

Ethical Considerations for Claims and Title Insurance Operations

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Old Republic National Title
Insurance Company

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Overview

Ethical Issues

I. Relating to Insurance Claims Handling

- ▶ Who is the client of the defense counsel?
 - ▶ Selection / control
- ▶ What information can/should be shared with the insurer?
- ▶ Defense counsel's proper handling of conflicts between insurer & policyholder?

II Relating to Attorney – Title Agents

- ▶ When does delegation of responsibility go too far?



**Rights & Obligations
of Insurer, Policyholder
& Defense Counsel**

Rights & Obligations of Insurer, Policyholder & Defense Counsel

- ▶ **Policyholders have certain obligations**
 - ▶ Pay premiums
 - ▶ Truthful applications
 - ▶ Provide notice of suit / claim
 - ▶ Cooperate in investigation and defense

Rights & Obligations of Insurer, Policyholder & Defense Counsel

- ▶ **Policyholders have certain rights**
 - ▶ Prompt and diligent defense, potentially covered claims
 - ▶ Statement of Insured Client Rights
 - ▶ Loyal counsel, free of material conflicts
 - ▶ Good faith investigation and decision
 - ▶ Proper reservation of rights or denial

Rights & Obligations of Insurer, Policyholder & Defense Counsel

- ▶ The Tri-Partite Relationship created by insurance claims
 - ▶ Insurer
 - ▶ Policyholder
 - ▶ Defense counsel assigned to policyholder

Rights & Obligations of Insurer, Policyholder & Defense Counsel

- ▶ Case example: Title Claim invoking the Tri-Partite Relationship and Ethics Issues
 - ▶ **Chicago Title Ins. v. F.D.I.C., 172 F.3d 601 (8th Cir. 1999)**
 - ▶ Bank provided construction loan / mortgage
 - ▶ Obtained title insurance on mortgage priority
 - ▶ Bank insolvent, FDIC steps in
 - ▶ Contractor suit to foreclose mechanics liens
 - ▶ FDIC requests a defense from insurer
 - ▶ Initial denial, but then defend under reservation of rights
 - ▶ Details below – coverage & fee disputes



Reservation of Rights

Reservation of Rights

- ▶ Insurer Options Upon Notice (3rd party claim)
 - (1) Accept coverage, defend unconditionally
 - (2) Deny coverage
 - (3) Investigate while defending under reservation of rights
 - Defense is critical for the policyholder
 - Defend promptly and diligently if arguably within coverage
 - ▶ Motorists Mut. Ins. v. Trainor (1973), 33 Ohio St. 2d 41
 - ▶ Willoughby Hills v. Cincinnati Ins. (1984), 9 Ohio St. 3d 177

Reservation of Rights

- ▶ When an insurer decides to investigate, why is a reservation of rights letter required?
 - ▶ Policyholder might have to pay
 - ▶ Control of the defense to shape outcomes
 - ▶ Potential conflict of interest in handling the defense
 - ▶ Dietz-Britton v. Smythe (8th Dist. 2000), 139 Ohio App. 3d 337
 - ▶ Insurer in *Chicago Title v. FDIC* paid for policyholder's own selected counsel due to conflict
 - ▶ Ohio law may be different

Reservation of Rights

- ▶ “The insured should know of the potential for a conflict in interest before accepting or proceeding with the insurer’s offer to provide a defense.” (emphasis added)
 - ▶ *Collins v. Grange Mut.* (12th Dist. 1997), 124 Ohio App.3d 574

Reservation of Rights

- ▶ **Goal of the Reservation of Rights Letter**
 - ▶ Fairly apprise of basis for possible denial
 - ▶ Enough for “knowing choice” to proceed or independent counsel
 - ▶ Cannot lull a policyholder into inaction and prejudice

Reservation of Rights

- ▶ **Details for the letter:**
 - ▶ Each known potential basis for such denial
 - ▶ Pertinent policy provisions
 - ▶ Pertinent facts
 - ▶ **Right to rely upon all policy provisions**
 - ▶ Policy date(s) and number(s)
 - ▶ Date when the policyholder was served with suit
 - ▶ Limit of liability if relevant

Reservation of Rights

- ▶ **Optional clauses:**
 - ▶ Right to discontinue and withdraw defense
 - ▶ Right to reimbursement of defense costs
 - ▶ Additional slides below
- ▶ **Fact development may require supplemental letter**
 - ▶ Send timely, prevent prejudice

Reservation of Rights

- ▶ Insurer Waiver of Defenses Absent Proper Reservation
 - ▶ Timely at start of defense
 - ▶ Adequate information / disclosure
 - ▶ *Utica Mut. Ins. v. David Agency*, 327 F.Supp. 922 (N.D. Ill 2004) (waiver found, inadequate disclosure, tainted counsel)
 - ▶ Waiver occurs if prejudice results
 - ▶ Lost settlement opportunity
 - ▶ Inability to produce witnesses
 - ▶ Adequate trial prep

Reservation of Rights

- ▶ Reserving Right to Reimbursement of Defense Costs
 - ▶ Not addressed by Ohio state courts
 - ▶ *United Nat'l Ins. v. SST Fitness* (6th Cir. 2002), 309 F.3d 914
 - ▶ “implied in fact” contract to reimburse
 - ▶ Controversial “majority rule”
 - ▶ *Travelers v. Hillerich & Bradsby Co.*, 598 F.3d 257 (6th Cir. 2010)
 - ▶ Settlement reimbursement permitted
 - ▶ Objection to reservation immaterial

Reservation of Rights

- ▶ **Some Courts Reject Reimbursement**
 - ▶ National Surety Corp. v. Immunex Corp, 176 Wn.2d 872; 297 P.3d 688 (2013)
 - ▶ Refusing to allow insurer “to impose a condition on its defense that was not bargained for”
- ▶ **Policyholders’ Options on Reimbursement Reservation**

Reservation of rights

- ▶ **Not all title insurance claims create defense issues**
 - ▶ failure to pay off prior mortgages and liens at closing;
 - ▶ failure to pay taxes at closing;
 - ▶ failure to promptly record a mortgage; and
 - ▶ forgeries on deeds.



Conflicts and Insured Client Rights: Applicable Rules

Conflicts and Insured Client Rights: Applicable Rules

- ▶ When defense of a title claim is required, ethics issues can arise in the tripartite relationship
 - ▶ Who is the client of the defense counsel?
 - ▶ Selection/control of the defense
 - ▶ Payment of defense counsel
 - ▶ What information can/should be shared with the insurer?
 - ▶ Defense counsel's proper handling of conflicts between insurer & policyholder?

Conflicts and Insured Client Rights: Applicable Rules

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) A lawyer's . . . representation of a client creates a conflict of interest if . . . :
- (1) ...directly adverse to another current client; [or]
 - (2) . . . substantial risk that the lawyer's [judgment or advocacy] for that client will be materially limited by the lawyer's responsibilities to another client [or other person or personal interests].
- (b) A lawyer shall not accept or continue the representation of a client if a conflict [arises here], unless all of the following apply:
- (1) . . . able to provide competent and diligent representation . . .
 - (2) each affected client gives informed consent, confirmed in writing;
 - (3) the representation is not precluded by division (c) of this rule.
- (c) [Illegal representation or claims against each other in same case]

Conflicts and Insured Client Rights: Applicable Rules

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: **SPECIFIC RULES**

- (f) A lawyer shall not accept compensation . . . from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's [independence];
 - (3) [confidentiality] protected as required by Rule 1.6;
 - (4) [insurance defense: additional requirements below]

Conflicts and Insured Client Rights: Applicable Rules

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including [privileged information], unless

- ▶ the client gives informed consent,
- ▶ the disclosure is impliedly authorized . . . or
- ▶ permitted / required by division (b) or (c) [next slide]

Conflicts and Insured Client Rights: Applicable Rules

RULE 1.6: CONFIDENTIALITY (cont'd)

- (b) A lawyer may reveal information . . . [if] reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the commission of a crime . . . ;
 - (3) to mitigate substantial injury to the financial interests [of another arising from lawyer's involvement in a client illegal / fraudulent act];
 - (4) to secure legal advice about the lawyer's compliance with these rules;
 - (5) to establish a claim or defense on behalf of the lawyer . . . in a controversy between the lawyer and the client [or in a related matter]
 - (6) to comply with other law or a court order.
- (c) [candor toward the tribunal or fraud towards a third party]

Conflicts and Insured Client Rights: Applicable Rules

- ▶ Rule 1.8(f)(4) – insurer hiring and payment of defense lawyer permitted only if:
 - ▶ Deliver Statement of Insured Client’s Rights
 - ▶ In person at the first meeting or by mail within ten days after...retention by the insurer

Conflicts and Insured Client Rights: Applicable Rules

- ▶ Rule 1.8(f)(4) official comments on rights / duties:
 - ▶ insurance defense counsel owes same duties
 - ▶ avoid conflicts
 - ▶ communicate
 - ▶ keep confidences
 - ▶ exercise independent judgment
 - ▶ subject only to insurer's rights, if any, under the policy

Statement
of Insured Clients' Rights
Rule 1.8(f)(4)

Statement of Insured Clients' Rights

Statement of Insured Clients' Rights

- ▶ An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights . . .
 1. "Your Lawyer: . . . retained by the insurance company. . . . If you have questions . . ., you should discuss the matter with the insurance company or the lawyer.

Statement of Insured Clients' Rights

2. Directing the Lawyer: Your policy may provide that the insurance company can reasonably control the defense of the lawsuit [and] your insurance company may establish guidelines . . . that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.
3. Communications: Your lawyer should keep you informed about your case and respond to your reasonable requests for information.

Statement of Insured Clients' Rights

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

Statement of Insured Clients' Rights

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files . . . If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you . . . If you withhold your consent, the audit shall not be conducted.

Statement of Insured Clients' Rights

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you . . . insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer . . .

Statement of Insured Clients' Rights

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible . . . your lawyer must promptly inform you . . .

Statement of Insured Clients' Rights:

- ▶ Rule 1.8(f), Cmt 12[A]: Insurer Billing Policies
 - ▶ Insurance defense counsel
 - ▶ “may not permit an insurer’s right to control the defense to compromise the lawyer’s independent judgment, for example, regarding the legal research or factual investigation necessary to support the defense.”

Statement of Insured Clients' Rights: application

- ▶ **Contrasting Examples re Defense Counsel Conflicts:**
 - ▶ *Chicago Title v. FDIC* (Minnesota law)
 - ▶ hired policyholder counsel
 - ▶ Insured and policyholder both participated directly in settlement
 - ▶ *Utica Mutual v. The David* (Illinois law)
 - ▶ used insurer counsel to try the case to adverse verdict
 - ▶ court found lack of counsel's independence
 - ▶ faulted insurer and found insurer liability
 - ▶ *Redhead Brass, Inc. v. Buckeye Union Ins.* (9th Dist. 1999), 135 Ohio App. 3d 616 (Ohio law)
 - ▶ Ohio differs on extent of conflicts tolerated, but similar issues
 - ▶ need only pay for the policyholder's private counsel when insurer's stance renders it "impossible" for it to "protect both its own interests and those of the insured."



Recovery of defense costs / fees

Recovery of defense costs / fees

- ▶ Ethical and Practical Factors
 - ▶ Burden to prove "the services rendered" and the "reasonable value"
 - ▶ Time and Billing Entries Should Take Into Account the Factors Courts Consider
 - ▶ Rule 1.5 factors

Recovery of defense costs / fees

▶ Rule 1.5 Factors in “Reasonable” Fee Amount

- ▶ Time and labor, novelty and difficulty, skill requisite
- ▶ Likelihood that the representation would preclude other employment
- ▶ Fee customarily charged in the locality
- ▶ Amount involved and results obtained
- ▶ Time limitations
- ▶ Relationship with the client
- ▶ Experience, reputation, and ability of the lawyer performing services
- ▶ Fixed or contingent

Recovery of defense costs / fees

- ▶ Other ethics issues re billing insurers or others
 - ▶ Segregated time entries may be important
 - ▶ Counterclaims
 - ▶ Prosecution of fee request
 - ▶ Rule 1.5: Basis / rate of the fee and expenses shall be communicated to the client
 - ▶ preferably in writing, unless a regular client

Recovery of defense costs / fees

- ▶ Further details re fee dispute in *Chicago Title v. FDIC*
 - ▶ Insurer agreed to pay policyholder's defense counsel
 - ▶ Fee dispute: insured claimed amount of fees unreasonable
 - ▶ Refuses to pay any fees
 - ▶ Policyholder seeks fees to pursue breach, establish fees
 - ▶ Result
 - ▶ Policyholder's counsel fees reduced somewhat
 - ▶ Some fees awarded for breach claim, but not all
 - ▶ Breach involved Chicago failed to pay undisputed portion
 - ▶ Segregated time entries were relevant



**Ethical Rules Pertinent
to Attorney – Title Agents**

Ethical Rules Pertinent to Attorney – Title Agents

- ▶ Handling client and third party funds (Prof.Con.R. 1.15)
- ▶ Use and supervision of non-lawyers (Prof.Con.R. 5.3)



Handling funds of clients and third parties

Handling client and third party funds

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation ***separate from the lawyer's own property.***

-shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title.

Handling client and third party funds

- ▶ Statutory requirements for accounts
 - ▶ Title Agents
 - ▶ O.R.C. § 3953.23.
 - ▶ Records; maintenance of separate funds;
 - ▶ escrow liability and errors and omissions coverage
 - ▶ O.R.C. § 3953.231: maintain interest-bearing trust account
 - ▶ identified as an "interest on trust account" or "IOTA."
 - ▶ bank to remit interest to state treasurer for legal aid fund per § 120.52
 - ▶ Attorneys
 - ▶ O.R.C. § 4705.09
 - ▶ deposit client funds in interest-bearing trust account
 - ▶ remit interest to state treasurer for legal aid fund per § 120.52
- ▶ Use of funds for legal aid per O.R.C. § 120.52



**Use and supervision
of non-lawyers**

Use and supervision of non-lawyers

- ▶ **Case Example: Old Republic v. Anonymous Law Firm**
 - ▶ Lawyer served as title agent, handled closings / insurance
 - ▶ Paralegal control of checkbook and statements
 - ▶ Old Republic audit revealed
 - ▶ shortfall in premium payments
 - ▶ unpaid liens
 - ▶ but no checks appeared to be written to improper payees
 - ▶ What happened?
 - ▶ Creative scheme to divert funds to personal home equity line
 - ▶ E & O insurance became involved

Use and supervision of non-lawyers

- ▶ **Case example:**
 - ▶ Office of Disciplinary Counsel v. Ball, 67 Ohio St. 3d 401
 - ▶ Ball's law practice began with partner in 1968
 - ▶ Legal secretary hired 1973
 - ▶ Partner retired 1978, secretary took more responsibility
 - ▶ Full authority to deposit and disburse from client accounts
 - ▶ Secretary misappropriated more than \$200,000
 - ▶ Ball claimed no knowledge
 - ▶ No evidence he had knowledge

Use and supervision of non-lawyers

- ▶ **Supreme Court's response:**
 - ▶ Suspension of license
 - ▶ Reasoning:
 - ▶ neglected to review a single account statement
 - ▶ “Delegation of work to nonlawyers is essential to the efficient operation of any law office. But, delegation of duties cannot be tantamount to the relinquishment of responsibility by the lawyer.”

Use and supervision of non-lawyers

Ohio Rule of Professional Conduct 5.3

- ▶ For non-lawyers “employed by” or “associated with” you:
 - ▶ Must make reasonable efforts to assure that those under your direct supervision operate consistent with Rules
 - ▶ firm / agency management take measures to provide assurance that they operate consistent with Rules
 - ▶ must not order, ratify, or fail to stop them in what would be an ethical violation

Use and supervision of non-lawyers

- ▶ Things to avoid with a paralegal or non-lawyer:
 - ▶ complete authority to make deposits / withdrawals
 - ▶ failing to review financial statements
 - ▶ permitting actions without knowledge
- ▶ Ignorance of wrongdoing is not a defense!



more *Insight.*

For more information:

Richard D. Porotsky, Jr., Ohio Insurance Law:
Policy Analysis, Bad Faith, and Ethical Conflicts
(Ohio State Bar Assoc'n CLE, 2011).

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