Who Is in Charge Here Anyway?
Ethical Issues When Representing an Insured

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Those of us insurance attorneys landing below the "v." face unique opportunities for ethical dilemmas. Representing the insured defendant is fraught with seemingly irresolvable conflicts, at least on a practical level. For instance, when an insurer representing an insured hires a lawyer in a liability matter, who does that lawyer represent? The insured? The insurer? Both? It is clear beyond cavil that, in the insurance context, the attorney owes his or her allegiance not to the insurer that retained him or her but to the insured defendant.[1] Yet an attorney provided by an insurer to represent an insured owes both the insured and insurer the same unswerving allegiance.[2] Since the duty of counsel is largely irrelevant in the absence of a conflict, the critical question becomes, To which client is loyalty owed in the event of a conflict of interest? We attempt to answer just that question in the following case survey.

Defining Conflicts of Interest

For insurance defense purposes, a conflict of interest between insurer and insured occurs whenever their common lawyer's representation of one is rendered less effective by reason of that lawyer's representation of the other. There is a conflict of interest when the attorney owes an ethical obligation to both the insurer and the insured.[3] Under New York's Disciplinary Rules, "[a] lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing different interests, except to the extent permitted under DR 5-105 (c)."[4] The consequences of a conflict of interest[5] are, from the insured's perspective, the potential effect on its defense and/or the loss of indemnity. From the insurer's perspective, they are a later first-party bad faith claim by the insured and/or being denied important coverage defenses. Finally, from the attorney's perspective, the consequences are malpractice and/or equitable subrogation theory, which allows the insurer to stand in the shoes of the insured and thereby sue the attorney hired to defend the insured even though no attorney-client relationship existed between the insurer and the attorney.[6]

Four reasons explain why such a conflict may arise:

1. The insured no longer bears a risk of paying a judgment or settlement but does bear other risks related to the lawsuit. These risks include all the manifold side effects of civil litigation.
2. The insurer and insured may disagree about the defense of the lawsuit because the insured will prefer a more expensive defense effort.
3. The insurer and the insured may disagree about the defense of the lawsuit because the insurer has an additional stake in the outcome beyond the amount paid to defend or settle it.
4. The insurer and the insured may disagree simply because each can take strategic advantage of the additional stake in the lawsuit possessed by the other.[7]

ABA Model Rules of Professional Conduct Rule 1.7(b) states that 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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. A current conflict is not required, and current material limitations on the lawyer's behavior do not have to be present. An attorney owes a duty to clients not to reveal confidences learned through the course of the professional relationship.[8] This duty continues after the conclusion of the attorney-client relationship.[9] In addition, the representation of a client with interests materially adverse to the interests of the former client in the same or substantially similar matter is prohibited.[10]

Insurance defense cases do not require a current conflict; they require only a clearly foreseeable risk of material limitation. In *Greene v. Greene*,[11] the court held that it is not necessary for a party seeking disqualification to show that confidential information necessarily will be disclosed in the course of litigation; rather, a reasonable probability of disclosure should suffice.[12] It should be noted that there is another school of thought, ably advocated by Professors Kent Syverud of the University of Texas School of Law and Charles Silver of the University of Michigan Law School, that believes Rule 1.7(b) should be ignored until a conflict is imminent.[13]

In New York, the lawyer who has been retained by an insurer to represent the insured must get the client's "consent after consultation." Otherwise, the lawyer will violate the requirements of Rule 1.7(b). Consultation means communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question under Rule 1.7(b)(2). This includes, but is not limited to, explaining the implications of the common representation and the advantages and risks involved. In addition, Model Rule 1.4 applies. It requires "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[14] In *Rejohn v. Serpe*,[15] the attorney did not disclose his dual representation to the client; thereafter, the client sued the attorney and recovered for malpractice.

Third-Person Compensation or Direction of a Lawyer

A lawyer may not represent a client if 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 *Restatement 3d of the Law Governing Lawyers* § 122 and knows of the circumstances and conditions of the payment. A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if (1) the direction does not interfere with the lawyer's independence of professional judgment; (2) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and (3) the client consents to the direction under the limitations and conditions provided in section 122.

Even if the insurer is paying the insured's legal bills, the attorney owes his obligation of loyalty to the insured.[16] New York Disciplinary Rule 5-107(b) provides that a "lawyer shall not permit a person who . . . pays the lawyer to render services for another to direct or regulate his or her professional judgment in rendering such services."

The Duty to Defend

Most policies promise that the insurer will defend "any suit against an insured alleging damage within the scope of the policy even if such suit is groundless, false, or fraudulent."[17] However, if the policy gives an insurer the right, but not the obligation, to defend it, the insurer has no duty to defend.[18] In most states, if the insurer has a duty to defend with regard to any aspect of a lawsuit, then it has a duty to defend with regard to every aspect of the lawsuit.[19]

Exceptions may exist when defense costs can be readily apportioned between covered and noncovered items.[20] Generally, whether a defense is owed may be determined by reviewing the petition or complaint.[21]

In New York, the duty to defend is broad. The underlying policy is that the insured purchased coverage not solely for any judg-

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ment that it might be obligated to pay but also for any defense costs that it might be obligated to incur.[22] The rule states:

> [The insurer] must look beyond the effect of the pleadings and consider any facts brought to its attention or any facts which it could reasonably discover when determining whether it has a duty to defend. . . . The possibility of coverage may be remote, but if it exists, the company owes the insured a defense. The possibility of coverage must be determined by a good faith analysis of all information known to the insured or all information reasonably ascertainable by inquiry and investigation.[23]

If there is a doubt as to the existence of a duty to defend, it is generally resolved in the insured's favor.[24] If the complaint contains any allegations that could possibly bring the claim within the scope of the insurance coverage, the insurer is obligated to defend.[25] However, when it can be determined from factual allegations that there is no basis for recovery within the policy, there is no duty to defend.[26]

The Insurer's Prerogative

When an insurer has a duty to defend its insured, it also has the rights (1) to select the counsel it wishes to handle the insured's defense and (2) to direct the defense of the litigation.[27] When no conflict of interest is apparent, the insurer chooses the defense counsel for the insured. The insurer also has the right to change counsel during the case without the insured's consent.[28] The exchange of defense counsel must be in good faith and in the best interests of the insured.

The right to control the defense. Normally, an insurer's duty to defend is coupled with the right to control the defense of the litigation. The purpose of this right is to allow insurers to protect their financial interests in the outcome of litigation and to minimize unwarranted liability claims. Giving the insurer exclusive control over litigation against the insured safeguards the orderly and proper disbursement of the large sums of money involved in the insurance business.[29] The decision about which defenses can be asserted ultimately rests with the insured, even where there is a legitimate concern about collusive claims and litigation.[30]

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. Although such a conflict of interest does not exist simply because the insurer has issued a reservation of rights letter, a conflict of interest does exist if the facts that will be adjudicated in the lawsuit against the insured are the same facts upon which the existence of coverage depends.[31] In *Schwartz v. Sar Corp.*,[32] the insurer thought the suit was collusive, and the lawyer retained by the insurer moved to dismiss and filed an affidavit saying he thought the accident had never happened. On review, the court found the affidavit inadequate to defeat summary judgment.[33]

When a conflict of interest is present, liability insurers contract for the right to control defense of claims and the possibility of indemnification. This control is effectuated by retaining a single attorney to defend the insurers and to protect the insured's interest with respect to the claim. The attorney cannot refuse to follow given direction from the insured, as this creates a conflict. Absent consent of the insurer to those directions, this presents an obstacle to the continuation of dual representation.[34] Also, the insurer loses its right to control the defense if the claim against the insured presents issues whereby the insurer would have the incentive and ability to improve its position on coverage depending upon a decision in the underlying lawsuit.[35]

With regard to the defense counsel's duty to the insurer, the retainer agreement between the insurer and the hired defense counsel defines the responsibilities of the hired counsel to the insurer.[36] If the retainer agreement provides so, the defense counsel must follow the directions of the insurer until there is a conflict between the interests of the insurer and the insured.[37] Even when the litigation is directed primarily by the insured, the defense counsel retains obligations to the hiring insurer. In *Goldberg v. American Home Assurance Co.*,[38] the court reasoned that, since defense counsel, hired by the insurer, "was acting as counsel not only for [the insured] but also for [the insurer] in defending the claim against plaintiff," there was no reason that defense counsel should not "provide periodic status reports to the client paying his fee."[39] The court went on to find that, in providing such reports, defense counsel had not violated any confidence or privilege of the insured.

The right to settle. Just as an insurer is entitled to control the defense of a claim, it also retains the right to control settlement.[40] This is true even if the settlement is par-

Potential Ethical Dilemmas

Rule 1: No Coverage Opinions from Defense Counsel

Assume that shortly after defense counsel is retained to defend a claim, he receives a copy of the relevant insurance contract. After reviewing the policy, he determines that the claim is not covered. Perhaps the event falls outside the policy period, an exclusion applies, or the insured has failed to satisfy some condition precedent to coverage in counsel's view. Flush with this "good news," counsel telephones the insurer, and the insurer disclaims coverage. Counsel has just violated his ethical obligations to his true client—the insured—by siding with the insurer and taking a position adverse to his client. See ABA Informal Opinion 1476 (1981), which suggests that coverage issues make up the "cardinal sin" of insurance defense counsel.

Variation 1—How much should counsel know about coverage and the policy in the first place?

The first portion of our ethical violation involved our counsel simply obtaining and reviewing the relevant policy. We must ask, Should the attorney review the policy or even have a copy of it? In a perfect world, insurance defense counsel could attend to the defense removed from coverage issues entirely. Yet, as a practical matter, this may not always be possible.

New York, for example, requires the disclosure of "the existence and content" of any insurance agreement that *may* be liable to satisfy all or part of the judgment. This requirement poses some ethical dilemmas to defense counsel. Few lawyers are particularly comfortable disclosing documents they have not reviewed. Further, does a defense counsel want to make an implicit representation that the policy *may* provide coverage?

Variation 2—What if the insurer instructs defense counsel not to produce the policy?

Insurance carriers are frequently disinclined to provide copies of their policies to plaintiffs. They often instruct insurance defense counsel to respond to a demand for the policy with a representation along the lines of "XYZ Aircraft Insurance Co. insures ABC Aeroengine Co. in an amount in excess of the damages sought in the complaint."

Let us think about this a moment. What has counsel just represented to his adversary? He has made a representation to opposing counsel as to the scope of coverage. That sounds sort of like a coverage opinion, doesn't it? Let us suppose that, fearing an improper misrepresentation to the plaintiff as to coverage, counsel suffers an attack of due diligence and elects to review the policy before making any representations as to coverage. Now it would seem that he has fallen even further into the coverage determination abyss.

To cap it off, let us assume that counsel determines that there is no coverage after reviewing the policy. Now what are his options? If counsel advises his adversary that the given policy provides coverage, he has (arguably) willfully misrepresented the facts to his adversary. Yet the alternative of opining that the policy does not provide coverage is similarly problematic for the reasons noted above.

The simple solution may simply be to blindly turn over any potentially applicable policy and leave the review and analysis to the adversary.

tially within the insured's deductible.[41] However, it should be noted that the insurer has no duty to engage in settlement.[42] Generally, three clauses in an insurance policy typically restrict the insured's control over the negotiation and settlement process:

1. the "defense clause" typically states that the insurer "may investigate and settle any claim or suit that [the insur-

er] decides is appropriate";
2. the "cooperation clause" permits the insured to pay amounts in settlement, in the absence of the insurer's consent, only at the insured's expense; and
3. the "no action clause" effectively bars the insured from suing the insurer for indemnification should the insured negotiate a settlement without the consent of the insurer.[43]

The right to settle and the right to control defense are independent and rest on entirely different foundations. The insurer's control over settlement is an aspect of indemnification. The obligation of defense counsel may or may not permit him or her to participate in a settlement over objections of the insured. Nevertheless, the defense counsel's inability to settle the matter does not prevent the insurer from independently settling claims brought against its insured if the policy authorized it to do so.[44]

Most insurance policies provide that the insurer "may make such investigation and such settlement of any claim or suit as it deems expedient." In addition, most policies authorize the carrier to settle an action on behalf of the insured irrespective of the insured's consent.[45] The insurer retains these rights even where it has not participated in defending the insured due to a conflict of interest.[46]

Generally, an insurer is not obligated to consult its insured in regard to settlement discussions. Nevertheless, the insurer is obliged to respond accurately to requests from its insured concerning the progress of any settlement negotiations.[47] However, when the proposed settlement exceeds the policy limits, potential sources of conflict may arise. Typically, the conflict arises when solid potential liability defenses exist but defense counsel knows that the case can be settled within policy limits.[48]

When the insurer has retained counsel to defend a claim, the insurer or its attorney other than defense counsel should timely inform the insured of the danger of exposure (1) where there is a probability that the damage will exceed the limits of the policy, (2) where the prayer of the complaint exceeds the limit of the policy, or (3) where there is an unlimited or indefinite prayer for damages and a probability that the verdict may exceed the coverage limit.

The insured should be encouraged to retain additional counsel at his or her own expense to advise him or her with respect to such exposure. As long as the financial interest of the insurer in the outcome of the litigation continues, the insurer retains the exclusive right to control and conduct the defense of the case, in good faith, subject to the right of the insured or another additional attorney to participate.[49]

This conflict only relates to the settlement, not the defense. There may be a conflict of interest between the insurer and the insured in connection with whether and for what amount the lawsuit should be settled, but those conflicts do not affect how the case should be defended. In turn, an attorney selected by the insurer should be able to represent the interests of both the insurer and the insured.[50]

In terms of conflicts that arise when a plaintiff offers to settle within policy limits, the insured's interest and those of the insurer may well diverge. Generally, the insured wants the insurer to accept the offer in order to avoid liability beyond the policy limits and potential financial ruin. However, settlement may not be in the insurer's best interest. The insurer may have an economic incentive to litigate aggressively in the hope of obtaining a lower verdict than the settlement demand or escaping liability entirely.

In *Ladner v. American Home Assurance Co.*,[51] the insured was a psychologist being sued for malpractice. The plaintiffs alleged that the insured physician had negligently treated, tested, and counseled one of her patients. In addition, the plaintiffs also alleged that the physician had engaged in various acts of sexual misconduct with her patients. The physician's insurer for malpractice was the defendant, American Home. The defendant provided general liability coverage of $1 million, but the policy also provided that claims for "erotic physical contact" were subject to a $25,000 limit. The physician contended that defense counsel hired by the insurer could not represent her because of their conflict of interest with the insurer. The policy's specific provisions governing claims of sexual misconduct made it advantageous for the insurer to have all the claims against the physician linked to the sexual misconduct. The court agreed and concluded that the doctor was entitled to counsel of her choice, to be paid by the insurer.[52]

The general rule in such cases requires that the insurer give "equal consideration" to the interests of the insured and the company in evaluating settlements.[53]

The insurer is only liable if its behavior in failing to settle departs from some norm by a margin a jury

can fairly distinguish. States use negligence, bad faith, or some combination of the two when determining what differs from the norm. Stephen Ashley, a professor at the University of California–Berkeley School of Law and author of numerous treatises on bad faith, conducted a survey and found 21 bad faith states, five negligence states, and 17 states that apply some permutation or combination of these standards. However, the practical distinction between a negligent failure to settle and a bad faith failure to settle remains elusive.[54]

Both standards turn on whether a particular settlement is reasonable. Most states compare the settlement demand to the "expected judgment" at the time the demand was rejected. The expected judgment is the amount of damages that the insurer reasonably should have expected to be awarded at trial.[55]

In New York, bad faith requires "gross negligence" and "deliberate or reckless failure to place on equal footing the interests of [the] insured with [the insurers'] interests when considering a settlement offer."[56]

Courts recognize a "duty to settle" because they believe that insurers will at times abuse their power over settlements by inappropriately refusing demands, thereby exposing their insureds to liability in excess of the policy limits.[57]

Who pays when the defense rejects a plaintiff's proposal that falls within the policy limits and the jury subsequently returns an award exceeding the policy limit? Generally, the insurer will insist that the plaintiff look to the insured's personal assets to pay the excess. However, if bad faith is present, the insured may recover from the insurer for failing to settle the case within policy limits when the opportunity presented itself. In Texas, courts require that the insured actually pay the excess judgment before it may sue the insurer.[58] This runs counter to the practice in most states.

In almost every state, the insured can sue the insurer. The District of Columbia, Hawaii, Nevada, and West Virginia, however, have never expressly endorsed or rejected such a cause of action.

The insurer that fails to settle a case within policy limits despite the opportunity to do so may be directly liable for any excess judgment. A trial against such an insurer will likely focus on the behavior of the insurer and, in particular, the behavior of its claims personnel and defense attorney during the settlement negotiations. No state holds the insurer strictly liable for the excess judgment when it rejects a settlement demand within the policy limits.[59] In many states the insured defendant can—and frequently does—assign his or her claims against the insurer to the plaintiff.[60] In a few states, the plaintiff may, by statute, be able to sue the insurer directly even in the absence of a formal assignment.[61]

The suit against the insurer will seek damages at least in the amount of the excess liability. In a few states, attorney fees may also be recovered. However, most states refuse to include attorney fees in recoverable damages in duty to settle actions.[62] In three states—California, Colorado, and Montana—damages for emotional distress may be awarded.

Mixed Claims: Some Covered, Some Not

The duty to defend. A common conflict scenario arises when a complaint alleges negligence (which is typically covered), as well as intentional tort (likely excluded), and punitive damages (which are likely uninsurable for public policy reasons). As a general rule, an insurer is required to defend an insured when a complaint alleges facts that, if true, would bring the case within the policy coverage. In other words, if there is a potential to indemnify covered claims, a duty to defend all of the claims arises.[63]

When a complaint asserts both covered and noncovered claims, most states hold that the insurer must defend the entire action.[64] Some courts provide an exception for this general rule and permit allocation of defense costs between covered and noncovered claims when the insurer can introduce "undeniable evidence of the allocability of specific expenses."[65] A minority of states permits allocation of defense costs where there are reasonable means of deciphering costs of defense between the covered and noncovered claims.[66]

Defending without reservation. Courts uniformly hold that an insurer waives all possible coverage defenses if it undertakes a defense of its insured without notifying the insured that this defense is subject to a reservation of rights to deny coverage. Therefore, failing to reserve rights may require an insurer to pay for claims that are not covered by the policy under the doctrine of waiver or estoppel.[67]

Waiver is the voluntary, intentional relinquishment of a known right.[68] Waiver doctrine will be invoked only where there is proof, actual or circumstantial, that the insurer intended to abandon or at least not rely upon a particular defense.[69] The general rule is that failure to disclaim coverage where

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Rule 2: Maintain Client Secrets

We have already noted that the true client is the insured. And we know that the attorney has an obligation to maintain client secrets, including those that the insured may ask to be withheld from the insurer. If the attorney breaches this confidentiality obligation, she may be subject to disciplinary proceedings and/or malpractice liability.

Although the subject of minimal case law, the requirements that insurance defense counsel maintain the secrets of her true client can present seemingly insurmountable dilemmas. Consider the forces in opposition: The attorney must preserve the insured's confidences. The insurer controls the defense. Counsel reports to the insurer so that the insurer can make decisions related to that defense.

What, then, are counsel's options when she is told to retain in confidence an item that is critical to the insurer's ability to defend the case? Again, specific case law is scarce in this area, so the answer may turn more on practical considerations than on legal ones.

Variation 1—Document Subject to Disclosure

Let us take as an example a damaging document that the insured asks counsel to withhold from the insurer. If that document is already subject to an automatic disclosure requirement or a discovery request, defense counsel should be able to convince the insured that counsel may advise the insurer of its content before disclosure to an adversary. In fact, the insurer may then be inclined to press for settlement based upon this information.

Variation 2—Privileged Information Not Yet Subject to Disclosure

If the particular document is disclosed to counsel at an earlier stage of the litigation—perhaps even in a prelitigation or claim stage—before any discovery obligations attach to it, the ethical dilemma is more acute. Counsel may first argue to the client that "the truth will out" and recommend disclosing the information now rather than later.

Absent the ability to persuade the client, what is counsel to do when she is faced with the Hobson's choice of either revealing a client secret to the insurer or withholding information critical to the defense of the action? We are aware of no specific case law on this subject, and the only answer that appears to be ethically sound—at least relatively—is for defense counsel to withdraw from the representation, alarm bells and all!

Variation 3—Privileged Information That Affects Coverage

As our final scenario, let us assume that the information the client seeks to withhold from the insurer also has coverage implications, for example, a document indicating willful or fraudulent conduct that would trigger an exclusion. These facts are critical to the defense of the case and have a clear bearing on liability and damages exposure. Clearly, these facts *ought to be* disclosed to the insurer controlling the defense. Yet, if these same facts implicate coverage, counsel has potentially violated her duty of loyalty to the true client.

As noted in the discussion of Rule 1, while on the one hand, it may be to defense counsel's advantage to stay as far away from coverage issues as possible, how then can he or she avoid inadvertently revealing facts to the insurer that implicate coverage absent some understanding of the policy? Add to the mix the fact that counsel will likely have to produce the policy (probably after reviewing it), and the ability of defense counsel to stay free and clear of coverage issues seems to present some clear challenges.

it would not otherwise exist does not create coverage that the policy was not written to provide. In the case where the insurance policy does not cover a particular risk, the insurer need not issue a disclaimer based upon lack of coverage.[70] The insured does not win indemnification merely by showing that the insurer did owe it a defense in the underlying cause of action. Even an unfaithful insurer may not be bound to an insurance contract it did not write.[71] On the other hand, the minority rule follows that the doctrine of waiver will create coverage that would not otherwise have existed by virtue of the terms of the policy.[72] Nevertheless, even the majority of courts will invoke coverage when the insurer pays a claim not encompassed by the policy and then refuses to pay a subsequent similar claim.[73]

Unlike waiver, the doctrine of equitable estoppel will estop the insurer from denying uncovered claims. This doctrine applies when an insurer that is not obligated to provide coverage undertakes the defense of the case without issuing a reservations of rights letter or asserting policy defenses, in reliance on which the insured suffers the detriment of losing the right to control its own defense.[74] It should also be noted, even if a reservation of rights letter is issued, estoppel can still occur if the insurer does not issue the letter in a timely manner.[75] Estoppel will apply only if the insured has demonstrated that it has been prejudiced by the insurer's actions.[76]

The insurer's options. Because of the potential liability associated with a wrongful denial, when an insurer has a question regarding whether coverage exists for allegations made in a third-party lawsuit, the insurer has three general options. It may issue a reservation of rights letter advising the insured of the right to independent counsel while providing a defense and indemnification to all allegations pleaded. It may deny the claim outright and force the insured to hire his or her own counsel. Or, lastly, it may pay a defense attorney to defend the interests of the insured while it reviews the coverage issues and or files a declaratory judgment action to determine coverage.[77]

The reservation of rights letter. Because the insurer's duty to defend is broader than its duty to indemnify, when there is a question as to the insurer's responsibility for any resulting judgment, the insurer generally provides a defense and reserves its rights to contest coverage at a later time.[78] An insurer must be careful to identify the policy provisions upon which it bases its reservation of rights. This reservation of rights letter sets forth the specific questions the insurer has regarding coverage and the specific policy provisions upon which the insurer may ultimately rely to deny coverage. The letter may also include a savings clause stating that the insurer reserves its right to cite other provisions of the policy as the investigation into coverage continues.[79]

When writing a reservation of rights letter, a number of factors should be kept in mind.

1. Set out every known and conceivable basis to deny coverage.
2. Write the letter as to fairly appraise the insured of the nature of any conflict with the insurer relating to the insured's defense. It may not be enough, depending on the circumstances, simply to set out verbatim the potentially applicable policy exclusions.
3. The letter should be written so that it may be understood by a layman. Ambiguities will be interpreted against the drafter.
4. Jurisdictions that appear to have adopted a fact-dependent test whenever an insurer issues a reservation of rights for determining the necessity of independent counsel include California,[80] Illinois,[81] New York,[82] Ohio,[83] Oklahoma,[84] and Pennsylvania.[85]
5. Other jurisdictions appear to have adopted a per se rule that the policyholder is entitled to independent counsel whenever an insurer issues a reservations of rights letter, and these include Alabama,[86] Arizona,[87] Florida,[88] Kentucky,[89] Louisiana,[90] Massachusetts,[91] Missouri,[92] Texas,[93] and Washington.[94]

Conflicts of Interest and Punitive Damages

Courts differ on whether a conflict of interest is automatically present when a complaint alleges negligent and intentional conduct. A number of courts have held that defense costs for damages arising out of egregious conduct by the insured may not be insurable for reasons of public policy.[95]

The Supreme Court of Illinois held that a conflict of interest arose where a complaint against an insured alleged counts for negligent and intentional conduct.[96] By contrast, other courts have found that a reservation of rights based on an intentional act of exclusion does not compel the retention of separate

counsel by the insurer. Interestingly, in *Maneikis v. St. Paul Insurance Co. of Illinois*,[97] the court found no conflict because it was possible for the same act to give rise to malpractice and fraud claims. The insurer therefore had every reason to defend the lawsuit vigorously.[98]

Courts differ on whether a conflict of interest exists when punitive damages have been claimed. Two of the principal cases addressing conflicts presented by punitive damage allegations are *Nandorf, Inc. v. CNA Insurance Cos.*[99] and *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*[100] In the latter case, a California appellate court held in 1984 that an insurer's reservation of rights always poses a conflict of interest, potentially requiring the insured's engagement of independent counsel at the insurer's expense.[101] In *Nandorf*, the court expressed a different view. It held that a conflict of interest is not automatically present when reservation of rights is filed based on punitive damages.[102] In this case, the plaintiff insured brought a declaratory judgment action against its insurer seeking reimbursement of attorney fees incurred by counsel who was separately retained by the insured to monitor a case against the insured by third parties. In the underlying case, several persons claimed that some employees of a thrift shop, which was owned and operated by the insured, had seized the plaintiffs and wrongfully imprisoned them against their will. The plaintiffs each sought $5,000 in compensatory damages and $100,000 in punitive damages. The court found that the parties shared a common interest in a finding of no liability. Nevertheless, if the insured was found liable, its interests diverged because the insurer's interests would have been just as well served by an award of minimal compensatory damages and substantial punitive damages. The court held that the insurer's fidelity to the insured was hampered by its own interests.[103]

In New York, the court in *Parker v. Agricultural Insurance Co.*[104] held that retention of independent counsel is only necessary where a reservation of rights is filed based on a punitive damage exclusion and the presence of actual evidence or a severe financial exposure to the insured creates a real disparity of interest.[105]

Where a conflict of interest is present, the next step necessitates a meeting between the insured and defense counsel. At this time, full disclosure must be made to the insured regarding the potential conflicts of interest that may arise between the insured and the insurer. Moreover, full disclosure is particularly important when the insurer reserves its rights. Insurance counsel must cover the following items (and perhaps more) with the insured at this meeting:

1. the insurer is paying for the defense;
2. the insurer's interest in the litigation may be different

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Final Thoughts

The thorny ethical scenarios posited in these sidebars and the issues discussed therein seldom engender conflicts that flare into something that cannot be handled on a professional or informal basis. Far more often than not, the insured will waive attorney-client privilege and allow reporting to the insurer. Despite the potential for disagreement, the combined interests of the parties in defending the litigation and the commercial interests of the insurer and insured typically combine to affect the smooth informal resolution of potential conflicts and the provision of an effective defense.

Instances may arise in which a lawyer reasonably believes a limitation imposed by an insurer materially compromises the lawyer's ability to provide adequate representation. In such situations, gentle persuasion is the lawyer's best tool. Regrettably, whether it be an unreasonable limitation imposed by the insurer, or an instruction by the insured that impairs defense counsel's ability to report or defend, there is a dearth of guiding case law on the subject. When caught between this proverbial rock and a hard place, withdrawal from the defense may be counsel's only option. Will the mere threat of counsel withdrawing bring the insured or insurer to its senses and facilitate a practical resolution of the conflict? Let's hope so.

than the insured's, and this requires disclosure and discussion of all potential conflicts and how they may manifest themselves during the pending case;
3. the attorney must disclose any prior or ongoing relationship he or she may have had (or has) with the insurer, and he or she must ensure the insured that he or she will act independently of the insurer regardless of that relationship;
4. the provisions of the insurance policy that materially affect the representation must be identified;
5. an explanation of the policy limits;
6. the need for prompt notice and cooperation;
7. the insurer's right to control the defense;
8. the various reporting requirements;
9. any provisions regarding settlement;
10. inform the insured that he or she has a right to retain other counsel on any matter or issue at the insured's expense at any time; and
11. the attorney must keep both the insured and insurer informed of any settlement demands.[106]

After this full disclosure, if the insurer refuses to consent to the attorney's representation, other additional independent counsel may be required.[107] Also, in the face of a potential conflict of interest, the attorney may withdraw from representation.[108] For example, when the insurer hires an attorney to represent the insured and a conflict arises between the two, the attorney cannot represent both.[109] In the case when a client challenges the attorney's loyalty and professional integrity, the "attorney may deem himself as effectively discharged by being falsely accused of a breach of his trust as if he were bluntly dismissed without cause."[110]

When coverage issues exist, some courts are concerned that counsel may prejudice the insured by aiding the insurer in escaping coverage. Thus, where a material coverage issue exists, some courts allow the insured to retain an independent counsel of its choice and control the defense of the litigation unless the insurer is willing to waive its coverage defenses. The insurer will be held responsible for the reasonable costs of this additional representation.[111] However, courts disagree as to whether the right to independent counsel allows the insured to make the choice unilaterally. Different courts have held that (1) the insured is allowed to make the decision unilaterally without the insurer's consent or approval; (2) the insured is allowed to choose independent counsel but then the insurer must approve the appointment, although the insurer cannot withhold approval unreasonably; (3) the insurer must approve the need for independent counsel and then the insured can choose its attorney; or (4) the insurer approves the need for independent counsel and provides independent counsel without the insured's consent.

In New York, the court in *Public Service Mutual Insurance Co. v. Goldfarb*[112] held that where there is a conflict of interest between an insurer and its insured, the insured has the right to independent counsel. Moreover, insured may choose counsel with reasonable fees to be paid by the insurer. This is not a steadfast rule. The insurer can contract otherwise provided the terms are not against public policy.[113]

Regardless of how the independent counsel is chosen, most states require the insured to act in good faith when selecting counsel. Generally, insurers are entitled to a specific accounting of independent counsel's activities and an explanation of its fee schedule. Insisting on such specificity is essential because courts have generally rejected insurers' challenges to defense counsel fees if the insurer fails to identify the challenged activity and fee in detail.[114]

When an independent counsel is retained, (1) the original defense attorney must never discuss coverage issues with the insurer; (2) the insurer may no longer be able to control the defense but is entitled to information regarding the status of the case; (3) the role of the original defense counsel varies considerably, and the possibility exists that the independent counsel will completely take over the defense; and (4) at other times, the independent counsel will play a limited role in the defense—e.g., monitoring litigation for the insured—and thereafter the original defense counsel will be able to effectively continue defense of the suit.

Conclusion

Thankfully, conflicts of interest arise far less often in practice than one might theorize given the delicate balance of the tripartite relationship. The combined interests of the parties in defending the litigation and the commercial interests of the insurer and insured typically combine to affect the smooth informal resolution of

potential conflicts and the provision of an effective defense. This, clearly, is beneficial in the eyes of insurance defense counsel for, should the insurer and the insured entrench themselves, the lawyer caught in the middle may have few positive options.

The duties of confidentiality, loyalty, and independent judgment are all ethical duties an attorney owes his or her clients. In the typical insurance defense case, interests rarely diverge between the insured and the insurer, and the lawyer may easily avoid confidentiality and good faith problems. When in doubt, insurance counsel should first obtain consent from the insured before passing onto the insurer any fact that could devolve into a potential conflict of interest. Insurance-retained defense counsel must be ever vigilant for situations in which the interest of the insurer and his or her true client may diverge. ■

Notes

1. 16A J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8839.35, at 108 (1981). *See also* Feliberty v. Damon, 72 N.Y.2d 112, 119 (N.Y. 1988) (finding counsel's primary duty is to the insured and that "the insurer is precluded from interference with counsel's independent professional judgment in the conduct of the litigation on behalf of its client").

2. ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED § 4:19 (4th ed. 2001) [hereinafter WINDT].

3. *See* Hartford Accident & Indemnity Co. v. Foster, 528 So. 2d 255, 284 (Miss. 1988) ("it is the attorney's ethical obligation to have undiluted loyalty to both clients").

4. *See* NEW YORK DR 5-105(a) (2002).

5. *See* Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 46 DEFENSE L.J. 211, 220 (1997).

6. *See* Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 484 (Tex. 1992). *See also* Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 787 N.Y.S.2d 15 (N.Y. App. Div. 1st Dep't 2004) (holding that an insurer could, as an equitable subrogee, assert a breach of fiduciary duty claim against the insured's law firm).

7. WINDT, *supra* note 2, § 4:19.

8. *See* Mancheski v. Gabelli Group Capital Partners, Inc., 802 N.Y.S.2d 473 (N.Y. App. Div. 2d Dep't 2005).

9. *Id.*

10. *See* Kassis v. Teacher's Ins. & Annuity Ass'n, 93 N.Y.2d 611 (N.Y. 1999).

11. 47 N.Y.2d 447 (1979).

12. *Id.* at 453.

13. *See generally* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995).

14. *See also* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 669 (1989).

15. 125 Misc. 2d 148 (N.Y. Dist. Ct. Suffolk Cty. 1984).

16. *See, e.g.*, Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 338, 419 A.2d 417, 424 (N.J. 1980); Moritz v. Med. Protective Co., 428 F. Supp. 865, 871–72 (W.D. Wis. 1977); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730 (7th Cir. 1976).

17. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 561 (1987).

18. WINDT, *supra* note 2, § 4.1.

19. WINDT, *supra* note 2, § 4.12.

20. *See*, e.g., Transport Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325, 1332 (N.D. Tex. 1980).

21. *See* Capital Bank v. Commonwealth Land Title Ins. Co., 861 S.W.2d 84, 87 (Tex. Ct. App. 1993) (looking at policy language and allegations in complaint to determine duty to defend).

22. WINDT, *supra* note 2, § 4.1.

23. Fitzpatrick v. Am. Honda Motor Co., 575 N.E.2d 90, 93 (N.Y. 1991). *See also* Newfane v. General Star National Ins. Co., 784 N.Y.S.2d 787, 790–91 (N.Y. 2004) ("an insurer may escape a duty to defend 'only if it can be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy'").

24. Rhodes v. Chicago Ins. Co., 719 F.2d 116, 119 (5th Cir. 1983) (applying Texas law).

25. Technicon Elecs. Corp. v. Am. Home Assurance Co., 74 N.Y.2d 66, 73 (N.Y. 1989).

26. *See* Allstate Ins. Co. v. Mugavero, 79 N.Y.2d 153, 162 (N.Y. 1992).

27. *See* Mount Vernon Fire Ins. Co. v. J.J.C. Stucco & Carpentry Corp., 1997 WL 177864, at *4 (E.D.N.Y. Apr. 3, 1997) (citing Parker v. Agric. Ins. Co., 440 N.Y.S.2d 964, 967 (N.Y. Sup. Ct. 1981).

28. *See* Petition of Preferred Accident Ins. Co. of N.Y., 78 N.Y.S.2d 674, 675 (N.Y. App. Div. 1st Dep't 1948).

29. Parker v. Agric. Ins. Co., 440 N.Y.S.2d 964, 967 (N.Y. Sup. Ct. 1981). *See also* Charles Silver & Kent Syverud, *supra* note13, at 363 ("The law is clear that, absent certain conflicts of interest, the company possesses exclusive and plenary control of the defense.").

30. Reynolds v. Maramorosch, 144 N.Y.S.2d 900 (N.Y. Sup. Ct. 1955).

31. *See* WINDT, *supra* note 2, § 4:20. *See also* HK Sys., Inc. v. Admiral Ins. Co., 2005 WL 1563340, at *15 (E.D. Wis. June 27, 2005) ("[I]n the event of a conflict of interest, the insurer,

absent an informed consent by the insured to less, has a choice between hiring independent counsel to control the defense or allowing the insured to select private counsel (to be paid for by the insurer) to control the defense.").

32. 195 N.Y.S.2d 496, 497 (N.Y. Sup. Ct.), *rev'd on other grounds*, 195 N.Y.S.2d 819 (App. Div. 1959).

33. *Id.* at 503.

34. William T. Barker, *ALI Draft Questions Insurer's Right to Control Defense*, 60 DEF. COUNS. J. 611 (1993).

35. *See* William T. Barker, *Reservation of Rights and Conflict of Interest: When Does the Insurer Lose the Right to Control the Defense?* 58 DEF. COUNS. J. 469 (1991); Nowacki v. Federated Realty Group, Inc., 36 F. Supp. 2d 1099, 1104, 1107–08 (E.D. Wis.1999) (finding reservation of rights created conflict of interest where plaintiffs' complaint could be characterized as a mixture of intentional and negligent acts; insurer had to pay for counsel selected by insured, and insurer's consent on choice of counsel was not required by law).

36. Charles Silver & Kent Syverud, *supra* note 13, at 269.

37. *Id.*

38. 80 A.D.2d 409; 439 N.Y.S.2d 2 (N.Y. App. Div. 1st Dep't 1981).

39. 80 A.D.2d at 412–13; 439 N.Y.S.2d at 5–6.

40. 1A R. LONG, THE LAW OF LIABILITY INSURANCE 10-138, 10-139 (1990).

41. *See* Liberty Mutual Ins. Co. v. Thalle Constr. Co., 116 F. Supp. 2d 495 (S.D.N.Y. 2000).

42. Birmingham Fire Ins. Co. of Pa. v. Am. Nat'l Fire Ins. Co., 947 S.W.2d 592 (Tex. Ct. App. 1997).

43. Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1118–19 (1990).

44. William T. Barker, *supra* note 34.

45. Feliberty v. Damon, 517 N.Y.S.2d 632, 634 (N.Y. App. Div. 4th Dep't 1987); Orion Ins. Co. v. General Elec. Co., 493 N.Y.S.2d 397 (holding an insurer was authorized to settle lawsuit involving two of its policyholders represented by independent counsel because it would otherwise be unable to make settlement offers).

46. *Orion Ins. Co.*, 493 N.Y.S.2d at 403.

47. *Feliberty*, 517 N.Y.S.2d at 634.

48. Kent D. Syverud, *supra* note 43.

49. Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 286 (1994).

50. *See* WINDT, *supra* note 2, § 4:20; Allstate Ins. Co. v. Campbell, 334 Md. 381 (1994).

51. 201 A.D.2d 302 (App. Div. 1st Dep't 1994).

52. *Id.* at 304.

53. S. ASHLEY, BAD FAITH LIABILITY: A STATE BY STATE REVIEW 89–134 (1987).

54. *Id.*

55. *Id. See also* Johansen v. Cal. State Auto Ass'n Inter-Inc. Bureau, 15 Cal. 3d 9, 16 (1975) (defining expected judgment as the probability of a plaintiff's verdict multiplied by the likely damages should the plaintiff win).

56. Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 453 (N.Y. 1993).

57. Kent D. Syverud, *supra* note 43, at 1126.

58. *See, e.g.*, Seguros Tepeyac, S.A., v. Bostrom, 347 F.2d 168, 178–79 (5th Cir. 1965).

59. R. KEETON & A. WIDISS, INSURANCE LAW § 7.8(b)(4), at 887–89 (practitioner's ed. 1988).

60. Annotation, *Assignability of Insured's Right to Recover Over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R.3d 1158 (1967 and Supp. 1998).

61. *See* Royal Globe Ins. Co. v. Superior Ct., 23 Cal. 3d 880 (1979); Klaudt v. Flink, 202 Mont. 247 (1983).

62. J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES 352–55 (4th ed. 1987).

63. *See* Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (Cal. 1966).

64. BARRY R. OSTRANGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 502[a][1] (6th ed. 1993).

65. Hogan v. Midland Nat'l Ins. Co., 91 Cal. Rptr. 153, 159 (1970).

66. Nat'l Steel Constr. Co. v. Nat'l Union Ins. Co., 14 Wash. App. 573, 576 (Wash. App. 1975).

67. WINDT, *supra* note 2, § 2.09.

68. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

69. Nat'l Indem. Co. v. Ryder Truck Rental, Inc., 165 Misc. 2d 848, 851 (N.Y. Sup. Ct. 1995).

70. Merchants Mut. Ins. v. Allcity Ins., 664 N.Y.S.2d 690 (N.Y. App. Div. 3d Dep't 1997).

71. Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1493 (5th Cir. 1992).

72. *See* WINDT, *supra* note 2, § 6:35.

73. *See* Hartford Accident & Indem. Co. v. Regent Nursing Home, 413 N.Y.S.2d 195, 198 (N.Y. App. Div. 1979).

74. *See* Bluestein & Sander v. Chicago Ins. Co., 276 F.3d 119 (2d Cir. 2002).

75. City of Carter Lake v. Aetna, 604 F.2d 1052 (8th Cir. 1979).

76. Hartford Ins. Group v. Mello, 81 A.D.2d 577, 578 (N.Y. App. Div. 2d Dep't 1981).

77. Lori Massey Cliffe, *Representing Your Client under a Reservation of Rights*, 41 FOR THE DEFENSE 7 (Jan. 1999).

78. Debra A. Winiarski, *Walking the Fine Line: A Defense Counsel's Perspective*, 28 TORT & INS. L.J. 596 (1993).

79. *Id.*

80. CAL. CIV. CODE § 2860(b).

81. Ill. Masonic Med. Ctr. v. Turegum Ins. Co., 522 N.E.2d 611, 614

(Ill. App. Ct. 1st Dist. 1988); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988 (Ill. App. Ct. 1st Dist. 1985).

82. Pub. Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810 (N.Y. 1981).

83. Henke v. Badowki, 1987 WL 15730, at *3 (Ohio Ct. App. 1987).

84. Nisson v. Am. Home Assurance Co., 917 P.2d 488, 490 (Okla. Civ. App. 1996).

85. Pennbank v. St. Paul Fire & Marine Ins. Co., 669 F. Supp. 122, 126–27 (W.D. Pa. 1987); St. Paul Fire & Marine Ins. Co. v. Roach Brothers Co., 639 F. Supp. 134, 139 (E.D. Pa. 1986) (existence of both covered and noncovered claims raises potential for conflict, "but actual conflict is not inevitable").

86. L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298, 1303 (Ala. 1987) (adopting holding of Washington Supreme Court that insurer defending under reservation of rights is subject to an "enhanced obligation of good faith," which includes an understanding that defense counsel's only client is the insured).

87. United Servs. Auto. Ass'n v. Morris, 741 P.2d 246, 251–52 (Ariz. 1987) (en banc) ("[t]he insurer's reservation of the privilege to deny the duty to pay relinquishes to the insured control of the litigation").

88. FLA. STAT. ANN. § 627.426(1)(b)3 (West 1996) (absent nonwaiver agreement, when insurer reserves rights, insured is entitled to "mutually acceptable" independent counsel).

89. Medical Protective Co. v. Davis, 581 S.W.2d 25, 26 (Ky. App.), *review denied,* (Ky. Ct. 1979) (when insurer offers defense under reservation of rights, "the insured has the right to refuse the proffered defense and conduct his own defense").

90. Nat'l Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986, 991 (5th Cir. 1990) (Louisiana law) (insurer that reserves rights discharges contractual obligation to defend by engaging separate counsel to represent insured).

91. Three Sons, Inc. v. Phoenix Ins. Co., 257 N.E.2d 774, 776–77 (Mass. 1970) (insured did not breach duty to cooperate by refusing to accept insurer's defense under reservation of rights).

92. State Farm Mut. Auto Ins. Co. v. Ballmer, 899 S.W.2d 523, 526 (Mo. 1995) (en banc) (insured has the right to reject defense under reservation of rights).

93. Rhodes v. Chicago Ins. Co., 719 F.2d 116, 120 (5th Cir. 1983) (Texas law) (when insurer proposes to defend under reservation rights, insured may refuse insurer's offer and pursue his own defense, and insurer remains liable for insured's attorney fees).

94. Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986) (en banc) (when defense is provided under reservation of rights, insurer's enhanced obligation of good faith requires recognition that "only the insured is the client" of retained defense counsel).

95. *See, e.g.,* Grumman Sys. Support Corp. v. Travelers Indem. Co., 828 F. Supp. 11, 13 n.2 (E.D.N.Y. 1993) (finding an insured who intentionally injures another may not be indemnified for any civil liability thus incurred). *See also* Rental & Mgmt. Assocs., Inc. v. Hartford Ins. Co., 588 N.Y.S.2d 982 (N.Y. 1992) (finding that public policy "prohibits insurance indemnification for punitive damages whether foundation for the award is intentional conduct, gross negligence, reckless, wantonness, or conscious disregard for the rights of others").

96. *See, e.g.,* Md. Cas. Co. v. Peppers, 64 Ill. 2d 187 (1976).

97. 655 F.2d 818 (7th Cir. 1981).

98. *Id.* at 825–26 (7th Cir. 1981).

99. 479 N.E.2d 988 (Ill. Ct. App. 1985).

100. 162 Cal. App. 3d 358 (Cal Ct. App. 1984).

101. *Id.* at 375. *See also* Dynamic Concepts, Inc. v. Truck Ins. Exch., 71 Cal. Rptr. 2d 882, 887 (Cal. App. 4th Dist. 1998).

102. 479 N.E.2d at 992.

103. *Id.*

104. 109 Misc. 2d 678 (N.Y. Sup. Ct. 1981).

105. *Id.* at 684.

106. *See* Debra A. Winiarski, *supra* note 78.

107. Lori Massey Cliffe, *supra* note 77.

108. Paez v. Varveris, 2004 WL 1094262 (N.Y. City Civ. Ct. 2004).

109. *Id.* at *3.

110. *Id.* at *4 (citing Matarrese v. Wilson, 202 Misc. 994, 997 (N.Y. Sup Ct. Bronx Cty. 1952)).

111. Debra A. Winiarski, *supra* note 78.

112. 53 N.Y.2d 392 (N.Y. 1981).

113. *Id.* at 401.

114. *See, e.g.*. Scali, McCabe, Sloves, Inc. v. North River Ins., 532 F. Supp. 203, 208 (S.D.N.Y. 1981) (upholding counsel's claim for all its reasonable fees over insurer's objection on the grounds that insurer failed to set forth as a matter of fact that the fees charged were unreasonable or the tasks performed unnecessary to the defense of the state court action).