E.2d 60, 67 (Ind. 1998); Nat'l Union Fire Ins. Co. v. Jay Tee Equities Co., 216 A.D.2d 546 (N.Y. App. Div. 2d Dep't 1995); Koval, 979 F. Supp. at 1231.

67. Teague v. St. Paul Fire & Marine Ins. Co., 10 So. 3d 806, 835 (La. 1st Cir. Ct. App. 2009). (quoting Mitchum v. Hudgens, 533 So. 2d 194, 201 (Ala. 1988), "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 consent prior to a settlement of a claim against him, no real conflict of interest exists between the insured and insurer, at least where the claim or settlement is without policy limits and there has been no reservation of rights by the insurer.").

68. Lieberman v. Emps. Ins., 419 A.2d 417, 423 (N.J. 1980); Luckett v. Greyhound Lines, Inc., 817 F.2d 1182, 1183 (5th Cir. 1987).

69. Fiese, 23 Cal. Rptr. 3d at 499.

70. See generally, Esguerra v. State, No. A-8395, 2005 WL 19220 (Alaska Ct. App. Jan. 5, 2005).

contention.<sup>71</sup> This is true whether counsel is hired directly by a defendant or by an insurance company. While sometimes these conflicts cannot be resolved, and the attorney must withdraw, they often can. A client often delegates authority, including authority to settle, to others.<sup>72</sup> However, this delegation is revocable.<sup>73</sup> As noted above, the only way to revoke the authority to settle given by a carrier is to repudiate the policy. This will, in essence, end any conflict the attorney has, because the carrier would no longer be defending the insured.

This is true for other tactical decisions. Generally, a carrier has the right to control the litigation, including: conceding liability, determining which experts to hire, etc. The only way for the client to stop the carrier from exercising this authority is to repudiate the policy. This would end all conflicts. Thus, in reality there is no conflict with the defense attorney. Defense counsel could state their reasons for the tactical decision, and it would still be up to the client whether to accept the decision. Since defense counsel will no longer be getting paid by the insurer, defense counsel would be free to either observe the client's wishes or to withdraw from the case.<sup>74</sup>

The Model Rules require an attorney to abide by his or her client's wishes, specifically regarding settlement, but also with decisions regarding the objectives of representation.<sup>75</sup> In the tri-partite relationship between an insurer, defense counsel, and insured, the insured has already contractually given the right to control litigation and to settle the case to the insurer. Therefore, an attorney abiding by the directives of the insurance company is abiding by his client's wishes. If the client repudiates the policy to take back tactical control on settlement authority, any potential conflict would end. The attorney could continue to defend the action, being paid directly by the client, or seek to withdraw because the client has repudiated the insurance policy.

## CONCLUSION

The only conclusion to be reached is that there will be significant confusion in the next few years. While this issue will not arise in a significant majority of cases, there will be cases where conflicts arise between a client's desire for vindication and clearing of his or her good name and the carrier's desire to keep costs down and protect itself from excessive verdicts. This issue can arise despite both the insured and the insurer acting in good faith. Defense counsel will be in the middle, trying to resolve this dispute. At the same time, defense counsel must be aware of its own reputation and its very ability to practice law. Defense counsel may be subject to possible suspension for the violation of the disciplinary rules as it seeks

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71. *Id.*

72. James M. Fischer, *Insurer-Policyholder Interests, Defense Counsel's Professional Duties, and the Allocation of Power to Control the Defense*, 14 Conn. Ins. L.J. 21, 41 (2007).

73. *Id.*

74. *Id.*

75. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

to walk the minefield created by the new Rules. It is not a question of whether this issue will arise and cause problems, but when.