Your Issues (In the Form of a Question)

Claims Jeopardy

By Scott Barabash, Melissa Demmon, Joseph Garin, Lisa Midkiff, and Kathryn Whitlock

What are the issues the triumvirate (insurer, insured, and defense counsel) commonly face at trial?

Claims Handling for $100

Answer: **Candid answers to the questions you always wanted to ask a claims professional.**

Question: **What is DRI's Professional Liability Claims Jeopardy?**

One of the most challenging aspects of the insurance defense business is navigation of the tripartite relationship among insurer, insured, and defense counsel. The relationship arises because the insureds, through insurance policy contracts, cede to the liability insurer the authority and responsibility of managing litigation against them. That management includes the insurance company hiring and overseeing lawyers. The question then arises to whom the retained lawyer's loyalty is owed and what that means to the third person in the relationship—the client insured. *See* Ronald E. Mallen, *Looking to the Millennium: Will the Tripartite Relationship Survive?* 66 Defense Counsel J. 481 (October 1999); Charles Silver and Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L. J. 255 (1995).

While successfully navigating this and other issues can feel like winning the Daily Double, all members of the triumvirate often feel that they are navigating the issues on their own because their various loyalties and interests preclude asking certain questions or providing certain information. This article is intended to answer some of the questions that might be challenging to address in actual litigation. Readers are encouraged to consider all comments in light of the specific facts and applicable law to their particular case.

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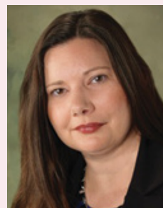

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Coverage for $200

Answer: **The most fundamental decision the claims handler will make in a case because all other decisions in the case depend on it.**

Question: **What is the insurance coverage under the policy for the claim?**

The insurance carrier is responsible for protecting the insured for claims that are covered by the insurance policy. *Jepsen, Murphy & Assocs., LLC v. Travelers Cas. Ins. Co. of Am.*, 2014 Colo. Dist. LEXIS 2295 (D. Co. 2014). At the same time, the claims handler is obligated to his or her company (and shareholders or mutual policy holders) not to spend money on a claim that is not covered.

The lawyer's duty to the insured is somewhat broader than that of the claims handler. *See, e.g., Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 152 P.3d 737 (Nev. 2007) (the court recognized a majority view that, absent a conflict between insurer and insured, a defense lawyer represents both the insurer and insured, but the insured is the "primary client"). Lawyers are obligated to protect the insured's interest covered by the insurance policy, but also to protect the insurance coverage. That means that lawyers cannot take action that would jeopardize coverage. So, for example, a lawyer cannot disclose confidential information showing that the insured's actions were intentional (and not covered) instead of negligent (and covered). *Parsons v. Continental Nat'l Am. Group*, 550 P.2d 94, 113 Ariz. 223 (1976). Nor can the lawyer encourage the insured to adopt the "no-settlement" position, which improperly exposed the insured to serious risk of personal liability *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (1984). It is also improper for defense counsel to take a deposition to establish lack of cooperation by the insured, which might defeat coverage. *Fid. & Cas. Co. v. McConnaughy*, 179 A.2d 117, 228 Md. 1 (1962). The implications for failing to recognize this can lead to malpractice claims or disciplinary action for the attorney and bad faith claims for the insurance company. *See* ABA Model Rules of Professional Conduct (MRPC) 1.6.

Coverage issues can creep into any case, but there are some cases where the issues seem thornier. *See San Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App.

3d 358, 162 Cal. App. 3d 358 (1984). Three examples of these particularly challenging cases involve partially covered claims, excess claims, and claims with diminishing or eroding limits policies.

Partially Covered Cases

In these cases, some claims are covered, and some are not (*see Only Partially Covered: Allocation Under Management Liability Policies,* 2014 Emerging Issues 7183, May 12, 2014), or the carrier is required to provide a defense, but not necessarily indemnity. *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*, 65 A.D.3d 872, 885 N.Y.S.2d 59 (N.Y. App. Div. 1st Dep't 2009); *City of Jasper, Ind. v. Employers Ins. of Wausau*, 987 F.2d 453 (7th Cir. 1993); *Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 797 F. Supp. 176 (E.D.N.Y. 1992). In these cases, both lawyers and carriers must carefully consider all litigation strategies.

- Lawyers have to consider whether facts obtained in discovery that could affect coverage should be reported to the carrier, especially when the disclosure could result in limited or no coverage of the claim.
- Lawyers must decide whether the facts can be reported under the Rules of Professional Conduct.
- Lawyers and claims professionals have to decide whether defense counsel can or should obtain consent from the insured before acting or making a settlement offer and, for example, settling the covered claims and leaving the insured to handle uncovered claims.
- Lawyers, after consultation with claims professionals and insureds, must decide whether special interrogatories can or should be submitted to the jury so it will be plain if liability is assessed on covered or uncovered claims. If the carrier and the insured disagree on the answer to this, does that disqualify defense counsel from trying the case?

Probably the most important thing for all three of the members of tripartite relationship to do in a case where there are coverage issues is to document in writing the scope and limits of the representation, together with the insured's right to retain separate counsel (perhaps at the carrier's expense). *See, e.g.*, Ga. R. Prof. Resp. 1.4, 1.7; "Insured's Rights To Independent Counsel," *Liability Coverages: Duty To Defend*, 1 New Appleman Insurance Bad Faith Litigation §3.05 (2d ed.). It is critical to make sure that the carrier, the lawyer, and the insured all understand what each of them can and cannot do and what they must and must not do.

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Excess Exposure

Most carriers expect and require case evaluations from their defense counsel according to claims handling guidelines. While evaluating a case is always a challenge, it is all the more so when there is a possibility that the insured's personal assets can be exposed by excess verdict.

This can happen at the outset if the plaintiff's demand meets or exceeds the available limit of insurance coverage. *New Eng. Ins. Co v. Healthcare Underwriters Mut. Ins. Co.*, 295 F.3d 232 (2d Cir. 2002); *Pinto v. Allstate Ins. Co.*, 221 F.3d 394 (2d Cir. 2000); *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445 (1993); *State Farm Mut. Auto. Ins. v. Floyd*, 235 Va. 136, 141 (1988); *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 426 Mich. 127, 136 (1986); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St. 2d 221, 224, 16 Ohio Op. 3d 251 (1980); *Maroney v. Allstate Ins. Co.*, 12 Wis. 2d 197, 201 (Sup. Ct. 1961); *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 370 (1950); *Boling v. New Amsterdam Cas. Co.*, 46 P.2d 916, 918–19 (Okl. 1935)). It can also arise during the case if facts develop showing that liability may exceed available coverage. The conundrum for the lawyer is making a recommendation to the carrier that meets his or her obligations to both the carrier and the insured.

Consider, for example, an early policy-limits demand in a case with questionable liability, but substantial damages. On a purely economic analysis, the lawyer might recommend defending the case because the cost-benefit analysis results in an upside (little or no liability) that makes business sense to seek to achieve. However, for the insured, an adverse verdict might be devasting, as it might wipe out the business and/or personal assets of the insured. Therefore, the insured's risk tolerance may be much lower than that of the carrier.

Case analysis and evaluations in these circumstances should include clear statements about what the lawyer did consider (the available facts, the law, the jurisdiction, jury verdicts, etc.) and the factors that the lawyer knows are important, but cannot comment on (e.g., facts that might be learned during discovery, the financial circumstances of the insured, or the company's corporate mandate on risk management).

Diminishing Limits or Expenses within Limits Policies

The dichotomy can also arise after the outset of the case as it moves through the litigation process, most often because the defense is being handled under a policy that has a limit of coverage that is diminished by defense costs—a serious problem if not anticipated and taken into account when planning. *See Illinois Union Insurance Co. v. North County Ob-Gyn Medical Group, Inc.*, 2010 U.S. Dist. LEXIS 50095, at *6 (S.D. Cal. May 18, 2010) (policy language attempting to reduce coverage limits by defense expenses could not be enforced because the insured could not have known that its policy limits would be eroded by defense costs); *National Fire & Marine Insurance Co. v. Lindemann*, 2018 U.S. Dist. LEXIS 176993, 2018 WL 4986878 (the insurer was estopped from asserting a "declining balance" provision in the policy at issue because the provision had not been

disclosed during the course of litigation but only on the eve of trial).

The carrier and the lawyer are obliged always to be mindful of the need to protect the insured and the effect of litigation costs on the protection available to the insured. One way to address those concerns is to include the insured in strategy decisions and discussions, even if the carrier has the right to direct litigation. It will be difficult for anyone to complain about exhaustion of limits if he or she participated in deciding how to expend policy proceeds.

Coverage issues make the defense of litigation more challenging, but coverage issues may also help drive settlement. For example, plaintiffs may take less than they think a case is worth to ensure that they get paid before the money runs out under a policy that has multiple claims. Or a plaintiff's lawyer may settle for less because he or she thinks a declaratory judgment finding no coverage is possible. Honest, timely, and through evaluation that is shared among the threesome is key to avoiding insolvable problems in these cases.

Communication Issues

Claims Handling for $300

Answer: **The relationship among the claims handler, attorney, and insured.**

Question: **What can make a hard case easy and an easy case hard?**

These evaluations help keep all members of the tripartite relationship in sync. Each and every client is the attorney's most important client and each and every case is the most important case. Uninformed clients—whether carrier or insured—don't feel that is true. And when clients don't feel important, they become dissatisfied.

Attorneys must return clients' calls and email inquiries promptly and keep a record that they have done so. Attorneys should send routine reports, even if they are not asked to (and keep a copy in their files). *See* Rule 1.4; *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 629 (2008). Being able to refer back to reports helps everyone stay on the same page during the course of the litigation.

The very first "report" that everyone should be able to refer back to is a good, clear, agreed-upon engagement letter. Engagement letters are warranted for every engagement. Thus, for example, a malpractice claim and an ethics complaint should have separate engagement agreements, even if they arise out of the same operative facts and are to be defended under the same policy. Counsel should be mindful of the limitations in the original engagement and push back on attempts to expand the written engagement without a writing.

Changes in Valuation

The reporting should also include regular and current evaluations and recommendations. Some attorneys are reluctant to evaluate a case until all the facts are known and discovery is completed. However, this makes handling cases more difficult for both the insured and the carrier. Even though a lawyer may not be able to provide a dollar-certain verdict value, he or she should be able to let the carrier and the insured know on the first evaluation if the case is likely to be a $25,000 case, a $250,000 case, a $2,500,000 case, or a $25,000,000 case. That information often affects reporting obligations and reserving needs for the claims professional, so it should be shared as soon as possible. This information also is important to insureds because it enables them to make reasoned decisions about how to protect their own interests. Whether they want or need independent counsel may vary, depending on whether the exposure is in the hundreds or thousands or millions of dollars.

For their part, claims professionals generally do and should understand that cases evolve as the facts develop. It is permissible for defense counsel, and the carrier, to hone and even change valuation opinions as the case progresses. *KBS, Inc. v. Great Am. Ins. Co. of N.Y.*, 2006 U.S. Dist. LEXIS 88520, at *20 (E.D. Va. Nov. 7, 2006); *Morrell Constr., Inc. v. Home Ins. Co.*, 920 F.2d 576, 580 (9th Cir. 1990); *Ramsey v. Interstate Insurors, Inc.*, 365 S.E.2d 172, 175 (N.C. Ct. App.), rev. denied, 370 S.E.2d 248 (N.C. 1988). What is not permissible or acceptable is for these valuations not to be shared in timely fashion with the carrier *and* the insured. Defending a case aggressively only to be told on the courthouse steps that it should be settled is a problem for everyone in the case. *See, e.g., Brown v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. App. LEXIS 3173 (5th Cir. 2006); *McCulloch v. Hartford Life & Acc. Ins. Co.*, 363 F. Supp. 2d 169, 178 (D. Conn. 2005); *Walbrook Ins. Co. v. Liberty Mut. Ins. Co.*, 5 Cal. App. 4th 1445, 1454 (1992); *Peckham v. Continental Cas. Co.*, 895 F.2d 830, 835 (1st Cir. 1990); *Glenn v. Fleming*, 247 Kan. 296, 306 (1990); *Thomas v. Lumbermens Mut. Cas. Co.*, 424 So. 2d 36, 38 (Fla. Dist. Ct. App. 1982); *Gov't Employees Ins. Co. v. Grounds*, 311 So. 2d 164, 167 (Fla. Dist. Ct. App. 1975). If defense counsel's opinion changes at any point in the litigation, it is imperative that this change is communicated to the claims professional and the insured immediately.

The carrier and the lawyer are obliged always to be mindful of the need to protect the insured, and the effect of litigation costs on the protection available to the insured. One way to address those concerns is to include the insured in strategy decisions and discussions, even if the carrier has the right to direct litigation.

Lack of Specificity

Regardless of when they are offered, many lawyers hedge their valuations and assess-

ments of liability by using words that have little practical value. They should learn how to develop a professional opinion and to share it. It is helpful to claims professionals to see purposeful assessments not just in terms of words ("more likely than not"), but also numbers. A 75 percent chance of prevailing on liability issues may mean a lot more than "more likely than not," and it enables the claims handler to do his or her job in making a recommendation about what the carrier should do. On the other hand, using numbers doesn't mean much of anything if the lawyer always evaluates cases as 51 percent–49 percent.

Claims professionals are tasked with handling their cases with the amount of money budgeted or reserved by the company for them, so they need to know how much to request. Do not use cookie cutter budgets. Help the claims professional by providing timely and realistic cost estimates for each case, both defense and indemnity.

Claims professionals also appreciate when lawyers report not only facts, but the significance of those facts. So, John Doe testified to X, Y, Z, and X, Y, Z is consistent with what we thought the facts would be, and thus does not change our recommendation. Or Jane Doe testified to A, B, C, and we did not expect B, so we should reevaluate and conduct specified discovery to learn more. The lawyer has many cases, but rarely as many as the claims handler and rarely across as many jurisdictions as the claims handler covers. For his or her part, the client can be either unfamiliar with litigation or have litigation as only a part of his or her job. Consequently, reports from the lawyer that pull together facts, reiterate the applicable law, and discuss future handling are much appreciated by both claims handlers and insureds.

Too Much Specificity

On the other hand, defense lawyers should be mindful of being overly specific or wordy in their report. Claims professionals and clients are busy and need to be able to assess the case and its value quickly. Unless the details are important, report that "the plaintiff crossed the street with the light" instead of "the plaintiff, wearing a light blue dress, crossed the street at Maple and Third on February 4, 2019, with the traffic signal when the wind was blowing hard." It feels suspiciously like overbilling when the attorney sends repetitive or overly verbose status reports.

And it is imperative that the lawyer know the claims handler's preference with respect to recommendations and reports. Some carriers look to the lawyer to value a case at $X, others view the valuation of cases as the province of the carrier. Whether and for how much to settle a case is always a decision for the carrier, and the lawyer should ask and understand how the carrier wants the lawyer to help the carrier make that decision.

Managing the Client

Litigating for $400

Answer: **Lawyers who do not get repeat assignments from insurance carriers.**

Question: **Who are lawyers who think they only need to consider the legal issues in a case?**

Reporting in a way that is helpful and meaningful to the carrier and the insured is one aspect of the lawyer's job of "managing" the client. Insureds often are traversing unfamiliar landscape and the claims professionals, while experienced, have specific metrics and obligations that they must meet to satisfy their own job requirements. The attorney should help them both.

Effectively Communicate the Insurers' Position to the Insured

Advocating on behalf of the insured client does not mean that the lawyer cannot communicate the insurer's position to the insured on any given issue and aid in the evaluation of the matter. The insured has the right to know and understand what the carrier is—and is not—doing to protect the insured's interests.

Manage the Insureds Expectations

Honestly and fairly communicating the evolution of the litigation can go a long way toward making the process less stressful for all parties involved. Counsel who overhype the victories and downplay losses often create false expectations or overreaction to particular outcomes. And, while losses and bad verdicts are manageable, surprise verdicts are much less so. *See Berg v. Nationwide Mut. Ins. Co.*, 235 A.3d 1223 (Pa. 2020).

Use Engagement Letters

A well-crafted engagement letter is an excellent way to manage the expectations of all three parties to the tripartite relationship right from the very beginning. Declination or disengagement letters are also quite useful in managing expectations.

Particularly important is the scope of services and the reporting relationship between the lawyer and the carrier. The MRPC state that the scope of the representation and the fees to be charged shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. MRPC 1.5(b). But *cf.*, Ct. Rule 1.5(b) (engagement agreement *shall* be in writing) and Ga. Rule 1.5(c) (contingency fee agreements *shall* be in writing). As noted in the rule, the scope of the representation

can and should be included in a representation agreement. They will provide guidance and protection for all three parties to the tripartite relationship as dispute resolution proceeds. *See Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 A.D.3d 1026, 93 N.Y.S.3d 353 (2019) (law firm's written engagement agreement precluded the client's later malpractice suit because it specified what the law firm agreed to do); *Jones v. Bresset*, 47 Pa. D. & C. 4th 60 (2000) (attorney successfully limited his potential liability to a client by limiting, in the engagement letter, the scope of his employment). *See also Joint Formal Opinion 2011-100*, PA Bar Assoc. Legal Ethics and Prof. Resp. Comm. and the Philadelphia Bar Assoc. Prof. Guid. Comm. *Cf.*, *Allyn v. McDonald*, 910 P.2d 263, 265 (Nv. 1996) (jury question on whether the attorney should have filed suit because no written agreement limited her to a case evaluation).

Manage Billing Effectively

The natural, next step following a good engagement letter is good, clear, regular billing. First, lawyers need to read, understand, and follow the carrier's billing guidelines. Thy are not suggestions. They are rules to which carriers expect adherence. All of the time.

Most guidelines require a budget. They are important components of the claims professional's job. Claims professionals are tasked with handling their cases with the amount of money budgeted or reserved by the company for them, so they need to know how much to request. Do not use cookie cutter budgets. Help the claims professional by providing timely and realistic cost estimates for each case, both defense and indemnity. One way to do this is pay attention to one's own billing and develop understanding of "normal" costs for particular activities. Claims professionals understand that unexpected developments may cause revisions in the budget. However, they need and expect reasonable estimates and reasonable explanations for deviations from those budgets.

Attorneys should also bill routinely. This usually avoids the surprise bill and eye-popping fees. *See generally Schonberger v. Serchuk*, 1991 U.S. Dist. LEXIS 11607 (SD NY 1991) (a tangled mess related to past due fees and claimed malpractice). It also avoids a violation of the professional obligation to keep the client reasonably informed about the matter and its progress. MPRC 1.4(a)(3) ("keep the client reasonably informed"). Bills are a monthly opportunity to showcase to clients the value the lawyer has provided to the clients.

Communicate Frequently

In other words, routine and regular billing is a way that the attorney can regularly communicate with the insured and the carrier. Communication during litigation should be frequent. The attorney should follow carrier guidelines about reporting, meet case deadlines, and timely respond to questions from the claims professional. In turn, the claims professional should stay on top of the case and involve the attorneys who are handling the litigation in communications.

In these regular communications, none of the parties should tell the others what they think the others want to hear. That leads to unrealistic expectations and disappointment. *See Goldberg v. Hirschberg*, 10 Misc. 3d 292, 806 N.Y.S.2d 333 (2005); *Smith v. O'Donnell*, 288 S.W.3d 417 (Tx. 2009). Communication should be clear, honest, and frank. This is especially true if a mistake has been made. Errors can usually be fixed, but not when they are not acknowledged and addressed. And they should be addressed, as a team, by the lawyer, the carrier, and the insured. Any other "solution" leaves open the possibility of later ethics, malpractice, or bad faith claims.

The communications should also take the proper form. Parties should think about when to make a call and when to put things in writing. Some things are harsh in print but need to be documented. Others need a more personal and gentle touch. Use good judgment and common sense to decide what is called for in the particular situation—whether it is the communication of bad news, sensitive information, or something else.

Develop Expertise

Judgment is developed over time, as is expertise. It is developed by trying cases when they need to be tried and knowing when that is. Not every plaintiff or plaintiff's lawyer is reasonable, and not every case can be resolved for a reasonable sum. The triumvirate should make decisions about when and how cases will be resolved (dismissal, settlement, or trial) based on the frequent communication, realistic budgeting, frank analysis, and fair billing that has occurred in the case. The client, the carrier, and the attorney can reasonably assess the risks and benefits of any particular course of action and neither flip flop at crunch time nor overpay.

Conclusion

Double Jeopardy

Answer: **What every claims handler and defense attorney loves.**

Question: **What is going to DRI Professional Liability conference?**

The tripartite relationship is complex and multifaceted. It is both complicated and interesting. Navigating it successfully is both a challenge and a reward of the litigation defense profession. We look forward to discussing it with you—hopefully in person at the next conference.

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