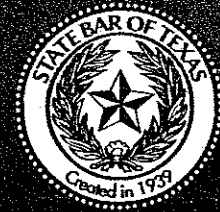


The Journal of Texas Insurance Law

Spring 2000

Volume 2, Number 2



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WHOM DOES THE INSURANCE DEFENSE LAWYER REPRESENT?

Every lawyer owes each of her clients a duty of undivided loyalty.¹ This is part of what it means to have a fiduciary duty. Clients need to be able to trust their lawyers. What clients buy when they buy legal services, at least in part, is lawyer loyalty.² This is part of the reason why faithless fiduciaries forfeit fees. Obviously, the interest of liability insurers and the interests of their insured are not completely aligned, and this is especially so when there are coverage questions. Yet, insureds under many types of liability policies contractually appoint liability insurers to manage litigation against them, and this right includes the hiring of lawyers.³ Thus, as everyone knows, under such insurance policies as general liability, homeowners, and auto, liability insurers routinely hire the lawyers who represent their insureds.

A recurrent question concerns whom insurer-appointed defense counsel for the insured represents. Everyone agrees that such a lawyer represents the insured. The interesting question is whether such a lawyer also represents the insurer, and, if so, when, for what purpose, subject to what limitations, and under what circumstances. It is the thesis of this essay that the insurance defense lawyer—the lawyer paid by the insurance company to defend the insured—will, as a general rule, also have an attorney-client relationship with the insurance company.

As everyone knows, this is a hotly debated topic.⁴ Frankly, I can't see why. The conclusion I am proposing here seems obvious and unassailable. A much more interesting question is why so many people and institutions resist it. For the most part, courts have not adopted the one-client view. There are, of course, a few exceptions.⁵ Perhaps it is the paucity of deci-

sions of courts of last resort which has contributed to the debate. After all, state supreme courts have had many opportunities to resolve this issue. Another possible answer is that the lawyers who are thinking about the problem are taking the wrong approach. Some cast this issue entirely in pragmatic terms, perhaps taking their cue from the resurgence of philosophical pragmatism in American thought and jurisprudence.⁶ Thomas Morgan, for example, has argued that defense counsel represent only insureds upon the grounds that *in most cases there will be no material difference in result depending on which characterization is chosen and that, more often than not, the one-client approach gives all parties better guidance on how to handle concrete issues as they arise in a case.*⁷

He continues: "When thinking about the tripartite relationship between the insured, insurance company and lawyer . . . , the lawyer who acts as if only the insured has the status of client will be least likely to go wrong."⁸

Stephen L. Pepper exhibits the same kind of pragmatic approach, in which the truth of the question that the nature of social world hinges upon potential effects of how the question is answered. Here is what he says:

*When a lawyer is hired by an insurance company to represent an insured in a liability matter, who does the lawyer represent? The insured, the insurance company, or both? Does the lawyer have one client or two? These questions are really sub-issues of broader questions: How ought the lawyer in this situation behave? . . .*⁹

This approach to solving the tripartite problem is quite mistaken. Alas, proponents of the one-client view are not the only ones to make this mistake. Sometimes advocates of the two-client view make it as well. Consider the following:

I think the dual-client approach, for a lot of reasons, works better. . . . I think it serves all the stakeholders' purposes well, including the insureds. At the end of the day, if insurers are considered a client, they will be better able to manage the overall litigation, including defense costs. Insurers are in the business of managing litigation and legal expenses, and they have gotten very good at it. If insurers are allowed to be more of a partner—a client—I think

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Mr. Quinn is an Austin shareholder in the law firm of Sheinfeld, Maley & Kay. He is mostly involved in litigation problems involving insurance coverage. Many of the problems upon which he works involve conduct of lawyers. He testifies from time to time on insurance related issues and on issues pertaining to the conduct of lawyers.

that the overall litigation and defense costs will be managed more effectively.¹⁰

Why is it that so many legal thinkers are tempted to believe that because a world would be better if a particular rule, *R*, were adopted, then *R* is already the rule? Perhaps origin of this fallacy is to be found not only in no actual laziness and sloppy thinking but in the way the common law evolves. More will be said of this presently.

Normally, lawyers worship the practical. Pragmatism is a philosophy built for lawyering. Nevertheless, if we ask a question about what the world is like, we cannot answer it by asserting a proposition which would make us all behave better. The only satisfactory answers to questions about what the world is like are propositions which state what is the case. This fundamental point is true, even if it makes conduct more, not less, difficult. Now, when we ask whether the insurance defense counsel represents one client or two, we are not free to construct an answer which is convenient, helpful, more moral, more ethical, or more in tune with somebody's ideas of what lawyers ought to be like. The answer to this question depends upon facts. To be sure, they are complex facts of a social nature, but they are facts nevertheless. It makes no difference at all whether the correct answer matters to some practical or normative issue. When it comes to facts—even facts about social relations—what is true is true, and what is false is not.

I. THE DEMONSTRATION.

A lawyer-client relationship exists if one has been formed. Section 26(1) of the Restatement (Third) of the Law Governing Lawyers (1998), states as follows, in part:

A relationship of client and lawyer arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services[.]

If a lawyer renders services to a client, and those services benefit someone else, it is necessarily the case that the lawyer represents that someone else. The Restatement (Third) of the Law Governing Lawyers §26 cmt. a, for example, states that a "lawyer representing a person may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the non-client litigant all the duties ordinarily owed to a client."

In general, if a client wishes to receive legal services, and a lawyer intends to render them, an attorney-client relationship has been formed. If a person wants other sorts of services from a lawyer (for example, real estate brokerage), and the lawyer renders those other services, no attorney-client relationship forms. However, in my opinion, this does not imply that either the client or the lawyer must expressly categorize what is going on as the rendition and receipt of *legal services*. If legal services (objectively understood) are in fact what are desired and rendered, then an attorney-client relationship is formed, even if no one gives a thought to whether legal services are being rendered. In fact, at the edges, the very concept of *legal services* itself may be fuzzy. So much for the first major premise of the demonstration.

Insurance companies pay claims with their own money. Insurance companies are not like banks. They are not depositories for someone else's money. Nor are insurers trustees holding the money of others. Insureds buy contracts of insurance which obligate insurance companies to pay certain sorts of claims with money belonging to the insurance companies. Thus, advice to an insurance company about a case—for example, advice about liability of the insured and advice about the value of the case before a local jury—is advice for the insurance company. So much for the second major premise.

Claims people for liability insurance companies frequently ask defense lawyers questions like these:

- Is the insured liable?
- How likely is it that a jury will find the insured liable?
- Are any of the other defendants liable? How likely is it that the jury will find other defendants liable? How likely is it that the insured will succeed in his cross-action (or third party claim) for contribution and/or indemnity?
- How likely is it that a court of appeals will affirm a judgment? How likely is it that the supreme court will affirm judgment against the insured?
- What is the case worth?
- What is the settlement value of the case?
- Who should we hire as a mediator?
- Are there subrogation possibilities?
- How talented is opposing counsel?
- What about her experience?

- What is the standing of opposing counsel with the judge?
- What about local counsel?
- What are the characteristics of the judge who is hearing the case? What is her judicial philosophy? Who contributed to her last campaign?
- What is the ethnic, class, and racial composition of the jury pool?

Most—if not all—of these questions, when asked and answered in the context of litigation, constitute the provision of legal advice. When an insurer inquires about the settlement value of a case, it is seeking advice paradigmatically given by lawyers, and almost every liability insurer in almost every defense case asks this question or expects this question to be answered. It is therefore seeking legal services, and the lawyer is providing it. What they are doing is voluntary. It arises from an agreement. So much for the third premise. It will not do to say that the *lawyer* is not giving legal advice but economic advice or practical advice. Lawyers are giving advice which usually constitutes legal advice. They are giving advice as *lawyers*. Surely that is the essence of legal advice.

Someone might try to take the position that many of these questions do not constitute legal advice because non-lawyers could discuss them without engaging in the unauthorized practice of law. For example, a non-lawyer could assess the standing of an attorney in the community. A non-lawyer could assess the talents of a mediator. Some accountants could figure out what a case might be worth. A non-lawyer who knows the judge could assess some judge-related matters. And so on. This approach is wrongheaded, however. First, some of these matters cannot be assessed by anyone but someone trained as a lawyer. Second, when all of these matters are discussed together, probably, only a licensed lawyer can do it without breaking the law. Third, as a customary matter, these questions do constitute the discourse of lawyers and not—generally—the discourse of others.

Now for the conclusion. When lawyers answer the above questions for insurance company claims people, they are providing legal advice to the insurer about the handling and disposition of its own assets. Hence, the advice given by the lawyer is not simply advice regarding the insured. It is advice about how the insurer should act. Since the insurer has a duty of prudent case management for its insured, the lawyer is (at least obliquely) advising the insurance company about its legal obligations. *Quod erat demonstratum!*

II. RECENT CRITIQUE AND REPLY

Nevertheless, some misguided souls may have doubts. In their recent book, *The Moral Compass of the American Lawyer*, Richard Zitrin and Carole M. Langford tell several horror stories in which insurance companies mistreat claimants. If these stories are true, several adjusters misbehaved themselves, and in at least one of the stories, the miscreants who acted badly, should be taken out and flogged.¹¹ Even this may be too good for them.

On the basis of this short parade of horrors, Zitrin and Langford discuss and criticize the controversy which occurred in the American Law Institute regarding precisely who it is that insurance defense lawyers represent. Very roughly speaking, the controversy within the ALI followed this trajectory. Originally, the drafters of the *Restatement (Third) of the Law Governing Lawyers* were inclined to believe that insurance defense counsel never represent insurers but only insureds. Under heavy pressure from a variety of sources, including some insurance companies, professors, judges (including the very distinguished insurance law scholar Judge Robert Keeton), and distinguished practitioners, the drafters altered the language so that defense lawyers may have client-lawyer relations with some liability insurers under some circumstances. In fact, this was a salutary development, and one which kept the Restatement in line with the law and prevented it from being a legislative innovation.

Zitrin and Langford are particularly critical of what they call an unprecedented, “intense, well-orchestrated lobbying campaign[.]” According to Zitrin and Langford,

The restatement on lawyering—a several-hundred-page document in all—already had been through close to a dozen drafts. In a single paragraph the ALI accepted the prevailing view that an insurance defense lawyer owes a paramount duty to the policyholder, even if the insurer chooses the lawyer. Ordinarily, the purpose of the restatement is to do exactly that—restate the law as it is, not legislate new changes. But the insurance lawyers saw an opportunity; they wanted that paragraph changed.¹²

Zitrin and Langford make numerous errors in this short passage. First, restatements influence courts mightily, as the authors admit, but they do so paragraph by paragraph. A serious problem in one paragraph, can create legal havoc. A several-hundred-page document can be flawed terribly by a single egregious error. Second, restatements do revise the law. The most famous example of this is the adoption of strict liability in the *Restatement (Second) of Torts*. The function of restatements is not simply to restate what is obvious in the law but to draw out implications, intimations, and indications. Restatements are about the spirit of the law and not just its letter.

Third, under circumstances where the defense counsel represent both the insured and the insurer, there is no reasoned principle on the basis of which to say that insurance counsel owes anyone of his clients a *paramount duty*. In general, it is an axiom of the law governing lawyers that if a lawyer has two clients, he must treat them both equally and well. There is simply no principled way to say that one co-client is better, more deserving, or better placed than another co-client. Fourth, the reason there was a “lobbying” campaign was that the drafters obstinately refused to listen to reason, and they had to be told to do so by the A.L.I. membership.¹³



Naturally, Zitrin and Langford say ugly things about those who attempted to get the drafters of the *Restatement* to listen to reason. Here is what they say: “Lawyers wrote articles and position papers in various journals expressing their view. Primary among them was Professor Charles Silver of The University of Texas, a recognized expert on insurance law whose work has been funded by two insurance industry organizations.”¹⁴ There are a number of things wrong with this remark. First, not all of Silver’s work has been funded by any organizations. Second, Silver has acted as ethics counsel for Texas plaintiff’s personal injury lawyers who brought the historic tobacco actions. He can therefore hardly be (even impliedly) characterized as an insurance industry shill. Third, Silver has worked on many class actions adverse to insurers. Fourth, this passage is a paradigm case of what “baby” logic textbooks call the *ad hominem* fallacy. The general idea is that because a person sometimes exemplifies a characteristic, something else must also be true of him.¹⁵ In this case, the barely concealed inference is that because Silver has received grants from some component of the insurance industry, he must be their spokesman in everything he says. Finally, the authors’ factual statement is false. Silver has *not* received grants from “insurance industry” organizations. Probably, the grants Zitrin and Langford have in mind came from defense lawyer organizations. As everyone genuinely familiar with this debate knows, Silver’s views are controversial among defense lawyers, as well as among insurance companies.

Fifth, and finally, the insurance industry did not speak with one voice in this controversy. Lots of liability insurance companies would prefer it if defense lawyers did not represent

them. Many liability insurers have a policy to the effect that insurance defense counsel does not represent them. One wonders what the consequences of such a policy are, when that very insurer is soliciting, digesting, and being guided by legal advice from defense counsel on, for example, matters of settlement.¹⁶

III. FOCUS OF CONTROVERSY

During the last several years, much of the controversy around the one-client view versus the two-client view has centered on how to formulate § 215 of the new *Restatement of the Law Governing Lawyers*. Chapter 8 of the *Restatement* concerns conflicts of interest. Topic 5 is entitled *Lawyer’s Obligation to Third Person*, and § 15 is entitled *Compensation of Direction by*

Third Person. Here is the text of § 215.

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer’s professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.¹⁷

Section 215 of the *Restatement* is similar to Rule 1.8(f) of the *Model Rules of Professional Conduct* promulgated by the American Bar Association, and imitated—to one extent or another—in many jurisdictions. That rule states as follows:

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

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer’s independence of professional judgment or with

the client-lawyer relationship; and

(3) information relating to the representation of a client as protected as required. . . .

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Comment *f* to § 215 concerns the insurer-insured-lawyer tripartite relationship. Here is most of its text.

Representing insured. A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is beyond the scope of the Restatement. Certain practices of designated insurance defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in non-insurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26 [which is quoted in part above on p. 5]. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer.

There is much to be said for Comment *f*, and only a little to criticize, at least in this late version. It is obvious that when a liability insurer appoints insurance defense counsel, that simple act does not create an attorney-client relationship between the defense lawyer and the insurer. No informed person who is also sane has ever thought so. The real problem was elsewhere. It does not lie simply in the engagement. Moreover, the Comment indicates that a defending liability insurer should be able to pursue the defense lawyer for malpractice. Even courts which adopt the one-client view accept this proposition, because of the theory of subrogation.¹⁸ The only problematic element to be found in Comment *f* is the claim that special rules should apply to liability insurers providing a defense and to insurance defense counsel. Comment *f* makes this claim because liability insurers are regulating entities involved in recurrent situations. This is really two points in one. First, it is the claim that liability insurers are regulated entities. Second, it is the claim that, because liability insurers are involved in recurring situations, they are likely to have internal procedures and cultures which will drive away problems. Both of these propositions are problematic. Surplus lines carriers are not really regulated much, and the existence of a recurring situation does not guarantee rectitude and adjustment practices.¹⁹

Comment *f* is supplemented by Illustration 5, as follows:

Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of \$5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder, Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

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. 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. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent, 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. Such occasions for conflict may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent, the lawyer may proceed after obtaining client consent under the limitations and conditions stated [elsewhere herein].

When 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. That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured.

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud and, if applicable, consistent with the lawyer's duties to the insurer as co-client. If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided [elsewhere in the Restatement]. The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims

against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this *Restatement*. [Cross references omitted.]

Illustration 5 is more troubling than Comment *f*. First, an insurance defense lawyer—like every other lawyer—owes

each of his clients a duty of zealous representation within the scope of the representation. Illustration 5 suggests that the lawyer can be less than zealous, if the defending insurer gives him those instructions. The idea, apparently, is that by appointing the insurer its case manager, the insured has consented to less than zealous representation. But surely such consent can only be given on an informed basis, and the mere purchasing of an insurance policy does not constitute an informed basis. To be sure, Illustration 5 does not permit the defense lawyer to follow the insurer's directions when the insurer directs less than zealous representation, and there is some risk of a judgment in excess of policy limits. One wonders, however, whether any such less than zealous representation is acceptable, if the insurance rates of the insured defendant might increase in the future, depending on the size of the judgment.

Illustration 5 forbids an insurance defense lawyer from disclosing information to a defending insurer which might adversely affect the insured's coverage situation.²⁰ The lawyer may act otherwise when the insured whom he is representing gives informed consent to such a disclosure. This part of Illustration 5 presents an extremely interesting problem and hints at several others. For example, many insurance defense counsel move for summary judgment when there is a significant risk that partial summary judgment will be granted as to covered claims? How might defense counsel actually secure informed consent to such a move from anyone less well informed than an extremely sophisticated insured?

According to Illustration 5 and a defense lawyer must proceed in a manner which is in the best interest of the insured, so long as he does not aid and abet insurance fraud. Under several recent cases, insurers may be entitled to reimbursement of some defense expenses, at least under some circumstances.²¹ Should defense counsel inform the insured of this possibility? If the insurer instructs counsel to word his bills in such a way that work on covered claims is indistinguishable from work on uncovered claims, does counsel have a duty to do that, if he can do so without asserting false propositions in his bills? Also, if insurance defense counsel has become counsel for the insurer, is he not obligated to act in the best interest of each of his clients? What should he do when he cannot act in the best interest of both of them? What if withdrawing automatically favors one of the clients and deserves the best interest of the other?

One of the principal draftsmen of § 215, Comment *f*, and Illustration 5 has claimed that they are all quite traditional.²² They did not start off that way. It has taken a long time—and a lot of controversy—to get there. Even now, the materials are not without problems.

IV. CRITIQUE: DEFENSE LAWYERS AND THEIR CLIENTS

If someone were to refute the views of Quinn, and those with whom he is aligned, such as Silver and others, he should really attack the views of Peña Silinn (hereinafter "Silinn"), who for many years now has been professor of insurance and legal ethics at the Ole Sod Law School, a free-standing institution in the Belgian West Indies.²³ Professor Silinn regards descriptive version of the one-client view as a virulent virus—an epistemological corruption—in need of eradication, although he has contemplated the possibility that the virus should be accepted as an inevitable fact of legal life so that legal institutions, rules, principles, and philosophies should all be radically changed to accommodate the virus. He is firm in his belief that one of these two things must be done. What he is sure of is that the present situation is impossible: as a matter of social fact, the existing laws and the one-client view cannot co-exist.

Several avenues of attack have been utilized in trying to discredit Silinn. One involves the *Traver* case.²⁴ Another involves certain other cases. And a third involves a more general approach to jurisprudence.

The *Traver* case says that defense lawyers are not agents of liability insurers when those lawyers are defending insureds. This proposition follows from the fact that they are not agents of the insurer, since lawyers are agents of their clients. But surely providing information and recommendations to liability insurers in the context of executing a legal defense is part-and-parcel with doing what one is supposed to do on behalf of a liability insurer. Hence, when a lawyer makes factual disclosures to and provides advice to an insurer he must be acting as an independent contractor. If he is acting as an independent contractor without the authority to bind, then he cannot be an agent. This is a necessary truth, like saying All bachelors are unmarried male adults. But it is also a necessary truth that lawyers are agents of their clients for some purposes, rather like saying All physical objects are extended in space. It follows, as night the day, that when a lawyer provides legal information to a liability insurer regarding defense of its insured, if he is acting as the lawyer for the insured, and that's all, he is not the lawyer for the liability insurer.

This is a paradoxical idea, because it also seems to be a necessary truth that

If a lawyer provides legal advice to a person, then he provides legal services to that person, and if an attorney provides legal services to a person, then he becomes the lawyer for that person, and an attorney-client relationship has been formed.

Paradoxes and divergent tendencies are the stuff of legal change and transformation, however. Thus, there may be a clash of legal principles and standards. Silinn would deny

the clash, sweep it under the carpet, and ignore reality. In a way, Silinn is too rationalistic. He has an insufficient appreciation of the role of tension in the development of legal progress. Silinn is simple. Silinn is also insufficiently attentive to the role of public policy choices in the development of the law. Public policy favors insureds. It favors legal principles which protect insureds from insurers. Designing the legal system so that liability insurers are not, as a general rule, clients of the defense lawyers who defend their insureds, insofar as that defense is carried forward, is surely a way to protect insureds. To say that someone is insufficiently sensitive to the role of public policy and the formation of the common law, is to say that they are insufficiently attentive to the role of ethics and morals in the formation of the law. It is odd that Silinn, of all people, would have this blind spot.

It is even more strange that Silinn has paid insufficient attention to the "incidental advice" cases, such as *Parker v. Carnahan*.²⁵ Among other things, that case (and its cousins) hold that if *L* provides legal services for *CI*, and in a context which is incidental to that representation, *L* provides some brief and superficial legal information to someone else, *P*, it doesn't follow that *P* has become *C2*. In other words, a lawyer may incidentally provide information about legal matters to a non-client without transforming the non-client into a client. Intent, agreement, and (to a lesser degree) significance are important. Given the rule in *Parker* there is plenty of conceptual space in the common law governing lawyers to say that liability insurers are not the clients of the defense lawyers they hire for their insureds. They are simply providing legal information incidental to the main responsibility, which is the representation of the insured.

Besides, someone might say, even if the legal information defense counsel provides the liability insurer is not brief, incidental, or fleeting, the lawyer is not engaged in giving advice. Rather, the lawyer is engaged in advocating for his client. The context of the defense lawyer is to try to obtain a satisfactory result for his client not only from the party which sued him, but also from the insurance carrier. To some extent, the relationship between the defense lawyer and the insurance carrier is adversarial, even though the insurance carrier is paying the lawyer's bills. Consequently, in no sense is the insurance defense lawyer providing legal advice to the insurer.²⁶

V. REPLY

The author of this paper has discussed these matters with Silinn at some length and is fortunate enough to be privy to cutting edge thinking. Here is how Silinn would reply, and the author agrees. Let's take the last point—the point which purportedly arises out of *Parker v. Carnahan*—first. Liability insurers spend their own money defending their insureds and paying settlements and judgments. To be sure, the insured has

purchased a right to such payments, but insurers are not trustees of the monies of their insureds. Rather, their insureds have contract rights as against the liability insurers, and the bottom line, as it were, of all of their contract rights is that the insurer will pay money on behalf of its insureds, if there is coverage. The money to be paid belongs to the insurer. Moreover, defending the insured is a central responsibility of the insurer. It can get into real trouble if it fails in this responsibility. Not only may it be liable for a breach of the contract, but it may be also liable for tortious violations of the rule which requires that defending liability insurers settle within policy limits if the opposite of such conduct will be unreasonable,²⁷ and for violations of tort-like insurance statutes which, for example, require that insurers make prompt, fair, and equitable payment once liability becomes reasonably clear.²⁸ Therefore, it is difficult to see how one could classify a lawyer's provision of relevant legal information, recommendations, and advice as *merely incidental* to the representation of the insured.

The suggestion that insurance defense lawyers do not advise insurers but, rather, advocate to them on behalf of the insured won't work either. It is inappropriate to characterize the relationship as principally adversarial. In fact, insurer and the insured are parties to a contract in which the insured has appointed the insurer its case manager in any case where the insured requests a defense. Absent an obvious and profound conflict of interest between the insurer and the insured, an insured may not insist that an insurer fund its defense yet at the same time refuse to permit the insurance company to run the defense.²⁹ The insurer has special responsibilities for the insured. The insurer is not in an arms-length relationship with the insured. In theory, at least, the insured does not need anyone to advocate his position to the insurer. The insurer has a responsibility to seek it out, treat it as at least equal to its own, and act accordingly.³⁰ What the insurer needs is information and advice on exposures, defense strategies, and tactics.

Lawyers often forget that in 99 cases out of 100, or even more, there are no real conflicts.³¹ Coverage is not an issue, and the plaintiffs are not seeking damages in excess of policy limits. No one but the defense lawyer sees these cases. As a general rule, they are not the cases that lead to bad faith litigation. They are not cases in which conflicts arise between insurers and insureds. Yet in all of these cases which are litigated, the

insurer will be interested in what the defense counsel has to say about the prospects of the case, the legal theories of the plaintiff and the defendant, the characteristics of the venue, the characteristics of the court, the personality and capability of the other lawyers, quirks in state law, information about juries, and so forth. The transmittal and the evaluation of such information can hardly be called anything but *advice*.

Section IV above is certainly correct that the life of the law is to be found in conflict, tension, and even sometimes contradiction. Nevertheless, the law seldom countenances the clash of necessary truths. Such an idea is an intellectual monstrosity. Furthermore, it can be so easily avoided by drawing a modest distinction. If we admit that when a lawyer provides legal advice to an insurer about the value of an underlying case it makes recommendations to an insurer about whether it should settle the case or not, it is not simply defending the insured. If that distinction is countenanced, then there is no conflict between the attorney status as an independent contractor vis-a-vis the insurer, insofar as he is defending the insured, and his being an attorney for the insurer, insofar as he provides the insurer advice about (say) settlement. There need be no conflict between these roles, and certainly no disqualifying conflict, although there may sometimes be even that. Moreover, it should be immediately clear that defense counsel is not providing insurer with coverage advice inconsistent with the interests of his client the insured. Manifestly, no one believes that a lawyer can lawfully do that.

The last paragraph shows what is wrong with the principal argument contained in § E. The key premise in that argument is that "when a lawyer provides legal information to a liability insurer regarding the defense of its insured, if he is acting as the lawyer for the insured, and that's all, he is *not* the lawyer for the liability insurer." Well, of course this is true. Indeed, it's true by definition. The phrase "and that's all" makes him only the lawyer for the insured. The issue is whether the lawyer for the insured also becomes the lawyer for the insurer when he provides the insurer legal advice and therefore legal services.

VI. THE TRAVER CASE

Surely *Traver* is one of the most important cases to be decided about insurance defense lawyers in this decade. The issue in *Traver* was whether a liability insurer managing defense of an



insured was vicariously liable for the malpractice of the lawyer whom it had appointed to represent its insured. The supreme court answered this question in the negative and gave two reasons. First, the court said that, although lawyers are the agents of their clients, they are not agents of the insurance company which gives them directions. Indeed, they are independent contractors with respect to the insurer. The reason the defense lawyers are independent contractors is because the managing insurer does not have the right to control the details of their work. This proposition follows from the fact that attorneys have the prerogative to make decisions about the details of litigation, and other representations.³²

Second, an insurance defense lawyer owes his client, the insured, a duty of undivided loyalty. If the lawyer were also automatically attorney for the insurance company, the lawyer would necessarily have divided loyalties, and that is contrary to law. Hence, the lawyer cannot represent the insurance company, whilst he represents the insured.³³

Neither of these arguments is any good, and one of them is probably not even what the court intended. First, if a defense lawyer is an independent contractor with respect to the liability insurer which the insured-client has appointed by contract to manage covered litigation, then the defense lawyer is also an independent contractor with respect to the client he represents. After all, the client has no more right to control the details of the lawyer's work than does the insurance company. The law which states that an attorney has the prerogative to control certain of the details of his work, applies to paradigmatic clients. But Texas courts have repeatedly said that an attorney representing a client is an agent of the client.³⁴

Moreover, while it is true that an attorney owes each of his clients a duty of undivided loyalty, it does not follow that an attorney cannot represent two parties with conflicting interests. For one thing, the attorney may receive consent from the clients to engage in such a representation. In addition, so long as the attorney represents the parties on matters where their interests don't conflict, there is no reason why one should even try to think of lawyers as facing a conflict. Insofar as lawyers provide legal advice to insurers about how to conduct litigation on behalf of insureds efficiently and effectively, there can be no conflict of interest between the liability insurer and its insured.

Without question, the supreme court recognizes that liability insurers have the right to give lawyers for their insureds many directions. Indeed, the most significant part of the *Traver* case is an invitation to plaintiffs to sue insurance companies directly for mishandling defense lawyers they hire.

VII. CONCLUSION

Some people like to say that it doesn't matter much whether the one-client rule or the two-client rule is adopted. There is some truth in that suggestion, but only *some*. Obviously, a lawyer for an insured who assists an insurer in injuring the insured has done something wrong. This is true whether or not the insurance company is the lawyer's client. Nevertheless, it is important to sort out the contours in and limitations on the lawyer's representation of the insured, and it is important to think about what responsibilities the lawyer has to the insurer. Insurers occupy a unique position. They are case managers appointed by insureds, but unlike many case managers, they pay judgments with their own money.

Besides, as important as it is to figure out how we *ought* to do things, it is surely just as important to figure out how it is that we actually do things. Figuring out the former is not possible without figuring out the latter. Without the truth, nothing else matters.³⁵

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1. *Arce v. Burrows*, 958 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1997), *aff'd* as modified sub nom., *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).
 2. *Burrow v. Arce*, 997 S.W.2d 229, (Tex. 1999). (Holding: Faithless fiduciaries forfeit fees.)
 3. *State Farm Mut. Auto Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998).
 4. The most significant paper in this area is Charles Silver and Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L. J. 255 (1995). A recent piece by a distinguished writer on legal malpractice is Ronald E. Mallen, *Looking to the Millennium: Will the Tripartite Relationship Survive?* 66 DEFENSE COUNSEL J. 481 (October 1999). A more focused piece is David R. Anderson, *Ten Years Later, The Restatement is Still a Work in Progress*, www.wrf.com/publications/insurance/tenyears.tml (1996). This paper concerns the argument over § 215—and related sections—of the RESTATEMENT OF THE LAW GOVERNING LAWYERS. This controversy has been the focal point of much of the discussion of the “tripartite” relationship in the last few years. The Anderson piece contains an extensive bibliography of material published before 1996. An older but encyclopedic piece is Eric Mills Holmes, *A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking and Ethical Tightrope Without a Net*, 26 WILLAMETTE L. REV. 1 (1989). A quite recent piece which is partly about the “tripartite relationship” is Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts to Manage Legal Care*, 28 U. MEMPHIS L. REV. 57 (1997). Another helpful piece is Walter J. Andrews, *Managing “Tripartite” Issues: Survey of Issues Involving the Use of Independent Counsel*,—COVERAGE—(September/October) 1996 [www.wrf.com/publications/insurance/independent.html]. (The material on the Internet is much longer than the material in COVERAGE, and its discussion of cited cases is quite extensive. At roughly the same place on the Internet, another interesting essay is to be found. Laura A. Foggan and Elizabeth A. Eastwood, *Assessing Conflicts of Interest in the Tripartite Relationship*, www.wrf.com/publications/insurance/tripartite.html (1999). See also Charles Silver and Michael Sean Quinn, *Are Liability Carriers Second-Class Clients? No, but They May Be Soon—A Call to Arms Against the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS*, 6 COVERAGE 21 (1996) and *Wrong Turns on the Three-Way Street: Dispelling Nonsense About Insurance Defense Lawyers*, 5 COVERAGE 1

- (November/December 1995). Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?* 72 TEX. L. REV. 1583 (1994). There is an extremely interesting symposium entitled "Liability Insurance Conflicts and Professional Responsibility," to be found in 4 CONN. INS. L. J. (1997-98). That symposium contains papers by Thomas D. Morgan, Kent D. Syverud, Stephen L. Pepper, William T. Barker, Tom Baker, Robert H. Jerry, II, Charles Silver, Nancy J. Moore, George M. Cohen, David A. Hyman, with an after word by District Judge Robert E. Keeton. Most of the papers in this symposium take the Silver and Syverud paper as a stalking-horse.
5. Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991). But see Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973) (impliedly adopting the two-client view).
6. Richard A. Posner, *Pragmatic Adjudication*, included in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE, 235 (Morris Dickstein, Ed. 1998). Richard Posner is the Chief Judge of the Seventh Circuit Court of Appeals. His essay is the lead essay in a section of the volume entitled "Pragmatism in Law." It includes essay by Thomas C. Grey, David Luban, Richard Rorty, Richard H. Weisberg, and Michele Rosenfeld. Each of these essays is similar or another about the resurgence of pragmatism in American legal thought. See David Luban, LEGAL MODERNISM, 125 ff (1994). For a history of the influence of pragmatism on American legal and social thought, see John Patrick Diggins, THE PROMISE OF PRAGMATISM: MODERNISM AND THE CRISIS OF KNOWLEDGE AND AUTHORITY (1994). And for a theoretical treatment pragmatism in social and legal thought, see Hance Joas, PRAGMATISM AND SOCIAL THEORY (1993).
7. Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L. J. 1, 9 (1997-98).
8. Id. at 15.
9. Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L. J. 27 (1997-98).
10. Peter Sexton, *Remarks*, 4 CONN. INS. L. J. 411-12 (1997-98).
11. Richard Zitrin and Carole M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED, 132-139 (1999). ("Solicitations that compound a bereaved's grief are inexcusable—unless they are the only way to protect against insurance companies and their lawyers getting the jump on the victims. [In other words, plaintiffs' lawyers should be able to contact victims immediately, if insurance companies can, as well.] There is simply too much evidence that insurance companies focus on the bottom line first, and that they would use a thirty-day window of opportunity [during which plaintiff's lawyers could not contact victims] to do almost anything within their power to resolve cases on their own terms. ¶ Shortly after the Supreme Court's decision upholding Florida's thirty-day ban, the insurance company Allstate began aggressive efforts to convince claimants to settle before lawyers got involved. The company started sending letters and brochures entitled "Do I Need a Lawyer?" Allstate encouraged claims representatives to get out into the field, monitor police reports, and visit accident sites, all in order to try to settle claims fast." Id. at 135. "Insurance companies are among the very few organizations in America, other than law firms, that are in the business of litigating cases. While litigation is not their sole business—they have to advertise and sell insurance first—any company selling liability insurance knows that inevitably a significant percentage of its claims will wind up in court." Id. at 132 (italics added.) One wonders what "a significant percentage" is. Our experience is that many-many more claims are settled than litigated.)
12. Id. at 139.
13. See Charles Silver, *The Lost World of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773 (1998) (a symposium on the American Law Institute's RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS).
14. Zitrin and Langford, n. 11 above at 139.
15. For a more elaborate treatment of these kinds of arguments, see Douglas Walton, AD HOMINEM ARGUMENTS (1998).
16. Zitrin and Langford are not mistaken about everything: "All the posturing and positioning from both lawyers and insurance companies comes at the sacrifice of the rights of the individual—whether victim or policyholder. Sometimes clients seem like little more than pawns in a high-stakes game being played by others. This must change. While the primary objective of insurance companies may be to make money for shareholders, and lawyers have the right to earn a decent living, neither of these goals should interfere with a more important goal—the public policy that the rights of individuals dealing with the insurance system be protected and respected by both sides." Id. at 140. If an insurance company treats a person like a pawn, the insurance company is wronging the person.
17. Section 202 is entitled *Client Consent to a Conflict of Interest*, and it concerns the nature of informed consent.
18. Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991).
19. Michael Sean Quinn, *The Ethical Habitat of Adjusters: Part 1. Principles, Problems, and Practicalities*, 10 ENV'T'L CLAIMS J. 91 (Winter 1998); and Michael Sean Quinn, *The Ethical Habitat of Adjusters: Part 2. Principles, Problem, and Practicalities*, 10 ENV'T'L CLAIMS J. 77 (Spring 1998).
20. See Parsons v. Continental Nat'l Am. Grp., 550 P.2d 94 (Ariz. 1976). See Ellen S. Pryor, *The Stories We Tell: Intentional Harm and Request for Insurance Funding*, 75 TEX. R. REV. 1721, 1741-43 (1997).
21. Buss v. Superior Court, 939 P.2d 766 (Cal. 1997) (holding that insurers may be entitled to reimbursement of some defense expenses, if the right is properly reserved).
22. Morgan, *supra* n.7 at 12.
23. There is no need to cite the works of Silinn. They are mostly published in unreadable foreign languages, although they are available on the internet at "www.phantasmagoricallegalscholarship.org."
24. State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998).
25. 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied).
26. This idea was first suggested to me by Werner Powers of the Dallas office of Haynes and Boone. Mr. Powers principally represents policyholders, although not exclusively. One of the things that worries Werner about the "Powers Gambit" is that the advocacy in which the insurance defense lawyers engaging is of quite special kind. It is not obviously adversarial in any thoroughgoing way. Moreover, it might be outside the scope of the defense lawyer's representation of the insured. This worries me, too. Arguably, the job of the defense lawyer is to defeat or minimize the plaintiff's claims. If the lawyer puffs too much to the insurance company, the insurance company may have action for negligent misrepresentation against the attorney, and that cause of action does not require privity between the plaintiff and the defendant, i.e., between the defendant-lawyer and the plaintiff. McCamish, Martin, Brown, & Loeffler v. F. E. Appling Interests, 991 S.W.2d 787 (Tex. 1999).
27. See Michael Sean Quinn, *Insurer Bad Faith and Other Extra Contractual Liability*, 'IV (2000). That essay is included in the booklet for this symposium.
28. Id. at ' X.
29. Sometimes this is possible where the insurer has issued a reservation of rights letter, and there is a danger that the insurer will manage the case in such a way that evidence will be produced on uncovered claims but not on

covered claims. In situations where there is a danger of "slanting" by the case manager, courts frequently require that the insurer turn the management of the case over to the insured, if the insured asks. Allen Windt, *INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURERS* Ch. 2 (3d Ed. 1995). Windt's treatise is the starting place for dealing with legal problems arising in the insurer-insured relationship. What makes this treatise interesting is not simply its comprehensive treatment but the fact that it contains many explicitly normative arguments. This distinguishes Windt's treatise from many others which, while normative, conceal what is really going on underneath bland prose which appears to be descriptive. For more on reservation of rights letters, see Michael Sean Quinn, *Reserving Rights Rightly*, 7 *COVERAGE* 23 (July/August 1997).

30. Insurers are often said to have some sort of "special relationship" with insureds. This "special relationship" lies somewhere between the relationship involved in an arms-length transaction and the relationship between a fiduciary and its charge. In general, in an arms-length transaction, a party may put its own interest first. In a fiduciary relationship, the fiduciary must put the interest of its charge first. In a special relationship, a stronger party—always the insurer, no matter what—must treat the interests of its insured as at least equally to its own. *G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n 1929, holding approved). (Are these remarks normative or descriptive?)

31. William T. Barker, *Insurance Defense Ethics and the Liability Insurance Bargain*, 4 *CONN. INS. L. J.* 75, 86 (1977-98).

32. *State Farm Mut. Auto Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). ("A defense lawyer, as an independent contractor has discretion regarding the day-to-day details of conducting the defense, and is not subject to the client's control regarding those details. While the attorney may not act contrary to the client's wishes, the attorney is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to the control of the court, if he is not permitted to act as he thinks best." Id. at 627-28.)

33. "[E]ven assuming that the insurer possesses a level of control comparable to that of a client, this does not lead to the requisite for vicarious liability. . . . [T]he [insurance defense] lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. Under these circumstances, the insurer cannot be vicariously liable for the lawyer's conduct. . . . In sum, we hold that a liability insurer is not vicariously liable for the conduct of an independent attorney it selects to defend an insured." Id. at 627-28.

34. David Beck, *Legal Malpractice in Texas: Second Edition*, 50 *BAYLOR L. REV.* 551 (1998.)

35. Filipe Fernández-Armesto, *TRUTH: A HISTORY AND A GUIDE FOR THE PERPLEXED* (1999). "[T]ruth is fundamental to everything else. Everyone's attempt to be good—every attempt to construct happy relationships and thriving societies—starts with two questions: How do I tell right from wrong? And how do I tell truth from falsehood? The first question has more practical applications but it depends on its apparently more theoretical twin. There is no social order without trust and no trust without truth or, at least, without agreed truth-finding procedures. The options on which society depends—such as mutual respect, adhesion to contracts, obedience to laws, devolution of individual strengths to the community—have to be commended on convincing grounds." Id. at 3. Genuinely convincing grounds presuppose an account of truth. "[W]hen people stop believing in something, they do not believe in nothing; they believe in anything. Crackpot cults prosper, manipulative sex thrive, discredited supervisions revive." Id. at 3. According to Fernández-Armesto, professor of modern history at Oxford University in England, normally a satisfactory theory of truth can avoid these problems. Truth can be found only if the descriptive is distinguished from the normative, however, and those who count should stay clear about the distinction.