Jeopardizing the Clients' Coverage: The Impact of the Insurance Policy's Cooperation Clause on the Tripartite Relationship

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The unique nature of the tripartite relationship adds layers of complexity to the already opaque Rules of Professional Responsibility. Years ago, the attitude of defense counsel about their clients' insurance coverage issues was that of Sergeant Schultz on *Hogan's Heroes*: "I know nothing, nothing!" After all, in the tripartite relationship, defense counsel's engagement was typically limited to defending the insured and specifically excluded any representation of insurer or insured as to coverage.

Today that attitude can unwittingly put clients at risk of losing coverage, and defense lawyers at risk of a malpractice suit.

The problem, of course, is the continual dilemma of what to do with facts or documents obtained in the course of defense that, if disclosed to the insurer, would create a potential coverage defense. (Let's call it "The Dilemma".) But the source of the dilemma, or at least of a good bit of it, is a provision in every third party liability policy called the cooperation clause. In a standard commercial general liability ("CGL") policy, it reads like this: "You and any other involved insured must . . . cooperate with us in the investigation or settlement of the claim".

The cooperation clause is what makes it obligatory for the insured to tell the insurance company everything that is material to the defense or settlement of the claim, even if doing so jeopardizes coverage. See Maplewood Partners, L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550, 610 (S.D. Fla. 2013) ("If Miller is going to disclose information to Indian Harbor that might be adverse to the coverage question, then Miller needs to tell his clients in advance. If the clients object to the disclosure, then they face the risk that the cooperation clause of the insurance policy will have been breached and there will be no coverage.").

Defense counsel's dilemma is straightforward: counsel cannot risk the client's coverage by disclosing such material facts without obtaining the client's informed consent. At the same time, the defense lawyer cannot jeopardize the

client's coverage by assisting in the concealment of facts that the cooperation clause obligates the client to disclose to the carrier. To walk that tightrope, the defense lawyer needs to know enough about coverage to recognize when disclosure to the carrier might threaten coverage, and understand (as well as anyone can, given their Talmudic complexity) the rules of professional responsibility that supposedly provide a balance pole for the ethical acrobatics required to stay out of trouble.

So let's look at what is a cooperation clause is, how it can be violated (let us count the ways), and what the consequences are of breaching it (think: first four notes of the "Dragnet" theme song). After that, we'll review the ethical rules most applicable to The Dilemma.

The Cooperation Clause: "Honest Cooperation" and "Telling the Truth"

One purpose of a cooperation clause "is to protect insurers and prevent collusion between insureds and injured parties". Wildrick v. North River Ins. Co., 75 F.3d 432, 436 (8th Cir. 1996). But the clause also is "of the utmost importance in a practical sense. Without such cooperation and assistance, the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense." . . . "[S]uch provisions 'enable the [insurer] to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to facts, material to [its] rights, to enable [it] to decide upon [its] obligations, and to protect [itself] against false claims.'" Belz v. Clarendon America Ins. Co.,158 Cal.App.4th 615, 626 (Cal. Ct. App. 2007).

"The kind of cooperation required... is honest cooperation. Honest cooperation involves telling the truth. It cannot be based on persistent falsehood going to the very essence of the problem." Wildrick v. North River Ins. Co., supra, 75 F.3d at 436.

Cooperation Requires Disclosure to The Insurer Of Facts Material to the Defense or Settlement of the Case.

Typically, we think of breaches of the cooperation clause as involving failure to cooperate in an investigation, to submit to an examination under oath, to appear for deposition or trial, or to communicate with defense counsel. The duty to cooperate extends, however, to providing the insurer with information material to the defense or settlement of the claim or suit.

This means, in the first instance, that there is no privilege that allows the insured to direct defense counsel not to tell the insurer about facts material to defense and settlement of the case. See *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991). In *Waste Management*, the Court found that, in a declaratory judgment action, an insured could not rely upon the attorney-client privilege to shield the insured's communications with its attorney in the underlying litigation from the insurer. The Court explained that the cooperation clause in the insurance policy imposed a broad duty upon the insured, and required the insured to disclose any communications it had with defense counsel. 579 N.E.2d at 328 (the communications must be disclosed where, as here, the insurer is ultimately liable for funding the settlement or judgment.).

Second, unlike most jurisdictions where an insurer must show prejudice in order to avoid defense or indemnity obligations, in Virginia a showing of prejudice is unnecessary if the breach of the cooperation can be shown to be substantial in nature, or to have been done willfully.

In Virginia, a "Substantial" Breach of the Cooperation Clause Violates a Condition Precedent to Coverage and Vitiates Coverage, Even If the Insurer Is Not Prejudiced.

"[A] co-operation clause is in the nature of a condition precedent to liability on the insurer's part for the loss growing out of a claim with the disposition of which the insured's co-operation is demanded, and a failure to perform, in the absence of a waiver or estoppel, constitutes a defense to liability on the policy, if the insurer so elects." State Farm Mut. Auto. Ins. Co. v. Arghyris, 189 Va. 913, 924 (Va. 1949). In fact, in a CGL policy, cooperation is expressly labeled as a condition to coverage, as it appears within the section of the CGL Coverage Form entitled "Conditions".

"Under Virginia law, it is not essential for the insurer to show prejudice to establish the defense of non-cooperation. To amount to a breach however, the non-cooperation **must be of a substantial nature**." Mayflower Ins. Co. v. Osborne, 326 F.2d 461, 464 (4th Cir. 1964). See also Lumbermens Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932, 937-38 (W.D. Va. 1968) (" . . . under the law of the State of Virginia it is unnecessary to show that the lack of co-operation prejudiced the insurance carrier. The only requirement in Virginia is that the lack of cooperation be of such a material and substantial nature as to be a breach of the contract. There was no necessity for a showing of prejudice to State Farm once it was shown that the Daltons violated a provision of the insurance

contract. However, Virginia courts do consider the factor of prejudice when determining if the actions of the insured are material and substantial.").

Where The Insured's Noncooperation Is Willful, Prejudice Is Irrelevant And The Insurer Has No Duty to Defend or Indemnify.

Prejudice also need not be shown if the insurer can "prove that the insured willfully breached the clause in a material or essential particular and that the insurer made a reasonable effort to secure the insured's cooperation." Continental Cas. Co. v. Burton, 795 F.2d 1187, 1193-94 (4th Cir. 1986). Such willful noncooperation "requires a deliberate or intentional refusal to cooperate." Id. at 1194. See also Cooper v. Employers Mut. Liab. Ins. Co., 199 Va. 908, 913-14, 103 S.E.2d 210, 214 (Va. 1958) (holding that willful noncooperation must be "in some substantial and material respect"). The insurer need not demonstrate any prejudice as a result of the insured's willful lack of cooperation. Cooper, 199 Va. at 914, 103 S.E.2d at 214.

The bottom line, then, is that in Virginia, a breach of the cooperation clause poses a significant risk of loss of coverage. This makes it all the more important for defense counsel to be alert to instances in which a report to the carrier can jeopardize the insured's coverage.

Examples of Reportable Information That Threatens Coverage

So what sorts of things are material to the defense or settlement of the case that might jeopardize coverage but that must be disclosed to the insurer under the cooperation clause? Here are a few examples:

- **Voluntary Payments.** All CGL policies, and pretty much all other third party insurance policies, preclude the insured from making agreements with the claimant, without the insurer's consent, to pay money or offer free or discounted services in the hope of avoiding a claim. Whether contained within the cooperation clause or contained in a separate provision (as in a CGL policy), voluntary payments can void coverage regardless of whether the insurer was prejudiced.

- **Prior Knowledge, Known Risk, and Late Notice.** Most all policies preclude coverage for claims or potential claims known by the insured prior to the policy's inception date that were not reported to the insurer,

or that were reported late enough to constitute a material delay. Modern CGL policies preclude coverage for a known risk, which has been interpreted as knowledge, prior to the policy's effective date, of the beginning of the property damage at issue, even if the insured did not yet know what was causing the damage.

- **Misrepresentations on the Policy Application**. Sometimes an insured describes its business on an application that doesn't jibe with what it actually does, such as whether they provide services in other states, or whether they are really a shell company meant to shield another, riskier company from liability. In other occasions, the insured may have failed to identify prior threats to sue, or knowledge of a potential claim. This information would certainly be material to the insured's evaluation of its defense and settlement duties; yet forwarding this information could provide a basis for the insurer to rescind the policy, rendering it void *ab initio*. The impact could extend beyond loss of coverage for the immediate claim to loss of coverage for any claims that otherwise would fall within the coverage of the policy. For example, CGL policies are occurrence policies, providing coverage for damages occurring during the coverage prior, regardless of when the claim is reported. Rescinding a CGL policy could pose grave consequences for an insured who might face future claims falling within that now uncovered policy period.

- **Misrepresentations During the Investigation.** During an investigation, an insured may misrepresent the nature of the work, the role or status of a particular insured, or the dates when work was performed in order to obtain coverage. For example, a CGL policy covers a project manager as an insured for purposes of claims arising out of the project the manager worked on in that capacity. A misrepresentation as to the individual's role on the project could lead to defense and coverage that the individual might not be entitled to. Yet the purported manager's role on the project is information material to the defense and would have to be reported, with the client's informed consent.

Why Does Defense Counsel Have to Care About Any of This?

Beyond the four corners of our representation agreement, we owe a fiduciary duty to warn our clients if we become aware that they are at risk, especially when we have reason to believe our clients expect us to do so. See Schlesinger v.

Herzog, 672 So. 2d 701, 709 (La. Ct. App. 1996) (attorney of the duty to warn his client of dangers he may see in his client's path, especially when he should have known his client would expect him to do so); *First Nat'l Bank v. Diane, Inc.*, 102 N.M. 548, 553, 698 P.2d 5, 10 (N.M. Ct.App.1985) (recognizing attorney's duty to warn client of potential liability and exposure under existing law). In the context of insurance defense, the insured client is unlikely to have independent coverage counsel but simply trusts in our expertise regarding making reports to the carrier.

Moreover, the duty is likely imposed by virtue of the Rules of Professional Responsibility, depending on one's interpretation of them. In that context, when we know that the facts we are obliged to forward to the carrier could trigger coverage defenses, the Rules preclude us from doing so without our client's informed consent. Should we be unable to obtain that consent, we will likely have to withdraw, as we cannot be a party to what will now become an intentional withholding of information material to the insurer's fulfillment of its defense and settlement duties.

Here are some of the rules most important for insurance defense counsel to be aware of in this context, together with the most relevant official comments, and a brief discussion of the rules' relevance to the issue of telling the insurer information that can trigger coverage defenses.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

Rule 106, Confidentiality of Information, is key to understanding the dilemma of insurance defense counsel who learns of facts that could jeopardize coverage. Its most relevant provision states:

> *(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the* ***disclosure is impliedly authorized in order to carry out the representation*** *or the disclosure is permitted by paragraph (b).*

Comment 5: Authorized Disclosure

(5) Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

The insurance policy's cooperation clause impliedly authorizes defense counsel to provide the insurer with all information material to the defense and settlement evaluations. See New Hampshire Bar Assoc. Ethics Op. 2000-01/05 ("The policy also will typically contain a provision requiring the insured's cooperation in its defense. Accordingly, the insured's execution of this contract will generally constitute an implicit consent (or "implied authorization" for purposes of Rule 1.6(a)) for the exchange of information necessary for the carrier to monitor and evaluate the case . . . ."). The attorney's actions in cooperating with basic procedural requirements of the carrier are impliedly authorized by virtue of the policy's cooperation clause. See Great Am. Ins. Co. v. Christopher, 2003 U.S. Dist. LEXIS 10076, * 14 (N.D. Tex. June 13, 2003) ("It is undisputed that there was no actual "joint defense" arrangement in the case at hand. Rather, Kalitta disclosed information to counsel for Great American pursuant to the cooperation clause in the D&O policy.").

What is not impliedly authorized is the provision of information to the carrier that could jeopardize coverage. In that regard, Rule 1.6(a) speaks to the most common ethical dilemma that insurance defense counsel complain about: what can I tell the carrier regarding my client? From a practical standpoint, Rule 1.6(a), together with Rule 1.8(b), require insurance defense lawyers to understand the coverage implications of the information they report to the insurer, so they can tell the difference between which disclosures are impliedly authorized, and which disclosures are potentially to the client's disadvantage. Those latter disclosures require informed consent, defined under Rule 1.0 (e) as "the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." It is impossible to communicate to the client how the reporting of certain information could jeopardize coverage unless defense counsel understands what coverage defenses could be triggered by the reported information.

That being said, the coverage implications of certain facts are often difficult to discern. Under any circumstances, it is essential that the insured client understand that while we do have a duty to warn of known risks, we do not represent our clients as to coverage matters. In that regard, as well as in certain other respects that flow from the nature of the tripartite relationship, our representation is a limited one in the sense contemplated by Rule 1.6(b) -- and, indeed, except in circumstances in which we truly function as independent counsel, the conflict rules, specifically Rule 1.7(a) (2), preclude us from acting both as defense counsel and coverage counsel. Our clients often expect us to act in both capacities; and this expectation triggers the duty of consultation contained in Rule 1.2(e).

As defense counsel, we also have to be able to determine what information has to be reported to the insurer because it is material to the defense, and what information may safely be withheld without jeopardizing the client's duty of cooperation.

One example of coverage-risking information that can be withheld because it is not material to the defense, was provided by the Pennsylvania Bar Association in a 1997 opinion:

> Generally, an attorney representing an insured need only inform the Insurer of the information necessary to evaluate a claim. For example, assume an attorney represents an Insured in a premise liability slip and fall. During the course of the representation, the attorney discovers that the subject property is a rental property, not a residential property as set forth in the policy.
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> Although this information may radically affect coverage, the attorney is prohibited from releasing this information to the Insurer or any other third parties. In the foregoing hypothetical, the attorney would simply inform the Insurer of the nature of the injuries claimed by plaintiff and the circumstances surrounding the incident. The insurer would have all of the information necessary to evaluate the value and

basis for the claim and the Insured's confidentiality would be protected.

*Pa. Bar Assoc. Comm. On Legal Ethics and Prof. Resp. Informal Op., No. 97-119, 1997 WL 816708 at *2 (Oct. 7, 1997).*

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER.

There may be times when the facts we learn about indicate our client is engaged in insurance fraud. Rule 1.2 is relevant in this regard, as well as in the context of the source of implied authorization by the client for us to communicate information to the insured where permitted.

> *(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.* ***A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.*** *A lawyer shall abide by a client's decision whether to settle a matter.* * * * * * *.
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> *(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances* ***and the client gives informed consent.***
>
> *(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*

Comment 13:

> *(13) If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(*5*).*

Rule 1.2(a), on its face, requires defense counsel to abide by a client's decisions regarding the *objective* of the representation unless that objective

exceeds the scope of the representation, or is criminal or fraudulent. In some instances, concealing facts that trigger coverage defenses can constitute fraud. But what if the objective simply violates the cooperation clause of the insurance policy? Rule 1.2 requires compliance with that objective, **subject to the limitations of Rule 1.2(c) and (d).**

Rule 1.2(c) allows the representation to be limited in scope. In the tripartite context, defense counsel's representation is limited in that it does not extend to coverage issues -- which is one reason why withdrawal becomes necessary in circumstances where the client, having been advised that informed consent is necessary prior to forwarding coverage-threatening facts to the carrier, instructs the attorney not to share those facts with the insurer.[1] Defense counsel's scope of representation does not include assisting the client in concealing from the insurer facts it otherwise is entitled to by virtue of the cooperation clause.

Informed Consent in the Tripartite Relationship

One challenge under Rule 1.2(c) – and under the tripartite relationship in general – is the informed consent requirement. **Implied** consent to a representation limited in scope is given by virtue of consent to a defense under the terms of the policy -- but informed consent, defined at Model Rule 1.0(e) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct", poses special problems in the tripartite relationship.

Informed consent to a representation limited to defense of the claim only (i.e., not coverage advice) can be memorialized in an engagement letter that recites the client's understanding of defense counsel's role. If insurance company guidelines place significant limitations on defense counsel's decision-making, these can be disclosed, and consent memorialized, in the engagement letter as well. What about defense under a reservation of rights that includes a reservation of the right to recoup defense costs upon a later determination of no coverage? What about a situation in which the insurer offers a defense but also initiates a declaratory judgment action to determine that it has no duty to defend? Here, there

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[1] See *New Appleman on Insurance Law Library Edition Section 1604[4][b]* (*"*But withholding information may create a conflict and require withdrawal from further representation, requiring reassignment of the case to other counsel or even permitting the insured to retain independent counsel.").

may be a "material risk" to the client in accepting defense counsel's limited engagement, for the reason that the client's interests and the insurer's interests may diverge over such issues as how much money should be spent on defense, when those defense costs should be incurred, and when settlement efforts should be initiated. The client has an "alternative", which is to refuse a defense under a reservation and instead employ counsel and seek to recoup defense costs later (how reasonable it is may depend on whether the client can afford it).

This is one reason why it is important for the attorney to receive a copy of any reservation of rights, and why it is critical for defense counsel to explain to the insured about the importance of talking to their own attorney about coverage issues.

At the same time, if the insurer has not sent a reservation of rights, defense counsel must be alert to avoiding any communication with the insurer that might remind it that no reservation had issued, since the failure to do so while defending the claim may under certain circumstances constitute a waiver of the insurer's coverage defenses.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. 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.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Under Rule 1.7(a)(2), a current conflict exists if there is a significant risk that the representation of a client will be materially limited by a lawyer's responsibilities to a third person.

This conflict exists any time a client directs an attorney not to reveal potentially coverage-threatening information that is nevertheless material to the defense. There is a growing consensus that the attorney owes a duty to a third person -- the insurer -- regardless of whether an attorney-client relationship exists or not.

Comment g to section 51(3) of the Restatement of the Law Governing Lawyers states: "[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 added.) The comment adds, "However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured." See also Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 602 (Az. 2001) ("[W]hen an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide. This duty exists even if the insurer is a nonclient."); State & County Mut. Fire Ins. Co. v. Young, 490 F. Supp. 2d 741, 744 (N.D. W. Va. 2007) (following Langerman and relying expressly on comment g).

One could take the position that, consistent with the Restatement comment above, whatever the attorney's duty to the insurer, it does not encompass sharing information that jeopardizes coverage because such a duty "would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured." However, the lawyer's duties to the insured include taking no steps that would potentially cause the insured to violate the duty of cooperation under the policy.

RULE 1.8(b) CONFLICT OF INTEREST: CURRENT CLIENTS

Here is another rule that speaks directly to the dilemma.

Rule 1.8(b) Use of Information Related to Representation

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Like Rule 1.6(a), Rule 1.8(b) forbids insurance defense counsel from sharing with the carrier information that could be detrimental to our client's coverage, without informed consent. Rule 1.8(b) speaks to the lawyer's "use" of such information, which is typically understood as being use for the lawyer's or a third person's advantage. As defense counsel, it is to our and the carrier's advantage to ensure that the carrier be kept apprised of facts material to the defense.

Moreover, lawyers are impliedly authorized by their insured clients to provide the carrier with information material to the defense. (Rule 1.2(d) allows us to take such action on behalf of a client as is impliedly authorized.) As is the case with Rule 1.6(a), however, if the facts defense counsel shares trigger defenses to the client's coverage, counsel must obtain informed consent before sharing that information with the insurer. If the facts are material to defense or settlement, by failing to share such information with the client, the attorney jeopardizes the client's coverage as well by creating a potential breach of the cooperation clause. (See the discussion above regarding Rule 1.6(a).)

The answer to the dilemma created by both Rules 1.6(a) and 1.8(b) lies in the rules themselves. Counsel must obtain the client's informed consent before sharing potentially coverage-destroying facts with the carrier. Lacking that, however, Rule 1.7(a) (2) -- or, potentially, Rule 1.2(c) (in conjunction with Rule 1.16(a)(1)) -- require counsel to withdraw.

RULE 4.3. DEALING WITH UNREPRESENTED PERSON.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Because insurance defense counsel's representation is limited in scope and does not extend to coverage matters, any communication with the insured regarding coverage is (assuming the insured does not have coverage counsel) governed by Rule 4.3. Rule 4.3 (b) limits defense counsel to warning the insured that certain facts may pose a coverage issue -- counsel cannot advise the insured whether a coverage defense is in fact triggered by such facts. Rule 4.3(c) requires counsel to remedy any misunderstanding regarding the limited scope of the representation.

CONCLUSION

No one said the job was easy – as Super Chicken used to say whenever his sidekick, Fred, would complain about something, "you knew the job was dangerous when you took it." The ethical constraints of the tripartite relationship are often at war with our insured clients' expectations and with our desire to be left completely out of the picture of potential coverage disputes. Effective vigilance on defense counsel's part requires a developing understanding of the coverage implications of facts material to defense and settlement, so that counsel can make what may be some of the most difficult ethical choices out there. Often, those choices shouldn't be made until the attorney calls or e-mails the Virginia Bar's ethics hotline. In many cases, the attorney's professional liability insurer will provide help working through these issues.