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Professional Responsibility

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I. CAN A TRIANGLE BE FAIR AND SQUARE?

Rule 1.7 of the Louisiana Rules of Professional Conduct begins with this sentence: "Loyalty is an essential element in the lawyers relationship to a client."[1] The task force of the Louisiana State Bar Association which submitted these rules to the Louisiana Supreme Court for its approval thought this sentence so important that it took it out of the comments where it is found in the American Bar Association rules of professional conduct and put it into the black letter rule of 1.7. It is the writer's intent to explore this element of loyalty in the relationships created by an insurance policy which imposes upon the insurer the duties of defense and indemnification. One author has termed this relationship "the eternal triangle."[2] The problem of course is whether the lawyer has one client or two. If we say that the lawyer has but one client, whether the insured or the insurer, we are ignoring practical reality. On the other hand, if we say that the lawyer has two clients, then there must be a perfect commonality of interest, or the lawyer finds himself in an impossible situation, because being perfectly loyal to one client would evidence disloyalty to the other.

Another force on the Louisiana attorney's duty of loyalty is the Direct Action Statute.[3] All of the articles which the writer has been able to find concerning this ethical dilemma have considered the problem in the context of suits involving only one defendant, the insured. The existence of insurance and the limits thereof are normally kept from the jury, and the second duty of the insurance company, "indemnity," is a true indemnification after a judgment has been rendered against the insured. In Louisiana, because of the Direct Action Statute, an insured is very seldom the only defendant. Almost inevitably the insurance company is joined as a solidary obligor. In addition, the instances in which an insurer may be sued alone are very limited. It is not then a question of later indemnification, but of a judgment directly against the insurance company as well as a judgment against the insured. In performing its first duty, the insurance company does in fact select the attorney to defend not just the insured, but both insured and insurer. This attorney makes an appearance on behalf of both defendants. Under this scenario it is impossible to say that the attorney represents one or the other, but not both. And it is likewise impossible to say that one of the clients is primary and that the other client is secondary.

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1. La. R.S. ch. 4, app., art. 15, rule 1.7 (1988).

2. Brooke Wunnicke, *The Eternal Triangle: Standards of Ethical Representation by the Insurance Lawyer*, 31 For the Def., Feb. 1989, at 7.

3. La. R.S. 22:655 (Supp. 1993).

In the states which do not have a Direct Action Statute, any one of three positions could be strongly supported: (1) the attorney represents the insurance company only, which hired him.; (2) The attorney represents both the insurance company which hired him and the insured by virtue of the contract of insurance; and (3) the attorney represents only the insured even though the insurance company is paying his fee.

Professor L. Ray Patterson in his textbook on legal ethics[4] solves the problem analytically in this fashion:

> The lawyer represents the insurer as a primary client; The lawyer represents the insured as a derivative client. This is because the insured's relationship with the lawyer is derived by way of the insured's relationship with the insurer. Thus, the rights and duties of the lawyer in relation to the insured are determined by the insurer's rights and duties to the insured. This means, of course, that the lawyer's rights and duties in relation to the insured are the same of those of the insurer.[5]

If there was always a perfect commonality of interest between the insurance company and the insured, this analytical solution would probably work. We know, however, that this is not correct, and that there are many situations which give rise to various and serious conflicts of interest between the insured and the insurer, the most common of which is the question of coverage. Because the usual insurance policy covers "accidents" or "negligence," but does not insure against intentional acts, the insurer prefers the act framed as an intentional one, whereas the insured, of course, does not. Another conflict involves the insurance company's quite rational desire to put out as little money as possible and the insured's desire that the matter be settled within policy limits. On the other hand, with professional people, whether doctors, lawyers, accountants, or others, you may have the insured wishing to vindicate himself by trial at all costs and the insurance company desiring to settle. In some instances you find the exact reverse of this situation with the professional desiring to settle quietly and without undue damage to his reputation, but the insurance company not being willing to put out "top dollar."[6] It is not the purpose of the writer to examine all of the many conflicts which can exist between an insurer and the insured, but to examine the Louisiana authorities to see how the conflict should be ethically resolved.

We first look to Louisiana model rules of professional responsibility and find that Rules 1.7, 1.8(B) and 1.8(F) are pertinent. The writer's aware that application of these rules to the interrelationship among a liability insurer, its insured, and the attorney chosen by the insured has been described as "awk-

4. L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility (2d ed. 1984).
5. *Id.* at 160.
6. Gibson v. Western Fire, 682 P.2d 725 (Mont. 1984).

ward."[7] The same court termed such relationships as "sui generis."[8] This is of no help to the insurance defense lawyer who finds himself on the horns of the dilemma. He does not want to guess at the proper ethical solution, but rightly expects to have some definite guideline which will avoid disloyalty to either client and at the same time protect him from charges of bad faith and possible malpractice claims.

If Louisiana did not have the Direct Action Statute, we could simply embrace the one client theory, i.e., that the one client is the insured, and the attorney would show absolute loyalty to that client, even though the attorney is paid by the insurance company which is ethically permitted to do so. Since Professor John K. Morris published his article on this question in 1981,[9] the one client view has certainly caught on.[10] This view also has the endorsement of the American Bar Association in its Opinion Number 282 rendered in 1950. The opinion first discusses the relationship existing between the insurance company and the insurer as follows:

> From an analysis of their respective undertakings it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest. The requirement that the insurance shall defend any such action contemplates that the company, because of its contractual liability and community of interest, shall take charge of the incidence of such defense including the supervising of the litigation. Whenever the insured is served with the court process as defendant, the contract of insurance expressly requires him to forward such process to the company so that the company may provide the means of defense. It is elemental that this includes retaining and compensating a lawyer at the company's expense.[11]

The opinion goes on to discuss the 1908 Canons of Ethics, particularly Canon 6, and concludes that the essential point of ethics involved is that the lawyers so employed shall represent the insured as his client with undivided fidelity.[12] This same opinion, however, accepts unequivicably that a lawyer

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7. Moritz v. Medical Protective Co., Etc., 428 F. Supp. 865 (W.D. Wis. 1977).

8. *Id.* at 872.

9. John K. Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 Utah L. Rev. 457.

10. Rebecca White Berch, *Insurer-Insured Conflicts: Can Insurer-retained Council Be True to the Insured?*, 23 Land & Water L. Rev. 185 (1988) and Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Council: The Eternal Triangle Reformed*, 66 Tul. L. Rev. 511 (1991).

11. ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950).

12. *Id.*

may ethically undertake dual representation of the insurer and the insured.[13] In 1981, however, the ABA issued Informal Opinion 1476 which states "when a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client."[14] The best that can be said of the ABA position is that either view is ethically correct. Writers on ethics who have considered this triangular relationship have concluded that the jurisprudence by and large has followed the dual representation standard.[15]

Since there is no way that a Louisiana insurance defense lawyer can claim that he represents only the insured when he has in fact signed his pleadings on behalf of both the insured and the insurer as a result of the Direct Action Statute, we must look to the ethical rules on dual representation. It is equally true that the Louisiana insurance defense lawyer cannot consider the insurance company the primary client and the insured the secondary client or vice versa. They are both his clients, and to each he owes a duty of undivided loyalty.

Rule 1.7 of the Louisiana Rules of Professional Conduct provides as follows:

> Loyalty is an essential element in the lawyer's relationship to a client. Therefore:
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> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) Each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless;
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[16]

Rule 1.8(b) provides as follows:

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless consents after consultation.[17]

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13. *Id.*
14. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981).
15. Charles W. Wolfrom, Modern Legal Ethics 430 (1986) and Wunnicke, *supra* note 2.
16. La. R.S. ch. 4 app., art. 16, rule 1.7 (1988).
17. La. R.S. ch. 4 app., art. 16, rule 1.8(b) (1988).

Rule 1.8(f) provides:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1) The client consents after consultation, or the compensation is provided by contract with a third person such as an insurance contract or a prepaid legal service plan.
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> (2) There is no interference with the lawyer's independent or professional judgment or with the client/lawyer relationships; and
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> (3) Information relating to representation of a client is protected as required by Rule 1.6.[18]

Obviously Louisiana Rule 1.7, which is the general conflicts article, deserves our primary focus. Professor Monroe Freedman in his textbook, Understanding Lawyers' Ethics, points out that the provisions of 1.7(a) are redundant and that actually all we have to look at are the provisions of 1.7(b).[19] He concludes that "there is a conflict of interest whenever 'the representation of [a] client maybe materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.'"[20] He goes on to point out, however, that the conflict of interest is waivable if two conditions are met.

> First, the client must consent, knowingly and voluntarily, to limit the representation to the extent required by the conflict. Second, the lawyer must reasonably believe that the client has fully understood the implications of the conflict and that the representation, as limited, will not be adversely affected by the conflict in any way that has not been consented to by the client.[21]

In view of the tremendous number of cases in other jurisdictions regarding the conflict of interest which the insurance defense lawyer may have, it is surprising to discover that Louisiana has very few reported cases on the subject. And more than half of these cases are from the Federal Court. One of the reasons for this may be the continued working of the case by the insurance company officials or adjusters. They deal directly with the plaintiff's lawyer in negotiation and also continue to deal directly with their insured. The insurance defense lawyer is "outside the circle."[22]

In 1974, the professional responsibility Committee of the Louisiana State Bar Association was asked to give its opinion as to the propriety of the following:

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18. La. R.S. ch. 4 app., art. 16, rule 1.8(f) (1988).
19. Monroe H. Freedman, Understanding Lawyers' Ethics 191-92 (1990).
20. *Id.* at 190 (quoting Model Rules of Professional Conduct Rule 1.7(b) (1983)).
21. *Id.*
22. Maryland Cas. Co. v. Dixie Ins. Co., 622 So. 2d 698 (La. App. 1st Cir. 1993).

> *"Where the insurer either denies coverage to the insured or reserves its rights to do so subsequently, may the same attorney properly represent both the insured and the insurer?"*[23]

The Committee answered the question in this fashion:

> Under the circumstances presented, the Committee is of the opinion that it would be improper, with or without the consent of all parties concerned, for the same attorney to represent both the insurer and the insured.
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> The Committee is compelled to this conclusion based upon its belief that once the insurer decides to assert a coverage defense, the same attorney may not represent both the insured and the insurer. Canon 5 and, to some extent, Canon 7, would militate against such dual representation. EC 5-1 provides that the attorney's professional judgment should be exercised "solely for the benefit of his client and free of compromising influences and loyalties," including "interests of other clients." EC 5-14 states that an attorney cannot represent two clients with "conflicting, inconsistent, diverse, or otherwise discordant" interests. And EC 5-15 indicates that counsel "should resolve all doubts against the propriety of the representation."
>
> The Committee feels that when coverage is disputed, the interests of the insured and the insurer are always divergent. The attorney should not be placed in the position of divided loyalties. Such an arrangement would be adverse to the best interests of the insured, the insurer, the attorney, and the profession.[24]

In 1976 the Louisiana Association of Defense Counsel applied to the Supreme Court of Louisiana for a review of Opinion 342. In a one line ruling the Supreme Court stated: "Application denied. There is no error in Opinion 342."[25] In the meantime, Judge Alvin Rubin in *Storm Drilling Co. v. Atlantic Richfield Corp.* quoted Opinion 342 with approval even though it was issued after the fact took place in *Storm Drilling*.[26] Judge Rubin concluded that Opinion 342 simply stated ethical principles that had been established long before. As he put it: "It is fundamental to the position of an advocate in an advisory system that is loyalty to his client be undivided. The lawyer's duty to his client is fiduciary in nature. He is, literally his client's attorney at law, agent, advocate, and champion."[27]

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23. Louisiana State Bar Association Comm. on Professional Responsibility, Op. 342 (1974) (italics in original).

24. *Id.*

25. In re Louisiana Association of Defense Counsel, 338 So. 2d 294 (La. 1976).

26. Storm Drilling Co. v. Atlantic Richfield Corp., 386 F. Supp. 830, 832 (E.D. La. 1974).

27. *Id.* at 831-32.

Perhaps one of the cases which led to Opinion 342 is *Shehee-Ford Wagon & Harness Co. v. Continental Casualty Co.*,[28] a Second Circuit Court of Appeal case decided by Judge Hamiter in 1936. In that case the insured, Shehee-Ford Wagon & Harness Co., was suing its own insurer Continental Casualty Company for failing to defend it properly in the prior damage case and that the insured was compelled to employ counsel and defend itself separately. In the original damage suit, Franklin Jones sued Shehee-Ford and Continental Casualty Company alleging their liability and solido. Continental provided counsel who answered on behalf of both defendants, but also filed exceptions of prematurity and no-cause of action. The company in these exceptions contended that it was not liable because it had not received the notice required from its insured under the policy and also that the driver of the insured's automobile was an independent contractor and not an employee. The trial court overruled both exceptions and found both defendants liable in solido. Both defendants then appealed through counsel provided by the insurance company. The second circuit affirmed as to Shehee-Ford, but found Continental not liable because of the lack of notice required by the policy. It was at this point that the interest of the two defendants diverged. Shehee through separate counsel that it had been forced to obtain asked for a rehearing in the second circuit which motion for rehearing was opposed by a counsel originally retained to represent both defendants. The motion was denied, and Shehee applied to the Louisiana Supreme Court for writs. Original counsel then attempted to obtain a dismissal or recall of the writs. After reciting all the above facts, the court said:

> The entire record in the prior suit, which is a part of the record in this proceeding, and the progress of the case which we have endeavored to above outline, graphically reveal that the insurer's primary purpose in defending the action was to free itself of liability, irrespective of the fate that might befall the insured. It is true that it presented the defense of independent contractorship for the insured in the various courts which considered the case; but it is likewise true that such insurer would have escaped liability had that defense been finally sustained. And, while defending on that ground, insurer was also seriously urging that it was not liable under the policy, even though the insured might be liable to Jones. It appears to us that these defenses, in so far as insured was concerned, were inconsistent, one with the other. It was the duty of the insurance company to either deny its obligation to the insured, and rely on that defense, or to recognize the policy as being in full force and effect and give to insured its undivided support.[29]

28. 170 So. 249 (La. App. 2d Cir. 1936).
29. *Id.* at 251-52.

The court went on to award to the plaintiff $500 as reimbursement for its legal expenses.[30]

In 1968, Judge Albert Tate authored the opinion in *Brasseaux v. Girouard* in which he reviewed the jurisprudence throughout the United States concerning a lawyers obligation not to represent different interests which are hostile or in conflict with one another in the same law suit and concluded that when the lawyer in violation of this principal does find himself representing conflicting interest, the court in which the proceeding is pending should disqualify counsel.[31] In the following paragraph he gave the reasons assigned for this disqualification rule:

> Reasons assigned for the fairly strict disqualification principle followed by all American jurisdictions in which the issue has arisen, having included its necessity in order to encourage maximum disclosure by clients to counsel of all relevant facts, without fear of future adverse use of this confidence. The courts also express as rationale that public confidence in the legal profession as a whole might otherwise be impaired. For these reasons of public policy, the general rule is that doubts in borderline cases should be resolved in favor of disqualification, with the important injunction being reiterated that, for these reasons, even the appearance of conflict should be avoided.[32]

The specific conflict of interests in *Brasseaux v. Girouard* concerned counsel's previous representation of both the insured and its insurer, and a conflict that arose thereafter. The facts did not indicate that the former client, the insured, had either actually or tacitly waived the conflict, and consequently he retained the right to urge disqualification of the attorney. In a footnote, Judge Tate referred to Opinion 102 of the Professional Responsibility Committee of the Louisiana State Bar Association. Opinion 102 is a landmark in which the Professional Responsibility Committee stated that it was never proper for one attorney to represent both the driver of an automobile and the guest passenger. From the opinion, it would appear that many lawyers prior to the issuance of Opinion 102 did not consider it unethical to represent both the driver and the guest passenger. The Committee, however, was very firm in its view that such representation could never be undertaken regardless of consent.[33]

In 1972, the Louisiana First Circuit Court of Appeal was confronted with a most unusual question: could a former client, the insured, subpena the entire file of the attorney who had represented both the insured and the insurer in the prior

30. *Id.* at 253.

31. 214 So. 2d 401, 404-06 (La. 1968).

32. *Id.* at 406.

33. Louisiana State Bar Association Committee on Professional Ethics and Grievances, Op. 102 (1964).

litigation?[34] State Farm Mutual Automobile Insurance Company was seeking writs to annul a subpena duces tecum. The Court, through Judge Landry, stated that it was faced with an apparently res nova situation.[35] The attorney whose records were sought to be subpoenaed had formally represented the insured and the insurer pursuant to a contract of insurance and allegedly failed to settle within the policy limits when he could have and should have done so. It is obvious that the present plaintiff hoped to be able to establish from the attorney's own file that he had received offers to settle within the policy limits and even negligently or improvently did not do so. Judge Landry concluded:

> We believe in elementary that the client is entitled to the benefit of the opinions, conclusions and theories of his attorney or expert as may be reflected from the contents of the attorney's or expert's file. We deem it equally basic that an attorney or expert may not be permitted to withhold any information that would adversely affect the legal rights of a client or employer on the ground that it would disclose the attorney's or expert's opinions or conclusions concerning the rights of another client whom the attorney represented simultaneously in the same matter. Under such circumstances, it is our opinion that the attorney must disclose to either client all opinions, conclusions and theories regarding the client's rights and position, even in communications to other parties whom the attorney also represented in the same matter. *Certainly it is the attorney's duty to fully inform each client, that is what the attorney is engaged to do, and especially if there exists a slightest conflict of interest.*[36]

This is perhaps an area of practice where attorneys fall short having been hired and paid by the insurer, it is nothing less than human to keep the insurer advised of all details, but at the same time to neglect passing on information to the insured. As stated in *United States Fidelity & Guaranty Co. v. Louis A. Roser Co.*:

> Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interest of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company.[37]

The same view is echoed in *Purdy v. Pacific Automobile Insurance Company*, wherein the court said,

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34. Cousins v. State Farm Mutual Automobile Ins. Co., 258 So. 2d 629 (La. App. 1st Cir. 1972).
35. *Id.* at 635.
36. *Id.* at 35-36 (emphasis added).
37. U.S. Fidelity and Guaranty Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978).

> [T]he "triangular" aspect of the representation afforded the insured by the insurer's lawyers is described as a coalition for a common purpose, a favorable disposition of the claim—with the attorneys owing duties to both clients. As a practical matter, however, there has been recognition that, in reality, the insurer's attorneys may have closer ties with the insurer and a more compelling interest in protecting the insurer's position, whether or not it coincides with what is best for the insured.[38]

One of the latest cases in Louisiana dealing with this triangular relationship is *Dugas Pest Control of Baton Rouge, Inc. v. Mutual Fire, Marine and Inland Insurance Company.*[39] In this case the original action was brought by the vendees of a residence, the Raglands, against the sellers, the Viators, Dugas Pest Control and its insurer The Mutual Fire, Marine and Inland Insurance Company. Mutual provided a defense, but at the same time denied coverage. Apparently Dugas was given no indication that Mutual was going to provide it with anything less than a complete defense. But on the second day of trial, Mutual's counsel informed Dugas that Mutual was going to deny coverage. The trial court rendered a judgment against all three, and Mutual, on behalf of itself and Dugas, along with the Viators, filed a motion for a new trial. In the motion filed by Mutual it claimed that Dugas had not introduced any policy of insurance and that therefore no insurance coverage was established. It was at this point that Dugas retained its own independent counsel. On the ruling for a new trial, the court noted that Mutual's counsel still represented Dugas at the time, had created an apparent conflict of interests and stated, "To deny Dugas the opportunity to establish coverage where his own attorney in trial is now denying coverage would be a gross injustice and will not be countenanced by this court."[40] At the new trial coverage was established, and only the Viators appealed, contending that they should not have been liable but that Dugas should have been solely responsible. Dugas' independent counsel represented Dugas in this appeal which was lost by the Viators. This lawsuit followed in which Dugas Pest Control sought reimbursement of attorney's fees. Mutual maintained that it fully satisfied its obligation to defend Dugas and gave Dugas a complete defense at the trial. The court found that and insurer is obligated to provide a defense unless the allegations of the petition unambiguously exclude coverage. The court then cited Opinion 342 of the Louisiana State Bar Association's Committee on Professional Ethics and Grievances and found that a conflict existed where an insurer owed a defense, but was also denying coverage.[41] The court pointed out that cases which had held that an insured might openly deny coverage and still provide a defense, did not address the ethical considerations involved and were therefore

38. 157 Cal. App. 3d 59, 76 (1984).
39. 504 So. 2d 1051 (La. App. 1st Cir. 1987).
40. *Id.* at 1053.
41. *Id.* at 1054.

not controlling. It then concluded that if the insurer chooses to represent the insured but deny coverage, it must employ separate counsel. If it fails to do so, the insurer is liable for the attorney fees and costs the insured may incur for defending the suit.[42]

The court went on to find that on the motion for a new trial, while Mutual's attorney was also supposedly representing Dugas, the conflict of interests developed in connection with the failure of that same lawyer to produce the policy on behalf of Dugas. Even thereafter, Mutual continued to breach its obligation to defend by not defending Dugas against the appeal of the Viators. The court affirmed the granting of attorney's fees and costs incurred by Dugas.[43]

Another interesting case concerning a refusal to defend is *Ezell v. Hayes Oil Field Construction Co. Inc.*[44] An employee brought a Jones Act claim against the employer, Hayes Oil Field Construction Co. and USF & G offered to defend Hayes but under a reservation of rights and also agreed to compensate Hayes for its expenses in defending the suit. Hayes was unsatisfied with both of these offers and filed a third party complaint against USF & G seeking attorney's fees and punitive damages for failure to defend. USF & G had refused to assume Hayes' defense in the action because (1) the geographical limitations of Hayes' policy excluded coverage for accidents outside of Mississippi, (2) Hayes misrepresented the nature of its business in its application for insurance, and (3) Hayes and USF & G had available conflicting defenses. The jury awarded $2,244.26 in attorney's fees and $2 million (reduced by remittitur to $500,000) in punitive damages. The court pointed out that both Mississippi and Louisiana did not allow punitive damages for a reasonable refusal to defend. The court then concluded that a serious conflict of interests between the insurer and the insured would be reasonable ground for the insurer to decline the defense. The court said,

> The right of the insured to have the insurer *assume* the defense, however, further requires that the insurer and the insured have no conflict of interests. Here the insurer and the insured had a conflict: Hayes did not have coverage under the Longshoremen's and Harbor Workers' Compensation Act, making a defense that Ezell, the original plaintiff, was a longshoreman acceptable to USF & G but unacceptable to Hayes. In the presence of such a conflict, the insured has only the right to demand that the insurer assume the defense under a reservation of rights. Because Hayes was not willing to do this, USF & G was justified in refusing to assume the defense.[45]

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42. *Id.* at 1054-55.

43. *Id.* at 1055.

44. 693 F. 2d. 489 (5th Cir. 1982), *cert. denied*, Hayes Oilfield Const. Co. v. United Sates Fidelity & Guaranty Co., 464 U.S. 818, 104 S. Ct. 79 (1983).

45. *Id.* at 494 (emphasis in original).

As we have seen from Opinion 342, in such a situation the same attorneys cannot represent both insurer and insured, but insurer remains liable for the cost of defense. In the cases prior to the adoption of the Code of Professional Responsibility in 1970, the decisions tended to stress the rights of the insured and the rights of the insurer under the contract of insurance. The ethical problems of the lawyers simply were either not mentioned at all or not stressed. As pointed out in *Clemmons v. Zurich General Accident and Liability Insurance Company*,[46] an insurer usually owes a defense to the insured even when the third party cause of action is groundless or fraudulent. But this duty to defend should not foreclose the question of coverage. Accordingly, the insurer may require the execution of a non-waiver agreement whereby the insurer agrees to defend and the insured recognizes the right of the insurance company to question coverage; or, the insurer may bring an action against the insured for a declaratory judgment on the question of coverage. In the first instance, the insured is not required to sign. In the second instance, the insured is not entitled to attorney's fees for defending the action. The court then recognized that the dilemma is compounded in Louisiana because an action by an injured party may be directed jointly against the insurer and the insured in which case there may arise a conflict of interest between the insurance company and its insured. It certainly does not seem appropriate for the insurance company to file either separately or in the same suit an action for declaratory judgment against its insured to determine coverage. In Wisconsin, which is the only other state which has a Direct Action Statute,[47] it is declared to be the public policy of Wisconsin that an insurance company may not bring a separate declaratory judgment action because one of the policies of the legislature in adopting the Direct Action Statute was to compel that all issues arising in the negligent action, including insurance policy coverage, be determined in a single action.[48] It is difficult to see how an insured would feel comfortable with a defense provided by the insurer when the insurer at the same time is attempting to establish in a second or separate suit that no coverage exists. It would be particularly unnerving if the court should order the consolidation of the two suits. From a judicially economy standpoint, however, the consolidation of the two suits could seem to be the proper course. The appearance of impropriety has generally been solved by having different attorneys chosen by the insurer for coverage questions as distinguished from the defense. It is believed that one of the reasons we do not have many recent cases in Louisiana involving a coverage conflict is because the insurance defense bar insists that the insurer retain them *either* for the purpose of defense *or* for the purpose of contesting coverage, but not both.

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46. 230 So. 2d 887 (La. App. 1st. Cir. 1969).

47. Wis. Stat. Ann. § 803.04(2) (West 1977).

48. Allstate Ins. Co. v. Charneski, 286 F.2d. 238 (4th Cir. 1960) and American Motorist Ins. Co. v. Trane Co., 544 F. Supp. 669, 696 n.21 (1982), *aff'd*, 718 F.2d 842 (7th Cir. 1983).

"The dual-client doctrine is a confusing and increasingly useless anachronism. It is unsound as a matter of policy, law, and legal ethics."[49] It was this sentence that prompted the writer to look at the dual-client doctrine in the light of Louisiana's Direct Action Statute.[50] Mr. Robert E. O'Malley who wrote the two sentences is identified in his article as Vice Chairman and Loss Prevention Counsel, Attorney's Liability Assurance Society, Inc. in Chicago, Illinois. He goes on to say in the very next sentence that "the insured should be deemed to be the *only* client of defense counsel in every case."[51] As long as there is no direct action statute and the insurance company is not made a solidary obligor with the insured, the writer finds absolutely nothing wrong with the position taken by Mr. O'Malley and also the position taken by Professor Morris.[52] In fact, it seems to be the ethical solution of choice. This would obviously do away with the "independent counsel" rule which has grown by leaps and bounds according to Mr. Ronald E. Mallon in the January 1986 Insurance Counsel Journal.[53] He suggests that

> [t]he area for ethical clarification is the perception that present or past business relationships with an insurer provide a basis for disqualification because of the risk that counsel will subjectively favor the interest of that client. Considering the many attorneys affective by developing "independent counsel" rule, a specific ethical provision would be appropriate. One approach would be to propose an addition to rule 1.8 (for the jurisdiction's comparable provision to Canon 5) as follows:
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> > (4) A lawyer shall not represent both an insurer and its insured if a coverage issued exists which may affect the quality of the lawyer's representation unless the lawyer's retention is limited solely to the defense of the liability claims.

Mr. Mallon goes on to argue that the insurance industry as well as insurance defense bar should work to dispel any vestige of the belief that appointed counsel will primarily represent the interest of the insurer. He believes that the perception can be overcome by relatively minimal efforts of insurance defense lawyers. Person contact by that lawyer with the insured and a pattern of communication would tend to convince the insured that the appointed attorney is able and would fully protect his interests.[54] Hopefully, this trend of enhanced communication has occurred in Louisiana and has consequently forestalled the

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49. O'Malley, *supra* note 10, at 512.

50. For a complete history and analysis of the Louisiana Statute , see Alston Johnson, *The Louisiana Direct Action Statute*, 43 La. L. Rev. 1455 (1983).

51. *Id.* (emphasis in original).

52. Morris, *supra* note 9.

53. Ronald E. Mallon, *A New Definition of Insurance Defense Counsel*, 53 Ins. Couns. J. 108 (1986).

54. *Id.* at 152-53.

possibility of those many insurance cases otherwise riddled with conflicts of interests.

II. CONCLUSION

Until there is some change in our model rules or in the direct action statute, it would appear that the Louisiana insurance defense attorney must represent both the insurance company and the insured and is ethically obligated to protect the interests of each. If during the representation, the interest of the two clients diverge, then the lawyer must analyze the situation to see whether his responsibilities to one of the clients would materially limit his responsibility to the other. Once he comes to that conclusion, it is the opinion of the writer that he must make full disclosure to each. If both clients thereafter consent to the continued representation and the lawyer reasonably believes that he can continue to representation without any adverse affect, then he may do so. Otherwise he must withdraw. This possibility does not prevent the insurance company and the lawyers selected by it from agreeing ahead of time that the lawyer would only handle the defense and will not report to the company anything concerning coverage or lack thereof. This approach avoids the serious ethical dilemma of working for and against the insured at the same time.[55]

55. Employers Casualty Company v. Tilley, 496 S.W.2d 552 (Tx. 1973) and Parsons v. Continental National American Group, 550 P.2d 94 (Az. 1976).