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# ADVANTAGES OF THE ONE-CLIENT MODEL IN INSURANCE DEFENSE

Jean Fleming Powers\*

## I. INTRODUCTION

Stephanie Plum hits Joe Morelli with her car<sup>1</sup> – an accident, of course. Who would intentionally hit another person with her vehicle? Perhaps a woman scorned,<sup>2</sup> the likes of which hell hath no fury?<sup>3</sup> A silly example perhaps, taken from a popular series about a lovely, but hapless, bond enforcement agent.<sup>4</sup> But let us assume that Mr. Morelli sues Ms. Plum and she makes a claim on her insurance policy. Her insurer agrees to hire an attorney to defend her as provided in her policy, but, the plaintiff having pled both negligence and an intentional act, does so with the understanding that there will be no coverage if it is later determined that the “accident” were in fact intentional.<sup>5</sup>

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1. The characters and accident described are taken from the first book in a series of mystery novels featuring Stephanie Plum, recently made into a motion picture. JANET EVANOVICH, *ONE FOR THE MONEY* 4 (1994).

2. Joe Morelli failed to call Stephanie Plum after a youthful “romantic” encounter. *Id.* at 4.

3. The quote “Hell hath no fury like a woman scorned,” OXFORD UNIVERSITY PRESS, *WHAT THEY DIDN’T SAY: A BOOK OF MISQUOTATIONS* 50 (Elizabeth Knowles ed., 2006), like “Play it Again Sam,” *id.* at 87, is actually a famous misquote. The original quotation, which appears in a 1697 play by [William] Congreve, *The Mourning Bride*, is:

“Heaven has no rage, like love to hatred turned,  
Nor Hell a fury, like a woman scorned.”

*Id.* at 50.

4. EVANOVICH, *supra* note 1.

5. See, e.g., Sean W. Gallagher, Note, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1266–67 (1994) (Noting that “courts have generally voided coverage for intentionally incurred losses on public policy grounds, while they have enforced insurance that covers losses resulting from the insured party’s own negligence.”).

The lawsuit has essentially three possible outcomes: (1) a finding of no liability; (2) a finding of liability based on negligence; or (3) a finding of liability based on an intentional act. Under the first outcome, both Ms. Plum and her insurer will be quite pleased.<sup>6</sup> Under the second, Ms. Plum may be less pleased, as she would prefer no liability at all, but she will take some comfort in the fact that her insurer will cover her financial exposure, at least within the policy limits.<sup>7</sup> Her insurer, of course, will not be happy with this result. Under the third, Ms. Plum will be distressed to find that she alone is responsible for paying the judgment, and her insurer will heave a corresponding sigh of relief.

The attorney hired to represent Ms. Plum occupies one point in what has been referred to as the “insurance triangle.”<sup>8</sup> The other two are the insured and the insurer.<sup>9</sup> At the time Ms. Plum bought her insurance policy, she may not have given much thought to the fact that her policy would provide a defense for her if she were sued. Her main impetus for buying insurance may have been a legal requirement to carry insurance.<sup>10</sup> Yet regardless of her focus, or lack thereof, on the need for a defense, standard liability policies covering a variety of potential claims include coverage for attorney’s fees for the insured’s defense.<sup>11</sup>

Given the ubiquity of the provision, it may seem surprising that the nature of the relationship among the attorney so hired, the insurer, and

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6. As pointed out by Professor Morgan, if “the defense provided by the insurance company succeeds in excusing the insured from all liability to the plaintiff, in most cases both the insured and the insurer will be happy.” Thomas D. Morgan, *Whose Lawyer Are You Anyway?*, 23 WM. MITCHELL L. REV. 11, 24 (1997).

7. 12 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 170:3 (3d ed. 2005) (“In the absence of contrary or modifying provisions in a statute, the liability of an insurer and the extent of the loss under a policy of automobile liability insurance must be determined, measured, and limited by the terms of the contract, and the parties to the contract of insurance may impose a dollar maximum upon the insurer’s liability.”).

8. See Peter A. Joy, *Making Ethics Options Meaningful: Toward More Effective Regulation of Lawyers’ Conduct*, 15 GEO. J. LEGAL ETHICS 313, 338 (2002). See also Mitchell M. Simon, *Navigating Troubled Waters: Dealing with Personal Values when Representing Others*, 43 BRANDEIS L.J. 415, 426 n.48 (2005); See, e.g., Amber Czarniecki, *Ethical Considerations Within the Tripartite Relationship of Insurance Law – Who is the Real Client?*, 74 DEF. COUNS. J. 172, 172 (2007) (noting that the relationship is also often referred to as a tripartite relationship).

9. Joy, *supra* note 8.

10. See, e.g., Jennifer B. Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the “Choice Architecture” of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69, 74–75 (2010).

11. See Tom Baker, *Liability Insurance Conflicts and Defense Lawyers from Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101, 102 (1997–98).

the insured should be subject to so much debate. That it *is* subject to such debate is beyond dispute.<sup>12</sup>

This article explores the debate first by describing the one-client and two-client models that are at the heart of the disagreement,<sup>13</sup> and second, by looking at the relationships and obligations that create conflicts and concerns. It explains how the one-client model is consistent with the obligations undertaken in the contract of insurance, better fosters the attorney's professional obligations, better protects the insured as a consumer of insurance and of legal services, and ultimately better protects the interests of the insurer and the attorney. Finally, this article examines the operation of the one-client model in various problematic situations to illustrate how it accomplishes these benefits, and concludes that a clear one-client engagement agreement, or, in the absence of such clarity, a default position that the attorney represents the insured alone, is better for all parties.

## II. THE COMPETING MODELS

The debate centers on the question whether the lawyer represents the insured alone, or both the insured and insurer.<sup>14</sup> The prevailing model seems to be the two-client model,<sup>15</sup> with the one-client model gaining approval.<sup>16</sup> Under a one-client model, when the insurer hires an attorney to

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12. Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I – Excess Exposure Cases*, 78 TEX. L. REV. 599, 601 (2000) (“In the field of professional responsibility, few topics are as controversial as the ethics of insurance defense, and no topic is the subject of more passion or lawmaking activity.”).

13. At least one author sets out three models, the One-Client Theory, the Two-Client Theory and the Third-Party Payor Theory. Czarnecki, *supra* note 8, at 174. Because my view is that the Third-Party Payor Theory is necessarily a subset of one of the other theories, *see infra* note 56, I will focus on the two main theories.

14. Pryor & Silver, *supra* note 12, at 607 (“Scholars, judges, and lawyers have long wondered whether a lawyer appointed by an insurance company to defend a liability suit against an insured has one client – the insured – or two clients – the carrier and the insured.”).

15. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY—PROBLEMS OF PRACTICE AND THE PROFESSION 251 (5th ed. 2012); Czarnecki, *supra* note 8, at 174 (“The Two-Client Theory is currently the majority view of the tripartite relationship among American courts.”). *See also* Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 595 (Ariz. 2001) (“Adopting what it described as the majority rule in this country, the court [of appeals] concluded that absent a real or apparent conflict between the insured and the insurer, the lawyer assigned by the latter to represent the former actually represents both.”).

16. Czarnecki, *supra* note 8, at 177 (“This [the One-Client Theory] is the view that appears to be gaining steam in America at the moment.”).

defend its insured, that attorney represents the insured alone.<sup>17</sup> Therefore, any conflicts that may arise come not from another client, but from the fact that a third party is paying for the representation.<sup>18</sup> The temptation to conduct the representation in a way that favors the fee-paying party is especially strong, given that appointed counsel is often hired regularly by the same insurance company,<sup>19</sup> and may, in fact, be a member of a “captive” law firm,<sup>20</sup> or even an employee of the insurer.<sup>21</sup>

Under a two-client model, the attorney hired by the insurer represents not only the insured, but also the insurer who hired him.<sup>22</sup> Thus, any potential conflicts necessarily include potential conflicts between two current clients.<sup>23</sup> Yet quite often the interests of the insured and the insurer are aligned: both want a determination of no liability on the part of the insured.<sup>24</sup> In that case there is no conflict and the two-client model seems

17. *Id.* at 176.

18. See MODEL RULES OF PROF'L CONDUCT R. 1.8(f) cmt. 11 (2014) (“Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference.”).

19. As pointed out by Professor Morgan, “When one basis of liability will require the insurer to pay the judgment against the insured, while another basis will require the insured to pay the judgment alone, it is easy to see that a lawyer representing the insurer and insured as separate and equal co-clients faces a serious conflict of interest. To compound the problem, the lawyer likely will never see the insured again, whereas the insurance company is a prospective source of many more legal fees.” Morgan, *supra* note 6, at 24.

20. See Herbert M. Kritzer, *Defending Torts: What Should We Know?*, 1 J. TORT LAW 3, 31 n.92 (2007) (“In this [a “captive law firm”] arrangement the lawyers formally are separated from the insurer, although they derive all of their revenue from a single insurance company. In a sense, the lawyers are ‘independent contractors.’”). See also *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co. and The Travelers Indemnity Co.*, 261 S.W.3d 24, 27 (Tex. 2008) [hereinafter UPL Comm.] (“Sometimes an insurer uses a ‘captive’ firm of attorneys who, though not the insurer’s employees, have no other clients.”).

21. UPL Comm., 261 S.W.3d at 27 (“Insurers also use lawyers employed as salaried corporate staff to represent insureds.”).

22. CRYSTAL, *supra* note 15, at 251.

23. Czarnecki, *supra* note 8, at 174 (“Under [the Two-Client] theory, both the insured and the insurer are clients of the defense attorney.”).

24. *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 598 (Ariz. 2001) (“[W]e note that the interests of insurer and insured frequently coincide. For instance, both insurer and insured often share a common interest in developing and presenting a strong defense to a claim that they believe to be unfounded as to liability, damages, or both.”). See also UPL Comm., 261 S.W.3d at 26. (“Because of its potential indemnity obligation, an insurer has a direct, substantial financial interest in defending

appropriate. Further, because the insurer has so much control over handling the claim,<sup>25</sup> and it is the insurer who will generally pay the claim,<sup>26</sup> it makes sense that the attorney it has hired will protect its interests.<sup>27</sup>

There also appears to be a variation on the two-client model, which I will call the favored-client model. When the attorney has two clients, one of them being an insured, the courts have a tendency, probably stemming from the policy reasons discussed below, to stress the attorney's obligation to the insured.<sup>28</sup> For purposes of this article, I will not treat this as a separate model. It is, after all, a two-client model, and the problems created by the representation of two clients persist.<sup>29</sup> Further, the concept of representing a client to whom one does not owe the full range of professional obligations adds unnecessary confusion.

Of course, the question of how many clients an attorney represents, and who those clients are, is ultimately a matter of agreement between (or among) the parties.<sup>30</sup> Yet the extent of the debate suggests that the

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claims against its insured, and often an insurer and an insured's interests are aligned toward simply defeating such claims.”).

25. *UPL Comm.*, 261 S.W.3d at 26 (“The right to defend in many policies gives the insurer complete, exclusive control of the defense.”).

26. *Id.* (“Liability insurance policies commonly provide that the insurer must indemnify the insured from liability from covered claims . . .”).

27. As pointed out by one author, when the interests are aligned, such that the insurer “bears all the important claim risk, we hardly need to think about the company's duty to defend, because the company has every incentive to attend to the defense.” Baker, *supra* note 11, at 103.

28. *See* Morgan, *supra* note 6, at 40 (“Clearly, more judicial opinions have used two-client language than one-client, but when the characterization makes a difference, the insured has been the only client worth the name.”). *See also* *Paradigm*, 24 P.3d at 598 (Ariz. 2001) (“[I]n the unique situation in which the lawyer actually represents two clients, he must give primary allegiance to one (the insured) to whom the other (the insurer) owes a duty . . .”); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1587 (1994) (“Recognition of the company's status as a client is usually accompanied by the admonition that counsel must show special regard for the interests of the insured.”).

29. Considering the insured as the “favored client” may in fact have the advantage of causing the attorney to focus on his obligations to the insured. *See supra* text accompanying note 28. However, the point is easily made and does not require a detailed discussion of favored clients. Further, that advantage is insufficient to outweigh all the other advantages of the one-client model.

30. Pryor & Silver, *supra* note 12, at 607 (“Like other lawyers, defense lawyers represent clients by mutual agreement. Therefore, defense lawyers represent as many clients as they agree to represent.”). *See also* *UPL Comm.*, 261 S.W.3d at 42 (“Whether defense counsel also represents the insurer is a matter of contract between [the parties].”); Silver, *supra* note 28, at 1604 (“Whether and to what extent defense counsel represents an insurance company depends on the retainer agreement between the two.”).

agreement is not always as clear as one would hope.<sup>31</sup> Further, limiting one's focus to the engagement agreement may not address important questions regarding whether a two-client representation adequately protects the legitimate expectations of the insured.<sup>32</sup> Additionally, while the engagement agreement may control the number of clients the attorney represents, ethical obligations require the attorney to confirm that no conflicts of interest preclude dual representation,<sup>33</sup> and to obtain the required informed consent to the dual representation.<sup>34</sup>

Thus, this article's questions are (1) which is the better arrangement for the parties to make; (2) which should be the default rule for purposes of analyzing the relationship where it is not explicit; and (3) what requirements and limits should be placed on engagement agreements? The answer to the first two questions should be the same, as the default position should be the one that will be the better approach in most cases. In addressing all three questions, it is important to examine how policy, professional, and practical considerations should and do affect the approach taken.

### III. THE ADVANTAGES OF THE ONE-CLIENT MODEL

#### A. Introduction

The complexity of the issue derives from several important considerations. Since the triangular relationship occurs only when an attorney has been hired,<sup>35</sup> the creation of an attorney-client relationship activates the professional obligations that an attorney owes to a client.<sup>36</sup> Further, as

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31. It has been suggested that the representation of both the insurer and the insured is implicit in the agreement. Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 284 (1995) ("It is our judgment that an insured who demands a defense thereby consents both to representation by company-selected counsel and to joint representation because of the context in which the demand is presented."). I will emphasize the importance, for the protection of the insured, of not leaving such agreement to implication.

32. See *infra* Part III.D.

33. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2014).

34. *Id.* at R. 1.7(b)(4).

35. Many claims are handled by claims adjusters. There is no litigation and thus no attorney is ever hired. See Morgan, *supra* note 6, at 12 ("In the majority of potential liability cases, lawyers are not involved. Insurance companies use non-lawyer adjusters to estimate likely liability and seek a release from persons to whom the insured might be found liable in exchange for a cash payment of less than the policy limits."). Such situations are beyond the scope of this article.

36. Cf. MODEL RULES OF PROF'L CONDUCT Preamble [12] (2014) ("Every lawyer is responsible for observance of the Rules of Professional Conduct.").

both the insurance agreement and the engagement agreement are contracts,<sup>37</sup> the contractual obligations undertaken must inform the decision. Finally, because of the inherent imbalance of power between attorney and client and between insurer and insured, issues of public policy and consumer protection,<sup>38</sup> often already addressed in insurance law, come into play.<sup>39</sup>

Each of these considerations recommend the one-client model. It is generally better for the parties to initially have a clear understanding that the attorney will represent the insured and only the insured. Further, if the agreement is not clear, the default rule should not be a two-client approach,<sup>40</sup> but that the attorney represents only the insured. Analyzing the issue in light of these considerations illustrates the superiority of the one-client approach, not only for the insured, but also for the insurer and the attorney.

### B. Contractual Obligations

The insurance contract between the insured and his insurer, like all bilateral contracts, provides rights and duties to both parties.<sup>41</sup> The obligations undertaken by the insurer<sup>42</sup> are accompanied by its so-called “right to defend.”<sup>43</sup> The insured has, by contract, given much control to the insurer.<sup>44</sup> Under the terms of the contract, the insurer normally has

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37. See, e.g., COUCH, *supra* note 7, § 17:1.

38. See *infra* Part III.D.

39. See COUCH, *supra* note 7, § 2:7.

40. For example, this was the approach taken by the court of appeals in *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 595 (Ariz. 2001).

41. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 18, at 37 (5th ed. 2011) (“There are two rights and two duties in [a bilateral] contract since each of the parties has a right against the other and each has a duty of performance to the other.”).

42. One author has suggested that the insurer has “three closely related duties tied to actual or threatened litigation against its insured: an express contractual duty to defend its insured, an express contractual duty to indemnify its insured up to its policy limits, and an implied duty to settle claims within its policy limits under certain circumstances.” Douglas R. Richmond, *Liability Insurers’ Right to Defend Their Insureds*, 35 CREIGHTON L. REV. 115, 115 (2001).

43. See *id.* at 115-16. See also Pryor & Silver, *supra* note 12, at 608 (“[T]he right to defend entitles a carrier to assert plenary and exclusive control of the defense.”).

44. Contractually, the insurer generally has “plenary and exclusive control of the defense. Ordinarily, the company can select counsel to defend the insured, discharge appointed counsel and name a replacement without the insured’s consent, bargain with appointed counsel over fees, monitor counsel and direct litigation strategy,” among many other rights. Silver, *supra* note 28, at 1594-95.

the right to control the defense<sup>45</sup> and make settlement decisions.<sup>46</sup> The advantages to the insurer of this control are obvious. Yet it is easy to see that insureds may likewise be advantaged. Many individuals, faced with a lawsuit, have few resources and little expertise in selecting competent counsel, managing a defense, or making settlement decisions.<sup>47</sup> Having the input of someone with those resources and that expertise can undoubtedly be a benefit.<sup>48</sup> On the other hand, the control given to the insurer involves a corresponding loss of control for the insured.<sup>49</sup> Yet it is a loss of control that the insured accepted voluntarily in his contract of insurance.<sup>50</sup>

The broad rights of control under the contract create much of the support for the two-client model.<sup>51</sup> It makes sense that the attorney who is handling the case, and communicating with the insurer as well as the insured, has obligations to both. It is not the intent of this article to quibble

45. See 1 ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 3:2, at 3-2 (5th Ed. 2011) (“Liability policies always contain a requirement that the insured cooperate with the insurance company in its investigation, defense, settlement, or other handling of a claim against the insured.”). See also *Paradigm*, 24 P.3d at 596 (“[A]s part of the insurer’s obligation to provide for the insured’s defense, the policy grants the insurer the right to control that defense . . .”).

46. WINDT, *supra* note 45, § 3.7, at 3-42-43 (“By virtue of both an insured’s implied covenant of good faith and fair dealing and, in many policies, an express provision, an insured, absent the insurance company’s approval, is not allowed to enter into a release agreement with the party that caused the insured’s loss.”). See also UPL Comm., 261 S.W.3d 24, 26 (Tex. 2008) (“The right to defend in many policies gives the insurer complete, exclusive control of the defense.”).

47. See Richmond, *supra* note 42, at 117 (“[M]ost insureds lack . . . the ability to efficiently manage litigation.”).

48. See Silver, *supra* note 28, at 1596. (“[T]he insured also benefits from the rule of exclusive company control. The insured is protected by the company’s financial resources, expertise, and efficiency in dealing with claims, and by its risk-neutrality, bureaucratic structure, reputation, bargaining skill, and ability to select and monitor defense counsel, all of which enable the company to react to claims better than the insured.”).

49. See generally *id.* at 1594–95.

50. The author recognizes that the insured has likely neither explicitly bargained with respect to, nor even actually contemplated, these terms at the time he bought his insurance. A detailed analysis of the adhesive nature of insurance contracts is beyond the scope of this article. Suffice it to say for purposes of this discussion that the terms are nonetheless part of the contractual undertaking, and are well accepted in the law.

51. Cf. Silver, *supra* note 28, at 1594 (A “[p]rimary insurance polic[y]” generally “imposes a variety of general and specific duties on the insured to cooperate with the company and to refrain from meddling in the defense. And it establishes that the insured may not settle a claim without the company’s consent, except at the insured’s own expense.”) (citations omitted).

with that conclusion. Rather, the intent is to define the nature of those obligations through the prism of a primary obligation to the insured.

When considered in this light, it is clear that the attorney can both represent the insured as his sole client and still honor the insured's contractual obligations. Nothing in the ethics rules suggests that the attorney should not protect his client's contractual obligations to the insurer. Such protection is, in fact, required for effective representation.<sup>52</sup> Failure to abide by the terms of the contract, at best, would be a breach of contract, and, at worst, would void coverage.<sup>53</sup> Thus, even an attorney with a primary obligation to represent the insured must advise him in ways that protect his contractual rights and honor his contractual obligations. The insurer is then protected by his contract, not by an attorney with divided loyalties.

Further, a focus on the attorney's contractual obligations helps define the limits of the duty to the insurer, thus limiting the number of conflicts. If it is clear from the outset that the attorney is not going to advise the insurer on certain matters, the attorney may never be faced with conflicting loyalties. Likewise, a focus on the attorney's contractual obligations, both in the insurance contract and in the engagement agreement, helps define the limits of the duty *to the insured*. Matters beyond the scope of that undertaking are not required under the contract, and thus will not become a source of conflicts.<sup>54</sup>

### C. Professional Obligations

#### 1. Conflicts of Interest

Regardless of the model chosen, the possibility of conflict is inherent in the arrangement.<sup>55</sup> At least two possible conflicts could arise – a fee-payor conflict<sup>56</sup> and a general concurrent conflict of interest.<sup>57</sup> In ex-

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52. See MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2014) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

53. WINDT, *supra* note 45, § 3:7, at 3-43-44 ("The insured who does effect such a release [of the one who caused the harm] will, as a general rule, be precluded from recovering under the policy; alternatively, an insured who has already recovered under the policy will be obligated to reimburse the insurer.").

54. See, e.g., *infra* Part IV.E.2.

55. *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 297 (Mich. 1991) ("[C]ourts and commentators recognize universally that the tripartite relationship between insured, insurer, and defense counsel contains rife possibility of conflict.").

56. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(f) and 5.4 (2014). As to the Fee Payor conflict, one author has suggested that the "Third-Party Payor Theory" is in fact an additional classification. See *supra* note 8, at 174. However, a Fee-Payor concern arises under either the one-client or two-client models, and in my view is

aming the conflicts, this article focuses on the Model Rules of Professional Conduct as a representative example of similar (and often identical) rules in the various states.<sup>58</sup>

Fee-payor conflicts are addressed first in the Model Rules in Rule 1.8(f), which provides:

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

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.<sup>59</sup>

A related rule, Rule 5.4(c), which focuses on the lawyer's professional independence,<sup>60</sup> provides "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."<sup>61</sup> Under either the one-client or two-client model, the insured is a client, whether the sole client or not. Under either model, the insurer is paying for the representation. Regardless of whether the insurer is *also* a client, it is nonetheless someone "other than the client"<sup>62</sup> (the insured) who is paying for the representation of the insured. Thus, the two rules are implicated under either theory. Fee-payor concerns must therefore be addressed whichever model is chosen.

Thus, before undertaking *any* insurance defense case, the attorney must satisfy himself that he can fulfill his professional obligations to his client, the insured, *even if* he is paid by another.<sup>63</sup> While the attorney's temptation to keep the insurer happy, and thus protect an income stream, may theoretically be ever present, if he cannot honestly proceed without

therefore a subset of both. Thus, the discussion will examine the one-client and two-client models.

57. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2014).

58. *Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Sept. 4, 2014) ("The ABA *Model Rules of Professional Conduct* . . . serve as models for the ethics rules of most states.").

59. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2014).

60. The title of the Rule is "Professional Independence of a Lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.4 (2014).

61. *Id.* R. 5.4(c).

62. *Id.* R. 1.8(f).

63. *Id.* R. 1.8, 5.4.

focusing on his obligation to the insured, he cannot accept such cases.<sup>64</sup> Further, the insurer who hired him must do so with the understanding that he will conscientiously represent the insured.<sup>65</sup> In other words, potential fee-payor conflicts cannot be avoided by choosing the two-client model.

Therefore, the real departure in the analysis relates to the general concurrent conflict of interest. A general concurrent conflict of interest may arise under either model. Rule 1.7 of the Model Rules of Professional Conduct provides in part:

[a] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>66</sup>

One potential conflict under this rule stems from the lawyer's self-interest in wanting to maintain a good relationship with the insurer.<sup>67</sup> The attorney has an unmistakable interest in satisfying the insurance company,<sup>68</sup> and must consider whether his representation of the insured may be "materially limited" by this "personal interest."<sup>69</sup> This personal interest concern is a factor regardless of the model chosen. Further, it is essentially the very concern raised in the fee-payor situation.<sup>70</sup> No new conflict potential is involved.

Under the two-client model, however, the attorney must also consider whether the interests of the two clients are directly adverse, a consideration not implicated under the one-client model. Because both fee-payor and personal interest conflicts are involved in either model, the

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64. *Id.* R. 1.7.

65. *Id.* R. 1.7. If this sounds overly simplistic and idealistic, it is because, while accurate as far as it goes, it is just the starting point of the discussion. The nuances of the situation will be developed in the remaining discussion.

66. *Id.* R. 1.7.

67. *See id.* R. 1.7(a)(2), which provides that a "concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." The personal interest in this instance is the interest in keeping the one who pays his fees happy.

68. *See supra* notes 19–21 and accompanying text.

69. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2014).

70. *See supra* notes 59–62 and accompanying text.

two-client model cannot reduce conflicts. It can, however, *increase* conflicts, as it is the only model under which there is a two-client conflict. The two-client model thus raises additional conflicts concerns without providing any real benefit.

Further, this new conflict is more problematic. A conscientious lawyer can, and often must, subordinate his own interest to that of his client.<sup>71</sup> Yet it is often impossible to subordinate the interest of one client to another without doing harm to one or both clients.<sup>72</sup> That this must be so is apparent when one realizes that the actual client-client conflict puts the attorney squarely in the position of serving two masters with differing interests.<sup>73</sup> It is impossible to serve one without harming the other.<sup>74</sup> However, if the conflict is with the attorney's own interest, the presumption may not be required.<sup>75</sup> It is possible in self-interest conflicts to subordinate one's own interest and adequately represent the client.<sup>76</sup> Any resulting harm is to the attorney's interest, not that of another client.

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71. See PAUL T. HAYDEN, *ETHICAL LAWYERING* § 1, at 1 (3d ed. 2012) (listing "four key 'elements' of a profession," one of which states that "self-interest is sublimated to the client's interest and the public good").

72. See, e.g., *Fiandaca v. Cunningham*, 827 F.2d 825, 829 (1st Cir. 1987) ("[T]he combination of clients and circumstances placed [the attorney] in the untenable position of being simultaneously obligated to represent vigorously the interests of two conflicting clients. It is inconceivable that . . . any . . . counsel could have properly performed the role of 'advocate' for both . . . regardless of its good faith or high intentions.").

73. An illustrative comparison is seen in conflicts of interest in criminal cases where ineffective assistance of counsel questions are raised. Proving ineffective assistance of counsel requires showing both ineffective performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 700 (1984) (stating that "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). However, prejudice is presumed when the attorney has an active conflict of interest between two defendants. See *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980) (explaining that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.").

74. In discussing why a client-client conflict in a criminal case may be insoluble, the U.S. Supreme Court stated that a conflict may "prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

75. See *Beets v. Scott*, 65 F.3d 1258, 1265 (5th Cir. 1995) ("The Supreme Court has not expanded *Cuyler's* presumed prejudice standard beyond cases involving multiple representation.").

76. See *id.* at 1270. Of course the question remains whether the attorney has actually done that, but that question involves a fact-based inquiry, not a legal presumption.

Likewise, in insurance cases, an attorney hoping to please an insurer for his own economic benefit can, and must, subordinate such inclinations to his obligations to the insured. However, if both the insured and the insurer are clients, the potential for insoluble conflicts increases - a problem the one-client model avoids.

## 2. Informed Consent

Another important conflict of interest concern is the impact of the informed consent requirement of the Model Rules.<sup>77</sup> Before proceeding with representation under a concurrent conflict of interest, the attorney is required to make sure “each affected client gives informed consent, confirmed in writing.”<sup>78</sup> Due adherence to the requirements for concurrent representation and specifically for informed consent will tend to lead the parties to choose a one-client contract. First, it should be emphasized that an informed consent discussion will occur only if the attorney “reasonably believes that [he] will be able to provide competent and diligent representation to each affected client.”<sup>79</sup> If that threshold cannot be met, there should be no joint representation.<sup>80</sup> Second, if it is met, any engagement agreement providing that the attorney represents both must be made with informed consent.<sup>81</sup> Informed consent means consent obtained “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>82</sup> Thus, the information provided to the client should include all the considerations discussed in this article, in which case it seems unlikely the client would consent.<sup>83</sup> Strict adherence

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77. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2014).

78. *Id.* The other three requirements are that “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; [and] (3) the representation does not involve the assertion of a claim by the client against another client represented by the lawyer in the same litigation . . . .” *Id.* R. 1.7(b).

79. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2014).

80. *Id.* R. 1.7.

81. *Id.* R. 1.7 cmt. 18 (citation omitted) (“Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. . . . When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.”).

82. *Id.* R. 1.0(e).

83. As one author has suggested, “One can envision a court applying an almost irrebuttable presumption that insureds who allow themselves to be represented by attorneys who also represent the conflicting interests of their insurers, even though

to conflicts rules and the informed consent requirement will cause more parties to choose a one-client contract, avoiding the need for the court to decide who the client is. On the other hand, if the informed consent discussion is less than rigorous,<sup>84</sup> it would seem appropriate that the default rule should be one that is more client-protective, as it would be under a one-client model.

### 3. Protecting Confidentiality

A one-client model is at least as compatible with the lawyer's duties of confidentiality as the two-client model, if not more so. It is true that contractual provisions allowing the insurer to control the defense necessarily require regular involvement and communication between the insurer and defense counsel.<sup>85</sup> But that requirement does not require a two-client approach. Such communication is consistent with ethical standards under a one-client model. Under the ethical duty to protect the client's information, sharing information to the extent required under the contract would normally be impliedly authorized "in order to carry out the representation."<sup>86</sup> If the attorney had questions about implied authorization, the insured could, and likely would, give actual consent to sharing information in order to abide by the terms of his contract.<sup>87</sup> Further, if after discussion with his attorney the insured is unwilling to give consent,<sup>88</sup> it is likely because protecting the information is important. An attorney who is focused on his obligations to the insured as his one client will be more attuned to recognizing potential problems with sharing information with the insured and to respecting and evaluating the confidentiality concerns of his one client.

The one-client model also adequately addresses the duty of confidentiality in the related obligation to protect attorney-client privilege. In cases where attorney-client privilege is important, an attorney must protect the privilege to fulfill his ethical obligation to effectively represent his client.<sup>89</sup> Protecting the confidentiality of communications with clients is

they could have insisted that their insurers provide independent counsel, could not have given informed consent." WINDT, *supra* note 45, § 4:21, at 4-207.

84. Given that generally "defense lawyers gain authority to represent insureds when carriers, not insureds, contact them[.]" Pryor & Silver, *supra* note 12, at 608, a rigorous informed consent discussion may not always happen.

85. *Cf.* Pryor & Silver, *supra* note 12, at 609 ("The retainer agreement . . . establish[es] that the carrier will make all defense-related decisions . . .").

86. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2014).

87. *Id.*

88. The rule requires "*informed consent*" (emphasis added) *Id.*

89. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2014).

an important part of preserving privilege.<sup>90</sup> Yet communications with non-clients, such as agents,<sup>91</sup> do not necessarily destroy privilege, as they are often important in facilitating the representation.<sup>92</sup> The insurer does not have to be a client for the privilege to attach.<sup>93</sup> As indicated in the Restatement, whether or not the insurer is a client,<sup>94</sup> “communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlements should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding.”<sup>95</sup> The attorney must first decide whether the communication is protected under this analysis,<sup>96</sup> and then decide whether revealing the information to the insurer would be detrimental to his client, the insured.<sup>97</sup> The former would be determined by examining the practical and legal considerations related to the contract and to the management of the representation. As to the latter, the attorney who has one client – the insured – will be more attuned to potential pitfalls in revealing information to the insurer and thus be a better protector of privilege for the benefit of the insured.<sup>98</sup>

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90. See Gregg F. LoCascio, *Reassessing Attorney-Client Privileged Legal Advice in Patent Litigation*, 69 NOTRE DAME L. REV. 1203, 1207–09 (1994) (discussing the Wigmore and *United Shoe* standards for attorney-client privilege, which include a requirement that the communication be made “in confidence” or “without the presence of strangers” respectively).

91. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000).

92. *Id.* (“Privileged persons . . . are the client . . . the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.”).

93. See Morgan, *supra* note 6, at 34 (“Co-client status is a sufficient but not a necessary way to preserve the protection of the privilege.”).

94. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (2000) (providing that the privileged nature of the communication exists whether or not “a client-lawyer relationship also exists between the lawyer and the insurer . . .”).

95. *Id.*

96. While the communication must be between “privileged persons” for the protection to apply, *id.* § 68, the insurer would normally be a privileged person. *Id.* § 70 cmt. f (providing that “the privilege covers . . . communications from the lawyer for the insured to the insurer in providing a progress report or discussing litigation strategy or settlement . . .”).

97. For example, if “there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question without explicit informed consent of the insured . . .”. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (2000).

98. See Morgan, *supra* note 6, at 37 (“[C]alling the insurance company a co-client of the insured can lead the lawyer, and the insurance company, astray. Calling the

#### 4. Evaluations for Third Parties

The Model Rules contemplate the possibility that an attorney may provide evaluations for use by non-clients, and additionally prescribe the parameters of such evaluations. Model Rule 2.3 provides in part that:

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer should not provide the evaluation unless the client gives informed consent.<sup>99</sup>

If the insured is considered the only client, the lawyer can nonetheless provide all necessary and appropriate<sup>100</sup> advice under this provision. Given the contractual obligations to the insurer, such an evaluation can be "compatible with . . . the lawyer's relationship with the client."<sup>101</sup> Yet by focusing on this provision, the attorney will also focus on the primacy of the obligations to the insured.

#### 5. The Duty of Loyalty

The one-client model further enhances the loyalty the attorney owes to the insured as a client<sup>102</sup> – a duty the attorney has regardless of the model chosen.<sup>103</sup> An attorney who looks at the insurer as his client will be more likely to improperly subordinate his responsibilities to the insured. The natural tendency to want to please the insurance company<sup>104</sup> will be exacerbated.

Further, to the extent that the attorney could have represented both, it is because the interests of both clients are aligned, as they gener-

insurer an agent of the insured for communication with counsel would be sufficient to protect as privileged those communications that are necessary . . .").

99. MODEL RULES OF PROF'L CONDUCT R. 2.3 (a)–(b) (2014).

100. The propriety of giving advice will of course be subject to a "compatibility" analysis, *see id.* cmt. 3, and potentially to a conflicts analysis. *See Pryor & Silver, supra* note 12, at 657 ("The . . . question, then, is whether a defense lawyer would incur a conflict of interest by assuming settlement-related responsibilities to a carrier.").

101. MODEL RULES OF PROF'L CONDUCT R. 2.3(a) (2014).

102. *See Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973) (asserting that the attorney "owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured.").

103. Joy, *supra* note 8, at 338 ("[T]he professional responsibilities of the lawyer, including the duties of confidentiality and loyalty, are owed to the insured.").

104. *See supra* notes 19–21 and accompanying text.

ally are in defending against a liability suit.<sup>105</sup> But if the interests are aligned, there is no additional benefit to considering the insurer a client. And there are potential downsides when an actual conflict arises. When there is an active conflict it can become impossible to maintain the required loyalty to both clients, often leading to the attorney's withdrawal.<sup>106</sup>

#### *D. Public Policy and the Insured as a "Consumer"*

An important aspect of the analysis, and one that is often overlooked, is recognition that the insured is a consumer, both of insurance<sup>107</sup> and of legal services.<sup>108</sup> It is not the goal of this article in recognizing such status to bring consumer protection law as such into the discussion. The goal is rather to show how the policies that underlie protection of consumers of insurance and of legal services support the greater protections found in the one-client model.

Consumer protection law stems from an evolving bargaining model in which consumers are often in an inferior bargaining position, and thus seeks to provide protections to ameliorate the effects of that disparity.<sup>109</sup> The policies behind consumer protection law likewise support ethics rules protecting clients and insureds because of their disparate bargaining position. Further, because consumer protection of clients is often tempered by the fact that professionalism rules may already provide adequate protection, it becomes especially important to ensure that the professionalism rules do indeed provide that protection.<sup>110</sup> If the terms of the insurance contract lead the insured to believe that he will be provided a

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105. See *supra* note 24 and accompanying text.

106. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (2013) ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation . . .").

107. See DEE PRIDGEN & RICHARD M. ALDERMAN, 1 CONSUMER PROTECTION AND THE LAW § 4.28, at 281 (2013–14 ed. 2013) (indicating that "the sale of insurance policies to consumers" is generally within the scope of consumer protection laws).

108. *Id.*

109. *Id.* § 1.1, at 3 ("As goods became more complicated . . . and sellers evolved into large corporate entities selling nationwide through impersonal marketing organizations, the old doctrines began to seem unjust. Buyers were not able to protect themselves from unscrupulous sellers and defective products. Thus the law slowly began to change.").

110. *Id.* § 4:36, at 308 ("Notwithstanding the fact that consumers may need more, not less, protection from professionals, some state consumer protection statutes expressly exempt certain professions."). The professions referenced include attorneys. *Id.*

defense,<sup>111</sup> the defense should be provided competently,<sup>112</sup> ethically,<sup>113</sup> and without dilution of loyalty,<sup>114</sup> as is inherent in the attorney-client relationship. Ethical representation of clients demands no less. Because the one-client model better guards against the ill effects of conflicts of interest, it better protects the expectations of the consumer of insurance.

The situation is further complicated by the fact that insurance law itself is complex, and the insurance industry is highly regulated.<sup>115</sup> While regulation takes much from the purchaser of insurance in terms of bargaining power,<sup>116</sup> it gives much in terms of oversight and protection.<sup>117</sup> The protective purposes of insurance regulation should be stressed here as, even if the consumer wanted to bargain for nonstandard terms, he would not have the bargaining power to do so.<sup>118</sup> Thus, the oversight of insurance contracts is undertaken largely for public policy reasons.<sup>119</sup> Any presumptions in connection with the effect of insurance policies should maintain that public policy focus.

Likewise, clients who hire attorneys are often in a position of dependence and vulnerability in the relationship.<sup>120</sup> Just as public policy concerns and consumer protection law seek to protect consumers from overreaching by insurance companies,<sup>121</sup> ethics rules seek to prevent cli-

111. See COUCH, *supra* note 7, § 22:14 (indicating that the rules of liberal construction of the policy in favor of the insured are “to effectuate the reasonable coverage expectations of the members of the public who purchase it . . .”).

112. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2014) (requiring competence).

113. See *id.*, SCOPE par. 16 (“The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer . . . The Rules simply provide a framework for the ethical practice of law.”).

114. See *supra* Part III.C.5.

115. See COUCH, *supra* note 7, § 2:1.

116. Cf. *id.* § 17:2 (“It is axiomatic that parties are free to create the insurance contract they deem appropriate to their needs *provided that its form and content do not conflict with any provision of law or public policy . . .*”) (emphasis added).

117. See *id.* § 2:1.

118. See *id.* § 22:11 (“[M]ost insurance contracts, rather than being the result of anything resembling equal bargaining between the parties, are truly contracts of adhesion in which many insureds face two options: (1) accept the standard insurance policy offered by the insurer or (2) go without insurance.”).

119. See *id.* § 2:7 (“Most states have statutorily empowered insurance boards, commissioners or similar officials to regulate and supervise the transaction of insurance business within the state in order to protect the public interest . . .”).

120. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §16 cmt. b (2000) (“Lawyers often deal with matters most confidential and vital to the client. A lawyer’s work is sometimes complex and technical, often is performed in the client’s absence, and often cannot be properly evaluated simply by observing the results.”).

121. See *supra* note 117–18 and accompanying text.

ents, who are consumers of legal services, from being taken advantage of by attorneys.<sup>122</sup> The law is rife with examples of the law's solicitude for clients in their relationship with attorneys, such as in fee setting,<sup>123</sup> informed consent rules,<sup>124</sup> recognition of the lawyer-client relationship as a confidential relationship,<sup>125</sup> or fiduciary responsibilities.<sup>126</sup> It defies logic to assume that a client faced with a lawsuit, who may have no other viable options to defend himself other than "hiring" an attorney selected by the insurer, would be any less in need of the protection.

Clients and insureds are further protected by the way their contracts with attorneys and insurers are interpreted and construed. In cases of doubt, the benefit of the doubt goes to the insured in insurance contracts,<sup>127</sup> and to the client in attorney-client contracts.<sup>128</sup> Because the contract is an integral focus in this analysis,<sup>129</sup> these presumptions loom large. Any analysis of the obligations owed to the insured should proceed from a viewpoint of protecting the legitimate expectations of the insured.

### *E. Advantages for the Attorney and the Insurer*

Another impact of the one-client model is that while the above considerations all focus on the client, that focus creates a potential positive impact for the attorney and for the insurer. An attorney who proceeds under a two-client understanding, whether by agreement or default, may,

122. See *infra* notes 123–126.

123. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2013) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . .")

124. See *id.* R. 1.0 cmt. 6 ("Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person . . . .").

125. EUNICE L. ROSS AND THOMAS J. REED, WILL CONTESTS § 9:12 (2d ed. 2013) ("Typically, the attorney-client and doctor-patient relationships are deemed confidential.").

126. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b. (2000) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary.").

127. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."); *id.* cmt. b. ("[I]nsurers are more likely than insureds to participate in drafting prescribed forms and to review them carefully before putting them into use."); see also COUCH, *supra* note 7, § 22:14 ("The words 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases.").

128. See, e.g., *Levine v. Bayne Snell & Krause, LTD.*, 40 S.W.3d 92, 95 (Tex. 2001) (holding that "the burden should fall on the lawyer to express in a contract with the client" the clear terms of the agreement).

129. See *supra* Part III.B.

after the fact, find his conduct evaluated under a one-client (or a favored-client)<sup>130</sup> model. For example, in *Employer's Casualty Company v. Tilley*,<sup>131</sup> an attorney representing both the insurer and the insured was faulted for his failure to fulfill his obligations to the insured.<sup>132</sup> The court conceded that the attorney was motivated by loyalty to his client, the insurer,<sup>133</sup> but found no justification for his conduct.<sup>134</sup> The court instead doubled down on stressing the duty the attorney owed to the insured.<sup>135</sup> While the attorney was not a party to any lawsuit in that case,<sup>136</sup> the court's reasoning could easily support either a malpractice action,<sup>137</sup> or an ethics complaint,<sup>138</sup> against an attorney proceeding in a similar manner. Any attorney confronted with such complaints will find little solace in the articulation of a two-client approach. Better for that attorney to begin with a clear one-client understanding.

Likewise, the insurer who follows a one-client approach will avoid many potential problems. In the Tilley case, it was the insurer, not the attorney, who suffered possible financial harm from the attorney's actions in that it was estopped<sup>139</sup> from proceeding with what might have been a legitimate denial of coverage.<sup>140</sup> It is cold comfort to an insurer to be considered a client, only to find that the designation has cost it the opportunity to contest coverage, as in the Tilley case,<sup>141</sup> or to take advantage of policy limits.<sup>142</sup>

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130. See *supra* note 28 and accompanying text. While the favored-client model does involve two clients, it increases the likelihood of violation of the attorney's obligations to the favored client.

131. 496 S.W.2d 552 (Tex. 1973).

132. *Id.* at 561 (stating that the attorney failed to fulfill his obligation to notify the insured of a coverage conflict).

133. *Id.*

134. See *id.*

135. *Id.* at 558, 561.

136. *Id.* at 561 (Johnson, J., concurring).

137. *Id.* at 561 (establishing that because of the attorney's actions, the insurer was "estopped as a matter of law from denying the responsibilities under its policy . . .").

138. *Id.* at 559–61 (holding that the attorney failed in his ethical obligations regarding the conflict of interest).

139. *Id.* at 561.

140. *Id.* at 555 (showing disputed fact issues included whether the notice to the insurance company was timely, and when the insured had actual or imputed knowledge of the accident).

141. See *infra* notes 310–11 and accompanying text.

142. See discussion of *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593 (Ariz. 2001), in Part IV.D.

## IV. APPLICATION OF THE ONE-CLIENT MODEL

### A. Introduction

Having discussed the reasoning behind the preference for the one-client model, it is instructive to look at the model in relation to areas of concern to determine if the reasoning holds up under closer analysis. Below is a general discussion of several situations in which the “who’s the client” question has arisen.

### B. Cost-Containment Issues

One recurring area of concern in insurance defense is the prevalence of so-called “litigation guidelines”<sup>143</sup> or other directions by the insurer that limit the amount of money an attorney is allowed to spend on the defense. One might question why this is an issue at all. After all, the insured has often contractually agreed to allow the insurer to control the defense,<sup>144</sup> which necessarily includes controlling expenses. Further, while it is the insurer that has an interest in controlling costs, it is generally in the interest of neither the insured nor the insurer to control costs to the extent that the defense does not succeed.<sup>145</sup> Finally, ethical considerations suggest that insurers should not be allowed to limit the attorney’s expenses to the point of damaging the defense.<sup>146</sup>

Cost-containment issues arise in several ways. First, the interests of the insured and the insurer can diverge on this issue.<sup>147</sup> While each normally wants the insured to prevail, it is only the insurer that has an incen-

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143. See Czarnecki, *supra* note 8, at 181 (“The controls that insurance carriers set forth to manage litigation are called litigation guidelines. . . . [L]itigation guidelines are common practice in the insurance industry.”).

144. See *supra* notes 43–44.

145. The statement would not be entirely true if one looks at a particular settlement as an unsuccessful defense. An insurer may prefer such a settlement when a cost-benefit analysis indicates it makes more sense to pay the claim.

146. Joy, *supra* note 8, at 339 (“In the past several years, ethics opinions in twelve states have concluded that insurance companies’ billing and auditing guidelines may unethically interfere with the professional judgment insurance defense lawyers owe their clients.”); See also Czarnecki, *supra* note 8, at 182 (“There is currently a national trend cautioning insurance defense attorneys against the ethical pitfalls inherent in submitting to certain requirements set forth by insurance companies in an effort at cost reduction.”).

147. See MODEL RULES OF PROF’L CONDUCT R. 1.8(f) cmt. 11 (2014) (“Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation . . . lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference . . . and there is informed consent from the client.”).

tive to do a cost-benefit analysis. It seems it would always be to the benefit of the insured, who is not paying the expenses, to spend everything that might possibly aid in his defense. On closer examination, such a statement may not be entirely accurate. It may be accurate in the context of any given ongoing defense, but unlimited defense spending is likely not the best for consumers in the aggregate. Few consumers would want to pay rates that would support unlimited and wasteful spending by insurers. Yet for purposes of this discussion, the focus will remain on the individual case, and any resulting divergent interest related to the cost of the defense.

Second, there must be some limitations on what appears to be a blanket grant of control to the insurer.<sup>148</sup> The important question for this analysis is: what is the source of those limits? It appears the real concern is to make sure the insurance policy gives the insured, as a client (and consumer), what it purports to give him.<sup>149</sup> One who has been promised a defense would not expect that the provider of that defense would be so undermined as to be ineffective, even if the coverage is small in relation to the claim.<sup>150</sup> The clear obligation to provide a defense should prevent an insurer from shirking this responsibility,<sup>151</sup> as should its general duty of

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148. The Restatement of the Law Governing Lawyers supports such a limit. After recognizing the propriety of following reasonable requests to limit expenses when the “Lawyer reasonably believes that the additional [expenses] can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder . . . [the] Lawyer may comply with Insurer’s direction.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §134 cmt. f., illus. 5 (2000). The comment then states that in some situations “the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage.” *Id.* cmt. f.

149. *Cf. id.* cmt. d. (citation omitted) (“Informed client consent may be effective with respect to many forms of direction . . . such as an insurer or indemnitor on whom the client has contractually conferred the power of direction.”); *Id.* cmt. f. (“With respect to client consent . . . in insurance representations, when there appears to be *no substantial risk that a claim against a client-insured will not be fully covered* by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence . . . should be all that is required.”) (emphasis added).

150. *See id.* cmt. f. (“Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured.”).

151. *See id.* (“If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage.”).

good faith.<sup>152</sup> With its focus on the attorney's duty of loyalty and other professional obligations to the insured, and on protecting the insured's contractual position, the one-client approach underscores these obligations.

Third, if cost containment becomes a disputed concern, an attorney representing both insurer and insured would be in the uncomfortable position of having to argue both for and against incurring the cost. Whether this conflict would mean that he could no longer represent either party would depend on whether the conflict is waivable,<sup>153</sup> and whether it has been waived.<sup>154</sup> Anecdotal evidence suggests that conflicts are often either avoided or waived through reasonable discussions between the attorney and insurer to satisfy both the contractual and the professional obligations.<sup>155</sup> This process is more likely to be followed when the attorney is focused on his ethical obligations to the insured as his only client. In that case the attorney is not dealing with a conflict between two clients at all, but with the tension between contractually imposed guidelines and the need to provide competent representation of his client. The attorney will generally abide by contractually mandated guidelines, but will also, when necessary, make a full-throated argument for expenses he deems necessary for an adequate defense.

Another cost-containment concern is the possibility that an attorney will be pressured or tempted to reveal information in an audit that would be harmful to the insured.<sup>156</sup> Under either model, the attorney's obligation to the insured compels a conclusion that such revelations are improper.<sup>157</sup> Yet the two-client model may create confusion in the mind of the attorney as to his obligations. The one-client model provides clarity to the attorney's obligation to his one client, so that he will more likely resist

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152. See WINDT, *supra* note 45, at § 2:21 (“Under insurance contracts, as in all contractual relationships . . . the law implies a covenant of good faith and fair dealing.”).

153. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 14 (2013) (“[S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.”).

154. *Id.* R. 1.7(b)(4).

155. Czarneci, *supra* note 8, at 182 (“[M]any insurers have stated that the guidelines are just that, guidelines. When a conflict arises, insurers say that the defense attorney should simply contact the insurance company to work out an acceptable plan of action that allows him to fulfill his ethical obligations to the insured and satisfy the insurer's requirements as well.”).

156. Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 598 (Ariz. 2001).

157. *Id.* (“[A]n attorney assigned to represent an insured cannot supply the insurer with information that either may be or actually is detrimental to the insured's interests.”).

temptation or pressure, and protect the insured's confidential information.<sup>158</sup>

A dramatic cost-containment concern arises when the insurer chooses to control costs by simply settling and paying the claim, having decided that the cost of defense will exceed the settlement payment. The situation would seem to be a win-win: the insurer saves money, and the insured faces no financial exposure. However, that is not necessarily the case. A professional sued for malpractice, for example, may have a strong interest in exoneration out of concern for his professional standing and his future insurance rates.<sup>159</sup> The insured could, at least in some instances, bargain for the right to control the settlement decision when he first purchases his insurance.<sup>160</sup> If he has retained that right, he has retained it for the reason that he expects his view of the settlement might differ from that of the insurer, and his attorney should focus on his interests. If he has, on the other hand, contracted away the right to make settlement decisions, the contractual obligations may become part of the advice given.<sup>161</sup> The client is nonetheless entitled to the complete and honest evaluation of an unconflicted attorney. This example of a cost-containment concern highlights settlements as an area rife with potential conflicts, which are discussed in the next section.

### C. Settlement Conflicts

The question of who the attorney represents can be especially confounding in the context of settlement negotiations, with some authors questioning whether giving settlement advice is even part of the defense attorney's function.<sup>162</sup> It is unquestionably true that many claims are set-

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158. MODEL RULES OF PROF'L CONDUCT R. 1.6 1.8(f) (2013).

159. See Nathan Anderson, Note, *Risky Business: Attorney Liability in Insurance Defense Litigation – A Review of the Arizona Supreme Court's Decision in Paradigm Ins. Co. v. Langerman Law Offices*, 2002 BYU L. REV. 643, 652 (2002).

160. See Jeffrey P. Donohue, Note, *Developing Issues under the Massachusetts "Physician Profile" Act*, 23 AM. J.L. & MED. 115, 146 (1997) (explaining "[i]nsurance policies play a critical role in determining the department of malpractice litigation. In certain situations, physicians may have some control over the course of a malpractice suit. Malpractice insurance policies sometimes include language requiring an insured's consent to settlement. Such clauses constitute 'pride' provisions intended to give physicians control over litigation that can harm the physician's professional reputation; doctors who are party to such policies pay a premium for this control.").

161. See *infra* notes 226–27 and accompanying text.

162. See Pryor & Silver, *supra* note 12, at 651 (emphasizing that the defense function and the settlement function are independent functions, and that insurers are not contractually required to use lawyers to settle most claims). See also *id.* at 657 (“[A]n insurance company has no authority to appoint a lawyer to handle settlement-related

tled without involvement of counsel at all.<sup>163</sup> However, in the context of a litigated claim, I suggest that settlement decisions are sufficiently entangled with litigation that the attorney hired to defend has professional obligations to the insured regarding settlement advice.<sup>164</sup> On the other hand, when settlement negotiations are ongoing, the insurer also may justifiably expect to receive competent advice from counsel about the settlement options.<sup>165</sup> Further, any rule that would require the insurance company to hire its own counsel for each case could not only be cumbersome in practice, but could ultimately increase insurance costs.<sup>166</sup> The key to harmonizing these apparently inconsistent expectations is to maintain the distinction between sharing information and giving an evaluation on the one hand, and giving legal advice on the other.

Consider, for example, an offer to settle within the policy limits.<sup>167</sup> Assume the offer is for the policy limit, but the likely actual damages are considerably lower than that amount. It might seem that the optimal advice from the insured's perspective would always be to settle for the policy limits.<sup>168</sup> After all, one could argue that the insured does not care about keeping the amount below the limits. Recognizing that this is an overstatement,<sup>169</sup> let us for the moment proceed with the assumption that it is best for the insured in at least some cases to settle for the policy

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issues for an insured."); *id.* at 654 (explaining that when the insurer assigns responsibilities to a lawyer, it "acts in its own right and on its own behalf.").

163. *Id.* at 651.

164. Baker, *supra* note 11, at 139 ("The duty to settle can also be seen as an extension of the duty to defend. After all, what better way is there to minimize the judgment risk than to settle the case?"). See also Pryor & Silver, *supra* note 12, at 654 ("We concede that defense lawyers often provide settlement-related services.").

165. Pryor & Silver, *supra* note 12, at 651 ("[A] carrier may choose to combine the defense and settlement functions by using a defense lawyer to settle a claim. Nothing in a standard contract prohibits this arrangement, which also turns out to be convenient and efficient in many situations."). See also *id.* at 653 ("[L]awyers usually run defense issues and settlement issues together . . . . Lawyers initially hired only to defend cases find themselves communicating settlement offers and demands, negotiating, making settlement recommendations, and drafting releases.").

166. See Baker, *supra* note 11, at 139 (pointing out the increase in costs that would be occasioned by hiring two attorneys for settlement negotiations).

167. See Morgan, *supra* note 6, at 27 ("The most common way the conflict of interest arises is when the plaintiff makes an offer to settle the case for a sum equal to or less than the insured's policy limits.").

168. See *id.* ("Acceptance of a policy limit offer would, in most cases, be an unqualified benefit to the insured; the insured's possible liability for a large excess judgment would be extinguished.").

169. See *supra* note 147 and accompanying text.

limits. Yet the insured also has a contractual duty to let the insurer make settlement decisions.<sup>170</sup>

Here, the obligations of Model Rule 2.3,<sup>171</sup> which allows an attorney to “provide an evaluation of a matter affecting a client for the use of someone other than the client”,<sup>172</sup> are especially pertinent. Giving a dispassionate evaluation to the insurer regarding possible settlement would usually be compatible with the lawyer’s obligations to his client.<sup>173</sup> Assume, for example, that the policy limit is \$100,000, and that a reasonable analysis of the claim indicates liability on the part of the insured. Assume further that a reasonable analysis indicates that damages are no more than \$10,000. Relaying this information to the insurer would not appear to be incompatible with the lawyer’s obligations to the insured. Taking the additional step of advising the insurer about how to proceed to avoid claims of bad faith refusal to settle, however, likely involves a conflict of interest.<sup>174</sup>

Now consider an offer to settle for the policy limits, when actual damages are likely much higher than that limit. Now the insurer would seem to have no incentive to settle for the limit. After all, that is the maximum it would be required to pay anyway. This, of course, ignores two realities. The first is that the insurer is contractually “obligated to treat the insured’s interests as its own.”<sup>175</sup> The one-client model promotes attention to the insured’s interests, so that the attorney’s advice protects those interests. This focus, in turn, protects the interests of the insurer by fulfilling its contractual obligation. Second, case law often makes the insurer responsible for the full amount of the judgment in the event of a bad faith refusal to accept a settlement offer.<sup>176</sup> It is the insurer’s improper concern for protecting itself at the expense of the insured that

170. See Silver *supra* note 51, at 1594.

171. MODEL RULES OF PROF’L CONDUCT R. 2.3 (2013).

172. *Id.* R. 2.3(a).

173. *Id.* (requiring that “the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.”).

174. An attorney advising an insurer about avoiding bad faith claims, while limiting its payment on the claim as much as possible, may find that his duty to the insured is “materially limited by [his] responsibilities” to an insurer that is more interested in protecting its bottom line than in protecting the insured. See *id.* R. 1.7(a)(2). Cf. Pryor & Silver, *supra* note 12, at 658–59.

175. WINDT, *supra* note 45, § 4:20.

176. See Morgan, *supra* note 6, at 28–29. See also, e.g., Unauthorized Practice of Law Comm. v. Am. Home Assurance Co. and The Travelers Indem. Co., 261 S.W.3d 24, 41 (Tex. 2008) (citing G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm’n App. 1929, holding approved)) (“An insurer has a so-called *Stowers* duty to accept a claimant’s reasonable offer to settle within policy limits or stand to an excess judgment.”).

would most often lead to a bad faith finding.<sup>177</sup> When the attorney providing the evaluation is focused on protecting the insured as his sole client, such bad faith decisions are less likely to occur.

Further, to the extent there is a conflict between the advice that an attorney for the insurer and one for the insured would give to their respective clients, the one-client model gives clearer guidance to the attorney. He knows what is best for his client regarding settlement advice, and he knows that he has an obligation to the insurer to keep it informed.<sup>178</sup> He knows that the insurer's right to make settlement decisions, while subject to a good faith standard,<sup>179</sup> is designed to provide some protection for the insurer.<sup>180</sup> The insurer's contractual right to avoid making excessive payments is as much a part of the contractual agreement as are the rights of the insured. If the context of the case raises any concern about the compatibility of giving a settlement evaluation to the insurer, the attorney would not do so without the informed consent of the insured.<sup>181</sup> If the attorney does not advise the insurer, the insurer understands that it will have to seek its own counsel for any legal advice. Thus confusion about who is represented is averted, and each party is better protected.

#### D. Malpractice Liability Questions

What are the attorney's obligations to the insurer, and when is the attorney potentially liable to the insurer for malpractice? In *Paradigm Ins. Co. v. Langerman Law Offices*,<sup>182</sup> Paradigm hired Langerman Law Offices ("Langerman") to represent its insured in a medical malpractice case.<sup>183</sup> Eventually the claim was settled within the limits of the insured's malpractice policy with Paradigm.<sup>184</sup> Paradigm later sued Langerman for

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177. Cf. Morgan, *supra* note 6, at 40–41 ("The insurance industry may complain that the one-client approach renders insurance companies second-class citizens, but if they strip away the rhetoric, surely they must see that to act as though the insured is not the only client will almost inevitably involve them in a claim of bad faith that will be a very expensive balm for their pride.").

178. That obligation is, of course, derivative based on the client's contract with the insurer.

179. See Morgan, *supra* note 6, at 28–29 (discussing the insurer's duty of good faith in settlement decisions).

180. See Richmond, *supra* note 42, at 115 ("By controlling its insured's defense, an insurer is best able to minimize its financial exposure in any given loss, especially with respect to its ultimate indemnity obligation.").

181. MODEL RULES OF PROF'L CONDUCT R. 2.3(b) (2013).

182. 24 P.3d 593 (Ariz. 2001) (holding that the attorney often owes a duty to the insurer even if the insurer is a non-client).

183. *Id.* at 594.

184. *Id.* at 595.

failing to discover and notify it that the insured was also covered by the hospital's insurance policy, and that the hospital's policy was likely the primary policy.<sup>185</sup> Assuming the plaintiff's allegations were correct, which we must,<sup>186</sup> the attorney's alleged negligence caused no prejudice to the insured.<sup>187</sup> Yet the harm to the insurer, who paid the entire amount, was significant.<sup>188</sup>

The Arizona Supreme Court rejected the findings of the court of appeals that the attorney owed a duty to the insurer based on an attorney-client relationship, and that there can be no malpractice liability without such a relationship.<sup>189</sup> Recognizing important reasons to find a negligent attorney liable to the insurer,<sup>190</sup> the court pointed out that it is not necessary for the insurer to be a client to have a cause of action against the attorney, as recognized by both the Restatement<sup>191</sup> and the common law.<sup>192</sup> The court thus assured accountability of the attorney while protecting the attorney-client relationship between the attorney and the insured.<sup>193</sup>

Choosing a two-client model in order to hold the attorney accountable to the insurer is too result-oriented, and not necessary for finding liability.<sup>194</sup> Because the required duty<sup>195</sup> does not have to come from an

185. *Id.*

186. The trial court had granted summary judgment against the plaintiff (insurer), and thus the court took the "facts in the light most favorable to" the plaintiff. *Id.* at 594.

187. *Id.* at 595.

188. *Id.*

189. *Id.* at 599.

190. *Id.* ("[I]f that lawyer's negligence damages the insurer only, the negligent lawyer fortuitously escapes liability. Or if the lawyer's negligence injures both insurer and insured in a case in which the insured is the only client but refuses to proceed against the law, the insurer is helpless and has no remedy.")

191. *Id.* at 600 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) cmt. g (2000)) ("[A] lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, *whether or not the insurer is held to be a co-client of the lawyer.*") (Emphasis in original).

192. *Id.* 600–601.

193. *See id.* at 602 (explaining that determination of whether the lawyer would ultimately be liable under the facts of this case required remand to the trial court).

194. *Id.* at 600–01.

195. *See, Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995) ("Generally, to recover on a claim of legal malpractice, a plaintiff must prove that (1) the attorney owed the plaintiff a duty, the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred.")

attorney-client relationship,<sup>196</sup> the one-client model actually works better. For example, when the attorney faces potential liability based on the fact that the insurer is an intended beneficiary of the attorney's representation, that duty cannot extend to the point that it undermines the duty to the insured.<sup>197</sup> Thus, under the one-client model it is clear that any duty to the insurer derives from, and must be consistent with, the paramount duty to the client.<sup>198</sup>

Tort law further protects insurers as nonclients by making attorneys potentially liable for misrepresentations on which the insurer reasonably relies.<sup>199</sup> The potential liability does not arise from an attorney-client relationship,<sup>200</sup> although the existence of the relationship may impact the analysis of the reasonableness of the reliance.<sup>201</sup> The duty to the insurer, on which liability is based, arises in tort and, given that the attorney is ethically prohibited from making misrepresentations, is consistent with the attorney's professional obligations to his client, the insured.<sup>202</sup> Thus, the one-client model provides appropriate protection for the insurer without putting the attorney in a no-win situation.

The one-client model provides this protection without losing the efficiency benefits that can result from the attorney giving appropriate information and evaluations to the insurer. It makes economic sense for the insurer to rely on the work of the attorney representing the insured where there is no conflict, as the work done to protect the client from liability necessarily inures to the benefit of the insurer. As the *Paradigm* court stated, “[w]hen the interests of insurer and insured coincide, as they often do, it makes neither economic nor practical sense for an insurer to hire another attorney to monitor the actions and decisions of the attorney

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196. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000) cmt. i (“In some situations lawyers owe duties to nonclients resembling those owed to clients. . . . Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer . . . .”); see also *id.* § 51(2)–(3) (outlining a lawyer's duty of care to a nonclient).

197. *Id.* § 51(3)(b) (indicating that the duty to the nonclient exists only to the extent it “would not significantly impair the lawyer's performance of obligations to the client”).

198. *Id.*

199. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *McCamish v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999).

200. Granted, the circumstances of the representation may have brought the parties together, but liability does not arise from the representation.

201. See *McCamish v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999).

202. Attorneys are prohibited by the rules from making misrepresentations to others on their clients' behalf. MODEL RULES OF PROF'L CONDUCT, R. 8.4(c) (2013) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”).

assigned to an insured.”<sup>203</sup> The resulting dependence on the attorney creates a “special relationship” under which the attorney’s discharge of his duties to the insured is designed to benefit, at least to some extent, the insurer.<sup>204</sup> However, any duty to the insurer extends only so far as is consistent with zealous representation of the insured.<sup>205</sup>

In *Paradigm*, the concern was too little accountability of the attorney representing the insured - a concern the Arizona Supreme Court determined was unfounded.<sup>206</sup> In another case, *Rogers v. Robson, Masters, Ryan, Brumond & Belom*,<sup>207</sup> the problem was arguably *too much* accountability.<sup>208</sup> In *Rogers*, the attorneys representing the insured settled a claim on the authority of the insurer without telling the insured about the settlement offer.<sup>209</sup> The insured sued the attorneys.<sup>210</sup> The trial court granted summary judgment to the attorneys.<sup>211</sup> The court of appeals reversed, citing the attorneys’ duty to the insured.<sup>212</sup> The Illinois Supreme Court affirmed.<sup>213</sup> The case has been criticized,<sup>214</sup> and the result does raise questions. Because the insurer paid the claim, there appear to be no damages to the insured.<sup>215</sup> Assuming, without conceding, that there were no damages, the additional time and money spent on the issue<sup>216</sup> were futile and wasteful. However, any problems with the result could as easily be addressed under the one-client model as under the two-client model, with the one-client model again being preferable.

First, even under a two-client model, the insured is *a* client, and is therefore owed a duty by the attorney hired to represent him.<sup>217</sup> Thus, the

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203. *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 601 (Ariz. 2001).

204. *Id.*

205. *Id.*

206. *Id.* at 598.

207. *Rogers v. Robson*, 407 N.E.2d 47 (Ill. 1980).

208. *Cf. Silver*, *supra* note 28, at 1593 (lamenting the ability of the client/insured to sue for malpractice under the facts of the case).

209. *Rogers*, 407 N.E.2d at 48.

210. *Id.*

211. *Id.* at 47.

212. *Rogers v. Robson*, 392 N.E.2d 1365 (Ill. App. Ct. 1979), *aff'd*, 407 N.E.2d 47 (Ill. 1980).

213. *Rogers*, 407 N.E.2d at 49.

214. *See Silver*, *supra* note 28, at 1593–94.

215. *Rogers*, 407 N.E.2d at 48 (showing that the defendants argued that the plaintiff suffered no damages in *Rogers*). *Cf. Rogers*, 392 N.E.2d at 1368 (settling the suit against Dr. Rogers for a nominal sum, and obtaining from the plaintiff an express denial of any wrongdoing by Dr. Rogers).

216. As summary judgment was found to be improper, the case was remanded for trial. *Rogers*, 407 N.E.2d at 47.

217. *Supra* notes 62–63 and accompanying text.

breach of that duty would necessarily yield the same result, as recognized by the appellate court in *Rogers*.<sup>218</sup> Second, even if there are no damages from the unauthorized settlement (which cannot be assumed at this point),<sup>219</sup> the issue might be avoided at the trial court level under either model. One element of a malpractice claim is damages.<sup>220</sup> If the plaintiff neither alleged nor offered proof of damages, and summary judgment had been granted on that ground, the judgment may have been affirmed on appeal. That was not the issue before the court in *Rogers*, and the Illinois Supreme Court emphasized that it was not making any decision about ultimate liability for damages.<sup>221</sup> Third, assuming neither the contract nor state law allowed a direct action against the insurer,<sup>222</sup> the claim is solely against the insured, and thus the insured is the one who is entitled to make settlement decisions.<sup>223</sup> Granted, the insured has *contractually* granted that right to the insurer,<sup>224</sup> but a right arising out of a contract

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218. After discussing the obligations of the attorney who represents both the insurer and the insured, the appellate court stated that, “[w]hile the foregoing discussion has focused on the risk of conflict inherent in dual representation, the principle to be gleaned is that the attorney does represent the insured and assumes all of the duties imposed by the attorney-client relationship.” *Rogers*, 392 N.E.2d at 372.

219. *Id.* at 1373 (“Dr. Rogers also alleges that as a result of the settlement he has sustained loss of both direct and referred surgical patients, suffered a substantial increase in professional liability insurance premiums and incurred legal fees and related costs. We believe these allegations are more than sufficient to allege specific and actual damages that were proximately caused by the defendant’s conduct. However, since questions of proximate cause and damages are ordinarily questions of fact which a jury must ultimately resolve, the case must be remanded for further proceedings.”).

220. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995) (“to recover . . . a plaintiff must prove that . . . damages occurred.”).

221. *See Rogers*, 407 N.E.2d at 49 (“[S]ince no disclosure was made and plaintiff was not given the opportunity to elect what course to pursue, we need not speculate what recourse, if any, plaintiff had under the terms of the insurance policy. Nor need we reach the question whether plaintiff could prove damages which are the proximate result of the breach of the duty to make a full disclosure of the conflict between defendants’ two clients. It cannot be determined from this record what damages, if any, plaintiff can prove.”).

222. Direct actions against the insured are beyond the scope of this article, but are discussed briefly in the next footnote.

223. The decision to allow or disallow a direct action against the insurer is an important policy decision made by the state. *See Couch*, *supra* note 7, § 104:1 (noting that public policy trends favoring direct action against the insurer are “not universal . . . and direct actions remain against the public policy of some jurisdictions”). Therefore, any policy decision to disallow direct action should not be undermined by ignoring the insured/defendant in settlement discussions.

224. *See supra* Part III.B, discussing the significance of the contract in the analysis. *See also*, *WINDT*, *supra* note 45, § 3:9, at 3-57.

does not change the attorney's obligation to his client, the insured.<sup>225</sup> Of course, it would be incumbent on an attorney representing the insured alone to advise his client of the consequences of not honoring his contract,<sup>226</sup> including the probability that he may become responsible for payment of the settlement.<sup>227</sup> Thus, if the attorney had considered the insured to be his sole client, he surely would have advised his client of the offer, and the reasons for accepting it. The insured, on advice of the attorney, may well have accepted the offer,<sup>228</sup> and the whole wasteful lawsuit would have been avoided.<sup>229</sup> On the other hand, the decision is the insured's to make.<sup>230</sup> The appellate court decision in *Rogers* respects the client's autonomy in making that decision, stating:

By failing to inform plaintiff of the proposed settlement, defendant foreclosed plaintiff from alternatives that were available to him. Plaintiff could have consented to continued representation by the defendant at the expense of the insurance company with the accompanying likelihood that the case would be settled without his consent . . . . If plaintiff believed such a course of action was not in his best interests, he could release the insurance company from its obligation under the policy, select different counsel, defend the action at his own expense and bear the risk of an adverse decision.<sup>231</sup>

Various factors may be involved in the insured's decision,<sup>232</sup> but it is his decision.

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225. See *supra* notes 100–101 and accompanying text.

226. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2013). See also *id.* R. 1.2(a) (“[A] lawyer . . . shall consult with the client as to the means by which [the objectives of the representation] are to be pursued.”).

227. WINDT, *supra* note 45, § 3:9, at 3-57 to 3-58.

228. Whether Dr. Rogers would accept an offer of settlement after thoroughly discussing the matter with his attorney, and weighing his reputational concerns against the contractual implications, is entirely speculative.

229. Even if the client did not accept the offer, had the attorney consulted him regarding the settlement, the basis of the lawsuit against the attorney would not have existed.

230. Morgan, *supra* note 6, at 32 (“The doctor may have lost coverage from a failure to cooperate and to allow the insurer to settle, but those consequences would have been the doctor's choice.”).

231. *Rogers v. Robson*, 392 N.E.2d 1365, 1372 (Ill. App. Ct. 1979).

232. See *supra* notes 219, 228.

## E. Coverage Conflicts

### 1. Introduction

Perhaps the most dramatic conflicts concerns arise when there is a question about coverage. For example, the complaint against the insured may allege some claims that are covered under the policy and others that are not.<sup>233</sup> There may be questions about whether the insured is covered under the policy for the particular event in question.<sup>234</sup> The insurer may have hired an attorney to represent the insured under a reservation of rights.<sup>235</sup> Or it may be that the argument for coverage is frivolous, or is based on fraud or collusion.<sup>236</sup> In dealing with each of these situations, the one-client model provides the better analysis.

### 2. Distinguishing Liability Issues from Coverage Issues

It is important to distinguish matters related to coverage and matters related to defending the insured against liability. The insured has no greater coverage than is provided by the policy,<sup>237</sup> but absent fraud or misrepresentation,<sup>238</sup> any suggestion that it is the attorney's job to ferret out coverage defenses is tantamount to an admission of a conflict. The insurance company should *never* rely on the attorney to uncover coverage problems, because doing so immediately results in a breach of an obligation to the client.<sup>239</sup> Of course, coverage conflicts may be apparent from the beginning.<sup>240</sup> If the insurer initially believes there is (or may be) no coverage, it will have to determine whether to proceed with the de-

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233. See *infra* Part IV.E.4.

234. Cf. WINDT, *supra* note 45, § 4:1 (“[T]he insurer must defend if, but only if, any of the allegations against the insured could result in a judgment that the insured would be obligated to pay.”)(Whether the allegations could result in such a judgment may of course be disputed.)

235. See COUCH, *supra* note 7, § 202:38 (citations omitted) (“A reservation of rights is a means by which insurer avoids breaching its duty to defend, and seeks by agreement to suspend operation of the doctrine of waiver and estoppel prior to a determination of the insured’s liability.”).

236. See *infra* Part IV.E.3.

237. Cf. WINDT, *supra* note 45, § 2:1 (“[U]nder the terms of a particular policy, an insurer may have no obligation to do anything, despite having been put on notice of a claim.”).

238. See *infra* Part IV.E.3.

239. See *Emp’rs Cas. Co. v. Tilley*, 496 S.W.2d 552, 559 (Tex. 1973).

240. See WINDT, *supra* note 45, § 4:20, at 4–194 (“The first thing that an insurer with a duty to defend must determine after receiving notice that a suit has been filed against one of its insureds is whether there is a conflict of interest between it and the insured with regard to how that lawsuit should be defended.”).

fense,<sup>241</sup> to deny coverage,<sup>242</sup> to seek a judicial determination regarding coverage,<sup>243</sup> or to proceed under a reservation of rights.<sup>244</sup> If the insurer denies coverage the resulting dispute will pit the insured against his insurer.<sup>245</sup> In such a situation, the insurer does not have to provide counsel to oppose it in the coverage dispute.<sup>246</sup> At the other extreme, the insurer may decide to accept coverage and proceed. At this point there would generally be no coverage conflict as the insurer has now waived the right to deny coverage<sup>247</sup> and must provide a defense. If conflicts develop during the course of conducting that defense,<sup>248</sup> the advantages of the one-client model related to conflicts of interest are key.<sup>249</sup>

The insurer may, on the other hand, elect to provide a defense while reserving certain coverage questions.<sup>250</sup> At this point there is a potential conflict.<sup>251</sup> Once the coverage conflict ripens, failure to deal with it appropriately by making sure the insured is represented by unconflicted counsel will likely have adverse consequences for the insurer.<sup>252</sup> In a recent Louisiana case, *Emery v. Progressive Casualty Ins. Co.*,<sup>253</sup> the insurer, after saying it was denying coverage,<sup>254</sup> hired an attorney to defend both the

241. *Armstrong Cleaners v. Erie Ins. Exch.*, 364 F.Supp.2d 797, 805 (S.D. Ind. 2005).

242. *Id.*

243. *Id.*

244. *Id.*

245. *See* WINDT, *supra* note 45, § 232:41 (“[I]f the insurer thereafter rejects the claim for proceeds or other benefits under the insurance contract, and the insured/beneficiary remains convinced that the contract calls for payment, the primary remedy for the claimant is to bring an action against the insurer for breach of contract.”). *See also*, Czarnecki, *supra* note 8, at 179 (noting that when “the insured is suing his own insurance company for denying his claim” the tripartite relationship is not implicated).

246. *See generally* WINDT, *supra* note 45 §4:1 (The duty to defend “applies solely with regard to the cost of defending lawsuits brought against an insured.”).

247. *See id.*, § 4:20 at 4–194 (“If the insurer defends unconditionally, there is, because of the application of estoppel principles, no potential for a conflict of interest between the insured and the insurer.”).

248. Even after the insurer has chosen to provide a defense, conflicts can arise related to spending guidelines or settlement. *See supra* Part IV.B and Part IV.C.

249. *See supra* Parts III.C.1 and III.E.

250. The insurer may elect to provide representation, reserving its “right later to deny coverage because of a coverage issue . . . .” WINDT, *supra* note 45, § 4:20, at 4-194 to 4-195.

251. *Id.*

252. *Id.*

253. *Emery v. Progressive Cas. Ins. Co.*, 49 So.3d 17 (La. Ct. App. 2010).

254. *Id.* at 18–19.

insured and insurer.<sup>255</sup> Yet once the insurer decided to deny coverage, the conflict was clear.<sup>256</sup> By not only failing to advise the insured of the conflict,<sup>257</sup> but also undertaking to provide a defense<sup>258</sup> despite the existing conflicts,<sup>259</sup> the insurer waived its right to deny coverage.<sup>260</sup>

The case is an extreme example of the problems caused (1) by expecting an attorney to represent both the insured and the insurer in a conflict situation, and (2) by failing to limit the representation to what should have been its contractual purposes.<sup>261</sup> Once it was clear a coverage dispute existed, one attorney should not have attempted to represent both sides. But the insurer was never required to hire an attorney to represent the insured in a coverage dispute at all. Any attorney the insurer hired to represent itself in such a dispute could not also represent the insured in that dispute or otherwise.<sup>262</sup>

However, the existence of a coverage dispute does not prevent the insurer from hiring an attorney to represent the insured. It still has a contractual obligation to do just that.<sup>263</sup> Moreover, the attorney so hired owes his client, the insured,<sup>264</sup> absolute loyalty<sup>265</sup> and a vigorous defense.<sup>266</sup>

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255. *Id.* at 19.

256. *Id.* at 22 (“[D]espite having already denied coverage, Progressive appointed a single attorney to represent itself and its insured in the litigation, and that attorney filed an answer asserting, for the second time, that the Progressive policy did not provide coverage for the accident. Despite this obvious conflict of interest, Progressive did not act to provide separate counsel for its insured for approximately seventeen months.”).

257. *Id.* (“Progressive did nothing to advise T & T of the conflict of interest inherent in [its] actions . . .”).

258. *Id.* (“These actions on the part of Progressive not only constituted a conflict of interest, but they constituted conduct so inconsistent with an intent to enforce its right to assert its coverage defense as to induce a reasonable belief that the right had been relinquished.”).

259. *Id.*

260. *Id.*

261. The purpose is to provide a defense to the insured as required under the insurance contract.

262. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2013) (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one client will be directly adverse to another client.”).

263. *Cf.* COUCH, *supra* note 7, § 202:34 (“If a conflict of interest exists, and the insured has rejected the insurer’s defense under reservation of rights, an insurer is not wholly relieved of its duty to defend the insured.”).

264. The insured’s status as a client is not dependent on whether the one or two-client model is chosen. *See supra* text accompanying note 62.

265. *See supra* notes 102–03.

266. *See* WINDT, *supra* note 45, § 4:20, at 4-195 to 4-196.

Thus, when an attorney is hired to represent the insured, many conflicts problems will be averted if two things are made clear from the outset: (1) the attorney represents only the insured regarding liability questions, and (2) the attorney *does not* represent either party regarding coverage disputes.<sup>267</sup>

### 3. Distinguishing Frivolous Claims, Fraud, or Collusion

The insured has no right to the aid of an attorney to help him commit fraud, make frivolous arguments, or commit perjury.<sup>268</sup> The number of clients an attorney represents cannot change this fact. Ethical<sup>269</sup> and (often) statutory rules<sup>270</sup> prevent the attorney and/or the client<sup>271</sup> from making a frivolous claim. Attorneys and clients are likewise prohibited from engaging in fraud or collusion.<sup>272</sup> For example, assume that the policy provides that the insured has no coverage if he lets an unlicensed driver drive his car. He gives the keys to an unlicensed driver, who proceeds to wreck his car. He makes a claim on his policy, stating that he was driving at the time. The claim by the “insured” is fraudulent.<sup>273</sup> The attorney hired to represent him *cannot* participate in this fraud.<sup>274</sup> Thus, at whatever point he discovers the fraud, he will be required to withdraw,<sup>275</sup>

267. See WINDT, *supra* note 45, § 4:20, at 4–195.

268. Cf. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (“[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury.”).

269. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2013) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”).

270. See, e.g., FED. R. CIV. P. 11.

271. While the model rules would by definition apply only to attorneys, clients can be sanctioned under many relevant statutes. See, e.g., *id.* R. 11(c)(1).

272. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2013) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”). Both clients and lawyers would be constrained from committing fraud under general tort and criminal principles.

273. BLACK’S LAW DICTIONARY 731 (9th ed. 2009) (defining fraud as “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”).

274. See MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2013). See also *id.* R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”).

275. *Id.* R. 1.16(a)(1) (internal punctuation omitted) (“[A] lawyer . . . shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law.”) This duty to withdraw is limited by the requirement that the lawyer continue with the representation when so ordered by the tribunal. *Id.* R. 1.16(c).

and may be allowed to report his involvement.<sup>276</sup> His choices are dictated not by some improper loyalty to the insured, however, but by legal, ethical, and moral considerations. A client has no legitimate interest in the attorney's assistance in committing fraud.<sup>277</sup>

Collusion with the insured to get coverage would work in a similar way. Assume, for example, a lawyer is hired to represent a husband whose wife sued him after she was injured as a passenger in a car he was driving. In a New Jersey case<sup>278</sup> the court discussed the potential conflict caused by this scenario. When the insured gave testimony at trial that conflicted with the version of the facts he had previously given to his attorney,<sup>279</sup> the attorney, with the court's blessing, proceeded to impeach his credibility.<sup>280</sup> After a judgment for the defendant,<sup>281</sup> the plaintiff appealed.<sup>282</sup> The appellate court reversed,<sup>283</sup> noting the impropriety of defense counsel's actions,<sup>284</sup> and the primacy of the attorney's duty to his client, the insured.<sup>285</sup> However, the court's disapproval related to the attorney's chosen course of action – a course that violated his professional obligations to his client<sup>286</sup> – not to his instinct to avoid putting on false testimony.<sup>287</sup> The court pointed out that an attorney who suspects his client is lying may need to disclose that information to the court,<sup>288</sup> but should not proceed with a conflicted, and damaging, representation of his

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276. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(5) (2013). See also MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3), (b), (c) (2013).

277. *Id.* R. 1.2(d) (“A lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

278. *Montanez v. Irizarry-Rodriguez*, 641 A.2d 1079 (N.J. Super. Ct. App. Div. 1994).

279. *Id.* at 1080–81.

280. *Id.* at 1081–82.

281. *Id.* at 1082.

282. *Id.*

283. *Id.* at 1085.

284. *Id.* at 1083–84.

285. *Id.* at 1084 (internal citation omitted) (“[I]t is clear that insurance counsel is required to represent the insured's interest as if the insured hired counsel directly. Indeed, insurance counsel's loyalty to the insured may actually be paramount.”).

286. *Id.* (“In this case, defendant was left essentially defenseless to his attorney's attack on his credibility. . . . [B]ecause he was abandoned by counsel, he was unable to advocate that position [that his testimony was not inconsistent] in a meaningful fashion.”).

287. *Id.* at 1085.

288. *Id.* (“The remedy for an attorney in such situations is to disclose the information the attorney believes is required [by the Rules] to the court, and request permission to withdraw . . .”).

client.<sup>289</sup> Thus, the insurer is protected not because it is considered a client of the attorney, but because no attorney can participate in a client's fraud or collusion.<sup>290</sup> Considering the insurer a client does not add additional protection, but any additional impetus to protect the insurer can exacerbate the problem.<sup>291</sup>

#### 4. Dealing with Covered Claims and Claims without Coverage

The complaint against the insured may allege some claims that are covered under the policy and others that are not. This brings us full circle to the Stephanie Plum example discussed at the beginning of this article.<sup>292</sup> If the complaint against the insured alleges both, it is especially important to the insurer to defeat covered claims, while it is more important to the insured to defeat those for which there is no coverage.<sup>293</sup> The policy often requires the insurer to provide a defense for both claims.<sup>294</sup> Where liability is likely as to either the covered claims or the uncovered claims, but not as to both, the conflict<sup>295</sup> is especially stark. To meet expectations created by the terms of the policy, the defense must be untainted by obligations that might dilute the attorney's zeal and effectiveness.<sup>296</sup> Thus, for this purpose, the one-client model again works best. Further, this pleadings based conflict is likely apparent from the beginning. In that case the two-client model is nothing more than a theoretical model, and can have no practical effect. From the outset the attorney hired to represent the insured must represent the insured alone and de-

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289. *Id.* (“[N]either rule requires or permits the attorney to represent a conflicting interest hostile to the client’s position.”).

290. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2013).

291. *See Montanez*, 641 A.2d at 1082 (explaining its rationale, the court stated “[i]t became obvious to us upon reviewing the parties’ briefs that defense counsel had no reason to impeach his client’s testimony were it not for his unexpressed concern that the testimony was going to be harmful to the interests of the insurer who had appointed him to defend the matter.

292. *See supra* text accompanying notes 1-5.

293. *See supra* text accompanying notes 6-7.

294. *Cf. Morgan, supra* note 6, at 22-23.

295. *See WINDT, supra* note 45, § 4:20, at 4-199 to 4-200. (“[A]ssume that a plaintiff alleges that a defendant-insured is guilty of either negligence or an intentional tort because of his wrongdoing, and the insurance policy does not provide coverage for intentional torts. The insurer, under those circumstances, would be benefited, at the expense of the insured, if the insured’s counsel shaped because the defense so that, in the event he was unable to prove that the insured was not liable, the insured would be found guilty of an intentional tort. A conflict of interest, therefore, does exist in that situation.”).

296. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013) (“A lawyer shall provide competent representation to a client.”).

fend him zealously against both kinds of claims. Whether that means that the attorney must be selected by the insured rather than the insurer<sup>297</sup> is a separate question, which will be discussed below.<sup>298</sup>

### 5. Coverage Disputes Unrelated to the Defense of the Claim

In the situation just discussed, the issues in the lawsuit go to the very heart of the dispute over coverage, creating a virtually unavoidable conflict. Yet not every coverage question involves such a conflict.<sup>299</sup> The analysis depends on the circumstances of the case, under which there may not be a conflict at all.<sup>300</sup> For example, assume that the insured and insurer disagree regarding the amount of coverage contractually provided by the policy, and the insurer proceeds with the defense, reserving its rights related to coverage. The dispute has no bearing at all on the way the attorney defends the lawsuit, and the attorney can provide a vigorous defense untainted by any conflicting loyalty to the insured.<sup>301</sup>

However, another potential problem may rear its head. While the attorney may have no conflict based on how he conducts the defense, he may be tempted to use his position to curry favor with the insurer by getting information from his client to help the insurer in the coverage dispute. This choice constitutes a breach of duty to the insured.<sup>302</sup> It arises not from a legitimate obligation of the attorney, but from succumbing to the temptation to help the insurer and thereby advance his own interests. The problem is not caused by choosing a two-client model, but can be exacerbated by it.

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297. See WINDT, *supra* note 45, § 4:20, at 4-196 (suggesting such in an outcome “an insurer can lose its right to select the insured’s defense counsel . . . if a conflict of interest exists between the insurer and the insured as to the defense.”).

298. See *infra* Part IV.E.6.

299. WINDT, *supra* note 45, § 4:20, at 4-196 (“[T]he existence of a reservation of rights does not automatically give rise to a conflict of interest between the insurer and the insured with regard to the conduct of the insured’s defense.”).

300. *Id.* at 4-197 (“Not every reservation of rights creates a conflict of interest requiring appointment of independent counsel. . . . If the issue on which coverage turns is independent of the issues in the underlying case, *Cumis* counsel (counsel selected by the insured) is not required.”). The author points out that some courts find that when an insurer hires defense counsel under a reservation of rights, a conflict of interest is always implicated, *id.* at 4-195, but disagrees with this conclusion. See also COUCH, *supra* note 7, § 202:26 (“[S]ome [courts] have explicitly found that a conflict of interest does not exist merely by virtue of the fact that the insurer reserved its rights.”).

301. *Id.*

302. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2014).

Consider a frequently cited Texas case, *Employers Casualty Company v. Tilley*.<sup>303</sup> In that case an injured worker filed a claim against his employer Tilley,<sup>304</sup> the insured.<sup>305</sup> Although it appears that Tilley's foreman was aware of the accident,<sup>306</sup> Tilley failed to notify his insurer until 20 months after it occurred. He claimed that he was unaware of the accident until the lawsuit was filed.<sup>307</sup> The existence of coverage depended on the resolution of disputes about whether the foreman told Tilley about the accident,<sup>308</sup> and whether the foreman's knowledge of the accident was imputed to Tilley.<sup>309</sup> Because the attorney hired by the insurer developed information to potentially help the insurer deny coverage,<sup>310</sup> the Texas Supreme Court decided the insurer was estopped from denying the coverage.<sup>311</sup>

In that case each party needed its own attorney to deal with the coverage questions. The interests of the insured, who is arguing for coverage, and the insurer, who would like to deny coverage, diverge. The attorney hired to represent the insured in the worker's claim should represent his client, and keep his client's confidences. Failure to do so is ultimately a losing proposition, as it was in *Tilley*.<sup>312</sup>

One wonders how seemingly ethical attorneys could get it so wrong. In *Tilley*, the court noted the "impeccable reputation" of the attorney representing the insured in this case,<sup>313</sup> even recognizing that his "conduct may be representative of the customary conduct of counsel employed by

303. *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

304. Suit was actually filed against "Joe Tilley, d/b/a/ Joe's Rental Tools and/or Oil City Casing Crews, Joe's Rental Tools Company, a corporation," collectively referred to by the court as "Tilley." *Id.* at 554.

305. *Id.*

306. *Id.* at 555.

307. *Id.* at 554.

308. *Id.* at 555 ("[I]t is disputed as to whether [the foreman] or anyone else told Tilley of the accident or whether Tilley had actual notice of it before Starky filed suit against Tilley . . .").

309. *Id.* (alleging the foreman's knowledge was "imputed to Tilley; and that failure of Tilley to give notice for 20 months was, as a matter of law, a breach of the notice provisions of the policy.")

310. *Id.* at 557 ("[W]e are still confronted with the undisputed proof that it was the attorney furnished by Employers to represent Tilley . . . who at the same worked for Employers adversely to Tilley in developing the evidence upon which this suit for denial of coverage is based; [and] that the development of evidence and briefing against Tilley on the coverage question was sought and paid for by Employers . . .").

311. *Id.* at 561.

312. *Id.*

313. *Id.* at 558.

insurance companies in similar situations.”<sup>314</sup> I submit that the situation provides an excellent example of the benefits of the one-client model. In *Tilley*, the court appears to adopt a two-client approach. Although it recognizes that the attorney “owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured,”<sup>315</sup> it bases its decision on considerations related to the representation of *multiple* clients<sup>316</sup> and refers to the attorney as the “Employers–Tilley attorney.”<sup>317</sup> Justice Johnson, not satisfied with the majority’s treatment of the issue,<sup>318</sup> wrote a concurring opinion clearly promoting a one-client approach.<sup>319</sup> He astutely pointed out that the majority, while recognizing that the attorney owes “unqualified loyalty” to the insured,<sup>320</sup> failed to appreciate how the divided loyalty suggested in the opinion was instrumental in the attorney’s inappropriate actions.<sup>321</sup> I posit that the failure to embrace the one-client model contributes to the problem of otherwise ethical attorneys making ethical missteps like the one in *Tilley*.

Further, once a conflict is discovered, the damage may already be to some extent irreparable. Consider again the situation in *Tilley*. When the attorney first realizes,<sup>322</sup> often based on confidential discussions with the insured, that there might be a coverage question, or that he has gained information relevant to a coverage question, he is faced with a dilemma under the two-client model. As an attorney for the insurer, he must tell it about the concern.<sup>323</sup> As an attorney for the insured alone, he must not.<sup>324</sup>

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314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 560 (internal quotation marks omitted).

318. *See id.* at 562 (emphasis added) (“If the representation from the record described by the opinion of the majority is to be considered as a representation of two or more clients, . . .”).

319. *Id.* at 563 (“The representation provided by the attorney more appropriately should be construed as representation of a single client, *Tilley*.”).

320. *Id.* (“[T]he attorney is the attorney of record and legal representative of the insured (*Tilley*) and owes him the same type of unqualified loyalty as if he had been originally employed by him.”).

321. *Id.* (“[T]he record strongly suggests concealment of the conflict from *Tilley* for the purpose of ultimately promoting the interest and position of Employers Casualty over that of *Tilley* . . .”).

322. In this discussion, I am assuming the initial realization is innocent. Any intentional search for information to help the insurer deny coverage is without a doubt a violation of the attorney’s obligation to his client, the insured.

323. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3) (2013) (“A lawyer shall . . . keep the client reasonably informed about the status of the matter.”).

324. *Id.* R. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client . . .”).

The attorney will necessarily have to fall short as to one of his clients. He now has an insoluble conflict, and must withdraw.<sup>325</sup> Yet, by telling the insurance company he now has a conflict, he will alert the company, at least implicitly, to the fact that he has discovered something that it will want to know. The insurer may likely realize the problem is related to coverage and thus engage in efforts to find out what the attorney has discovered. The insurer might consider this an advantage, but if it is an advantage gained at the client's expense, it is neither proper,<sup>326</sup> nor likely an advantage at all.<sup>327</sup> Surely if the two-client model were chosen by the insurer to discover such potential coverage issues the conduct would be improper, and the insurer would likely lose its right to contest coverage.<sup>328</sup> A legal presumption that creates the same potential harm to the insured should likewise be rejected.

## 6. Avoiding the Attorney Selection Dilemma

Under a two-client approach, the effect of the discovery of a conflict, which may be apparent from the beginning<sup>329</sup> or discovered later,<sup>330</sup> is generally that the insured is allowed to hire a new, "independent" attorney.<sup>331</sup> Often that attorney will be selected by the insured.<sup>332</sup> The question whether counsel is to be selected by the insured or the insurer is somewhat independent of the one-client/two-client question. At the point new counsel has been appointed, regardless of who chose that counsel, there is no question that the attorney now represents the insured alone.<sup>333</sup>

325. *Id.* R. 1.16(a)(1) ("[A] lawyer . . . shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law.").

326. *See id.* R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

327. *See supra* notes 310-12 and accompanying text.

328. This was the effect even *without* a finding of pre-planning. *See supra* notes 313-14 and accompanying text. Intent could only magnify the impropriety.

329. *See* WINDT, *supra* note 45 § 4:20 ("The first thing that an insurer with a duty to defend must determine . . . is whether there is a conflict of interest . . .").

330. *Cf.* Employer's Cas. Co. v. Tilley, 496 S.W.2d 552, 561 (Tex. 1973) ("[The] attorney owed an obligation to immediately notify Tilley of the conflict . . .").

331. *See* COUCH, *supra* note 7, § 202:34 ("If a conflict of interest exists, and the insured has rejected insurer's defense under a reservation of rights, an insurer is not wholly relieved of its duty to defend the insured. . . . Instead, independent counsel must be appointed . . .").

332. *See id.* § 202:35 (discussing jurisdictional, and some situational, variations in approach to who selects independent counsel).

333. *Cf. id.* § 202:34 ("[I]ndependent counsel must be appointed, and the insurer's duty to defend is transformed into a duty to reimburse the insured for the defense costs . . .").

However, it does seem that the two-client approach, in *generally* assuming that the attorney hired by the insurer represents the insurer, contributes to a view that the insured should be the one to select independent counsel. To the extent that it does, it can add unnecessary difficulty and expense<sup>334</sup> for little gain. As the new counsel will still be paid by the insurer,<sup>335</sup> the potential for a fee-payor conflict persists.<sup>336</sup> Any temptation the attorney has to favor the insurer over the insured can arise no matter who selected counsel. There is no logical reason to believe that counsel selected by the insurer could not provide adequate representation.<sup>337</sup> Ethical representation of the client demands no less.<sup>338</sup> This analysis is equally persuasive when applied to the counsel initially appointed by the insurer and counsel selected by the insured after a conflict manifests. It is the suggestion that the lawyer *represents* the insurer, much more than the fact that he is *paid by* the insurer, that creates the more intractable conflict.

Before deciding how new counsel is to be selected, however, the crucial question is whether it is necessary to hire new counsel at all.

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334. *See id.* § 202:35 (“Both the ‘good faith’ of the insured [in making the selection] and the reasonableness of any insurer [sic] refusal to approve may beget yet another legal proceeding contesting these duties.”); § 202:36 (discussing the possibility of a fee dispute with independent counsel).

335. *See, e.g.,* MORGAN, *supra* note 6, at 12.

336. While it is true that the independent attorney likely will not have a long-standing relationship with the insurer, it may hope to develop one. And the fee-payor rules are not limited to such situations. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(f), 5.4(c) (2013), neither of which contains any such limitation, and MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 11 (describing several different instances in which a third party may pay for the representation without specifying that any of them must involve an ongoing relationship.).

337. *See* WINDT, *supra* note 45, § 4.22. The author discusses what an attorney should do after discovering a conflict of interest in relation to the defense of the insured under a two-client model. After discussing various lines of cases, he indicates a preference that the insurer hire independent counsel to control the defense. He points out that as long as certain “requirements are met, there is no reason why the insurer should, in theory, be precluded from hiring as independent counsel an attorney which it has used in the past to represent the insurer’s interests.”

338. *Cf.* Unauth. Practice of Law Comm. v. Am. Home Assurance Co., Inc. and The Trav. Indem. Co., 261 S.W.3d 24, 41 (Tex. 2008) (comparing the obligations of staff attorneys with outside counsel) (“The Committee argues that a staff attorney cannot be expected to disregard the insurer’s policies on such matters [related to settlement], even when it would be in the insured’s best interest to do so, because of fear of reprisal in employment. But a private defense attorney who fails to follow the insurer’s instructions may also fear reprisal – in loss of business and consequent pressure from partners and the law firm. As we have noted, defense counsel, whether private or on staff, owes the insured unqualified loyalty. It is possible that counsel will fail to render that loyalty, but we cannot presume that a staff attorney is more likely to do so . . .”).

Under a one-client model, the need to hire new counsel will be greatly reduced. Consider the situation of the parties when the attorney is hired to represent the insured under a reservation of rights. Regardless of who chose the attorney, the attorney does not represent either the insurer or the insured in regard to the coverage dispute. Simply stating the possibility illustrates why this must be so. The coverage *dispute* is by its nature an adversary process, and the conflict is real. The same attorney cannot represent one party to the dispute against the other.<sup>339</sup> However, the solution is not for the insurer to hire an attorney to represent the insured *regarding coverage disputes*. That is *not* part of its contractual undertaking: the insurer has *no obligation* to provide an attorney to oppose it in contesting coverage.<sup>340</sup> Thus, under either model, the attorney should focus on what he has been hired to do – defend against the claim – and not on coverage disputes. The one-client model helps maintain this focus.

The advantages of the one-client model when a coverage question arises become apparent when one considers how a coverage question might occur to an attorney. When the attorney has already been hired to represent the insured, no coverage information gained could favor the insured – coverage has already been accepted, even if subject to certain challenges. Further, the attorney has been hired to defend against the claim, not to represent anyone in a coverage dispute. Thus, any coverage questions that occur to the attorney would tend to favor the insurer as they would most likely relate to possible denial of coverage. Thinking of the insurer as a client may well convince the attorney that such ideas or information should be shared with his client, the insurer. However, if he represents only one client – the insured – the temptation (or confusion) should not occur.

Further, beginning with the two-client model inevitably leads to withdrawal when the conflict materializes,<sup>341</sup> and possibly to a compro-

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339. Such a situation would involve a nonconsentable conflict of interest. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2013) (stating the "assertion of a claim by the client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal" precludes representation, even with consent).

340. See *supra* note 246 and accompanying text.

341. WINDT, *supra* note 45, § 4:19, at 4-186 to 4-187. After clearly embracing the two-client model the author stated "counsel with reason to believe that the discharge of the duty to either the insured or the insurer would conflict with any discharge of the duty to the other cannot, absent the informed consent of both clients, continue to represent both. Moreover, if an insured imparts to the lawyer information that would or might provide a basis for denying policy coverage – such as fraud in obtaining the policy – the lawyer is bound not to disclose the information to the insurer and to withdraw from the representation of the insurer." *Id.* (footnotes omitted).

mise of the insurer's ability to raise legitimate concerns.<sup>342</sup> If the attorney begins with a one-client model, he may never have a conflict, and thus there may never be a need to hire new counsel mid-stream. For example, it was the attorney's attempt to develop information for the insurer that caused the problem in *Tilley*.<sup>343</sup> Had the lawyer focused on representing the insured on the underlying claim, the problem would not have arisen. The client could have kept his attorney, and the insurer would have retained its potential coverage challenge. Granted, the insurer may not have known about the challenge without the attorney's help, but it was not entitled to the information from the attorney,<sup>344</sup> and ultimately got no benefit from receiving it.<sup>345</sup> Further, had the insurer understood that it could expect no assistance from the insured's attorney, it may have taken greater care to examine coverage issues for its own benefit.

## V. CONCLUSION

It is not possible to choose a model that will avoid all potential conflicts in insurance representation. The potential for conflicts of interest will persist no matter what model is chosen. However, the potential is exacerbated under a two-client model. As illustrated, it is often the choice of a two-client model that *creates* the conflict. Further, there will always be attorneys who will be willing to work outside the strictures of law and ethics, and no theoretical approach can completely prevent this. However, the two-client model contributes to problems even where the attorney is trying to act legally and ethically. The one-client model avoids some of the potential problems and better protects the interest of the insured without harming the interest of the insurer.

Thus, the default rule when the engagement agreement is unclear should be that the attorney represents only the insured. The rule should amount to a presumption that the one-client model applies unless clear agreement, subject to rigorous conflicts and informed consent analysis, indicates otherwise. For the reasons given, both attorneys and insurers should be especially wary of adopting, by agreement, a two-client repre-

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342. In *Tilley*, the insurer lost its right to argue what might have been a legitimate coverage question because it was estopped by its attorney's conduct. *Employer's Cas. Co. v. Tilley*, 496 S.W.2d 552, 561 (Tex. 1973). While the attorney's actions were intentional, the same result could result if the attorney discovers the information innocently, but then decides he or she must share it with the insurer due to an attorney-client relationship with the insurer.

343. *Id.*

344. *Id.*

345. *Id.*

sensation in their engagement agreements. The better approach in most cases would be for the insurer to hire the attorney on the express understanding that the attorney represents the insured alone regarding any claims for which the insurer is to provide a defense, making clear that the attorney does not represent the insured regarding any coverage disputes with the insurer, nor regarding claims for which the policy does not provide for representation. The understanding will include a recognition that the attorney will conduct the representation in a way that honors both the contractual obligations and his professional obligations. Such an approach will better protect insureds as consumers and as clients, and, ultimately, will better protect insurers and attorneys.