# Ethics: Navigating The Tripartite Relationship - Insured, Insurer And Outside Counsel

Lee Hollis
Lightfoot Franklin & White (Birmingham, AL)

lhollis@lightfootlaw.com | 205.380.9166
http://www.lightfootlaw.com/alabama-lawyer/lee-m-hollis

**Privilege and the Tripartite Insurance Relationship**

Lee M. Hollis
Partner
Lightfoot, Franklin, and White

Dawn Krigstin
Vice President - Claims
Ironshore Environmental

Jonathan R. Goodman
Executive Counsel

**Introduction**

It has been said that no one can serve two masters, but in the legal world, where many insurance cases arise under the representative arrangement, counsel must sometimes do just that—at least to a certain degree. Under a typical insurance contract, one of the obligations of the insurance company is to defend the policyholder against brought claims. Referred to as the "tripartite relationship," the insurance company will retain defense counsel to represent both the insured and the company because they have (in theory) the same stake in the outcome. Within this relationship, it is often a beneficial, though not well understood, necessity for the parties and the attorney to share information in order to reach the desired outcome of the litigation.

Running within this tripartite relationship, as with any attorney-client relationship, is the concept of attorney-client privilege. The attorney-client privilege exists to facilitate open communications between the client and counsel so that counsel can effectively prepare representation without the client fearing that sensitive information could possibly fall into the wrong hands. Although communications between insurer and insured are ordinarily not privileged, the representative arrangement of the tripartite relationship allows those communications and communications between those parties and the attorney to be protected under the attorney-client privilege. However, the relationship also creates some unique challenges to safeguarding sensitive information. While the tripartite relationship often proceeds through litigation without issue, a rub exists when sensitive information is shared between counsel and insurer or counsel and insured when the parties' interests may soon diverge—particularly regarding coverage issues.

This article examines how different jurisdictions deal with the attorney-client privilege as it pertains to defense of insurance cases. Part I of this article looks at the different theories states apply to the attorney-client privilege in the tripartite relationship and the effects that those theories have on the sharing of information within the tripartite relationship. Part II discusses the practical effects of jurisdictional laws on privilege in the tripartite. In Part III, this article examines how jurisdictions handle the effects that a reservation of rights have on the attorney-client privilege.

**I. Who Owns the Attorney-Client Privilege in a Tripartite Relationship?**

**A. Relatively few states have established a bright-line approach.**

Courts in only a few states have specifically laid out whether attorney-client privilege applies within the tripartite relationship. Still, caution should be exercised even in jurisdictions that recognize a bright-line privilege because potential for the policyholder and insurance company to become adverse to one another always exists.

**1. When privilege applies to all members of the tripartite:**

In states adopting a bright-line approach

for attorney-client privilege in a tripartite relationship, "confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and both the insurer and insured are holders of the privilege." Bank of Am., N.A. v. Superior Court of Orange Cnty., 151 Cal. Rptr. 3d 526 (2013); Ratcliff v. Sprint Missouri, Inc., 261 S.W.3d 534, 548 (Mo. Ct. App. 2008). Most states adopting this approach reason, as explained by the Illinois Court of Appeals, that "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." Holland v. Schwan's Home Serv., Inc., 992 N.E.2d 43, 84-85 (Ill. App. Ct. 2013); Shahan v. Hilker, 488 N.W.2d 577, 581 (Neb. 1992). Others explain that the attorney-client privilege applies to the tripartite because "the carrier is required to represent the insured and the insured is obligated to cooperate with the carrier . . . ." Kentucky v. Melear, 638 S.W.2d 290 (Ky. Ct. App. 1982) (citing Asbury v. Beerbower, Ky., 589 S.W.2d 216 (1979)).

**2. When privilege does not exist between the insured and insurer:**

As discussed below in single-client theory, some states predicate the lack of privilege on the grounds that no attorney-client relationship exists between the insurance company and an attorney hired to represent the insured. E.g., Koster v. June's Trucking, Inc., 625 N.W.2d 82, 84 (Mich. App. 2000).

**B. Several jurisdictions apply a hybrid approach to privilege with varying degrees of limitations.**

Other jurisdictions recognize the existence of privilege to the extent it applies to parties outside of the tripartite, but not to subsequent disputes between the insured and insurer. Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 47 (N.C. App. 2005); Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania, 623 A.2d 1118, 1123 (Del. Super. 1992); Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781, 784-85 (N.H. 1971); Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37, 41 (E.D.S.C. 1964); Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958); Shapiro v. Allstate Ins. Co., 44 F.R.D. 429 (E.D.Pa. 1968); Horowitz v. LeLacheure, 101 A.2d 483 (R.I. 1953). In such instances, the communications against outside parties are often protected by the common-interest or joint-client exceptions. Bourlon, 617 S.E.2d at 47. While some states allow the existence of attorney-client privilege even when it appears that the insurer and insured could end up as adversaries, other states sever the tripartite when the insured and insurer take adversarial positions at the outset, and thus, communications made between the insured and the attorney are not protected by the attorney-client privilege. Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1, 10 (Conn. 2005) (citing Liberty Mutual Fire Ins. Co. v. Kaufman, 885 So. 2d 905, 908 (Fla. Dist. Ct. App. 2004)). In these jurisdictions, "if the insured or the insurance company retained separate attorneys to represent only that party's specific interests, they should each be able to preserve their respective attorney-client privilege as to their communications with their own lawyers." Progressive Exp. Ins. Co. v. Scoma, 975 So. 2d 461, 466-67 (Fla. Dist. Ct. App. 2007).

Some states limit the privilege by acknowledging that, while it ordinarily does not apply to statements between an insurer and a policyholder, it does apply "where it can be shown that the [insurer] received the communication at the express direction of counsel for the insured." Langdon v. Champion, 752 P.2d 999, 1004 (Alaska 1988); Ballard v. Eighth Judicial Dist. Court of State In & For Cnty. of Clark, 787 P.2d 406, 407-08 (Nev. 1990); DiCenzo v. Izawa, 723 P.2d 171, 176-77 (Haw. 1986). This distinction is based upon the idea that adjustors and others working for the insurance company act as "'one employed to assist the lawyer in the rendition of professional legal services,' thus making him a 'representative of the lawyer.'" Langdon, 752 P.2d at 1004.

This exception is limited though, as it likely applies only when the communication was made for "the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured." Pfender v. Torres, 765 A.2d 208, 212-13 (N.J. Super. Ct. App. Div. 2001); Cutchin v. Maryland, 792 A.2d 359, 366 (Md. 2002). A court applying this rule likely will look to factors such as: (1) "whether the statement was made at the direction of an attorney;" (2) "whether there was anything indicating the insured was seeking legal advice;" (3) "whether there was pending litigation;" and (4) "whether the insurance company might have interests other than protecting the insured's rights." Id. One key factor that should be considered is whether the information is "part of the

regular business of an insurance company," in which case the information would be discoverable. Melworm v. Encompass Indem. Co., 951 N.Y.S.2d 829, 831-32 (N.Y. Sup. Ct. 2012).

These cases show that, while courts seem willing to allow communications between members of the tripartite relationship, counsel should always caution parties to be judicious in their discussions; the privilege cannot be relied upon to completely screen such communications from later adversarial discovery by the insurer.

**C. The majority of jurisdictions have not yet decided the issue.**

The America Bar Association established in a formal opinion that an attorney hired in the tripartite relationship may represent (1) the insured alone, (2) both the insured and insurer, or (3) the insured and the insurer for limited purposes only. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 at 2 (1996); see David H. Anderson, Balancing the Tripartite Relationship Between Defendant, Defense Counsel, and Insurer, 88 Ill. B.J. 384 (July 2000) ("Depending upon the jurisdiction and the circumstances of the engagement, the defense attorney might have two clients, the insurer and the insured."). These three options reflect the decisions made by states mentioned supra, and also provide guidance for courts deciding the issue in jurisdictions where no determination has been made yet.

As its name suggests, the attorney-client privilege covers only those communications between an attorney and that attorney's client or an authorized agent of the client. Richard C. Giller, Confidentiality and Privilege in the Insurer–Policyholder–Defense Counsel Relationship, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/litigation/committees/insurance/articles/marapr2012-confidentiality-privilege.html#_ednref3 (last visited October 30, 2013) (citing United States v. Mass. Inst. of Tech., 129 F.3d 681 (1st Cir. 1997); In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules and Procedures, 299 Mont. 321 (Mont. 2000)). In jurisdictions where courts have yet to decide whether attorney-client privilege applies to the tripartite, the linchpin in evaluating the issue is a relatively straightforward question: who is the client?

**1. When a state applies a single-client theory:**

Although gaining in popularity, the single-client tAlthough gaining in popularity, the single-client theory is still considered the minority approach. Under the single-client theory, the policyholder alone is the attorney's client. See e.g., Pine Island Farmers Coop v. Erstad & Riemer, 636 N.W.2d 604 (Minn. App. 2001); In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000); Givens v. Mullikin ex. rel. McElwanney, 75 S.W.2d 383, 386 (Tenn. 2000); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Cor., 730 A.2d 51 (Conn. 1999); Safeway Managing General Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App. 1998); Finley v. Home Insurance Company, 975 P.2d 1145, 1153 (Hawaii 1998); Colorado Bar Association Formal Ethics Opinion 91 (1993); Gibbs v. Lappies, 828 F.Supp. 6, 7 (D.N.H. 1993); Continental Cas. Co. v. Pullman, Comley, Bradley, & Reeves, 929 F.2d 103, 108 (2d Cir. 1991); Atlanta Int'l Ins. Co v. Bell, 475 N.W.2d 294 (Mich.1991); First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990); In re A.H. Robins Co., 880 F.2d 694, 751 (4th Cir. 1989). The Third Restatement of the Law Governing Lawyers § 134 (2000) reflects this theory, stating, "a lawyer designated to defend the insured has a client-lawyer relationship with the insured" and "[t]he insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer." Those states that follow the single-client model but still recognize the existence of the privilege often do so under the common-interest exception or joint defense doctrine. E.g., Hoechst Celanese Corp., 623 A.2d at 1123-24; Bourlon, 617 S.E.2d at 47; Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 642 (Iowa 2004).

Absent special cause or a carved-out exception, in single-client jurisdictions, the insured-attorney communications are privileged, not only with regard to the traditionally adversarial parties, but also with regard to the insurers within the tripartite. On its face, this seems like the easiest approach to protect communications from disclosure, but tactically it can be burdensome for the tripartite. Insurance providers will seek certain information in order to better understand and analyze their position in the case, and while "this seems innocuous enough, [a lawyer] providing those status reports—which often

contain privileged strategy discussions—may waive the attorney-client privilege that otherwise protects [those discussions with the insured] from disclosure." Stephen L. Cope, Unholy Alliance: Defending The Client On The Insurer's Dime, California Litigation Report (September 2008) available at http://www.whitecase.com/files/Publication/1e161b03-1c3a-468a-9bfe-644cca9 0ada9/Presentation/PublicationAttachment/2b4c0f48-aa46-4a59-b12b-66733935 f052/California_Litigation_Report_September_2008_2.pdf (discussing the attorney-insurer relationship prior to the insurer accepting defense of the case). Because of the risk associated with waiving privilege, the attorney should refrain from providing potentially privileged information to the insurer.

Whether communicating directly or using counsel as a pass-through, the insured and insurer must necessarily limit their sharing of information because the risk of waiving privilege is high. As a result of this limitation, counsel must exercise particular caution to avoid unnecessarily disclosing information that would destroy its privileged nature.

**2. When a state applies a dual-client theory:**

The majority of states have adopted the position that counsel represents both the insurer and the insured. See, e.g., Restatement of The Law Governing Lawyers Sections 26(1) and 215; ABA Model Rule 1.7(b), comment 10, and Rule 1.8(f); Cincinnati Insurance Company v. Wills, 717 N.E.2d 151, 161 (Ind. 1999); Waste Management v. International Surplus Lines Insurance Company, 144 Ill.2d 178 (1991); Mitchum v. Hudgens, 533 So.2d 194, 198 (Ala. 1988); Squeller Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995); Hodges v. State Farm Bureau Cas. Ins. Co., 433 So. 2d 125, 132 (La. 1983); McCourt Co., Inc. v. FPC Properties, Inc., 434 N.E.2d 1234, 1235 (Mass. 1982); Goldberg v. American Homes Assurance Company, 439 N.Y.S.2d 2, 5 (N.Y. App.Div. 1st Dep't 1981); Lieberman v. Employers Insurance, 419 A.2d 417, 424 (N.J. 1980); Nezley v. Nationwide Mutual Insurance Company Company, 296 N.E.2d 550, 561 (Ohio App. 1971). Generally, under this theory, "[w]hen an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each." Mitchum, 533 So.2d at 198. However, some states, such as California and Arizona, narrow the scope slightly, viewing the policyholder as the "primary client." This naturally implies that the lawyer has at most a secondary obligation to the insurer. Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 602 (Ariz.2001); State Farm Mut'l Auto v. Federal Ins. Co., 86 Cal.Rptr.2d 20 (1999).

At least at first blush, dual representation appears highly beneficial to the functionality of the tripartite. The attorney may more freely communicate between parties without fear of destroying privilege, allowing for more thorough preparation of the defense. As a result, both the insured and insurer are provided with better quality legal work. The insurer also benefits from a more through litigation analysis. However, with that increased ability to share information also comes an increased risk that, should the insured and insurer become adverse to one another at a later point, information that would otherwise be privileged may be accessible by the opposition.

**II. The Theory a State Chooses has Practical Impacts on Communication.**

**A. When in a single-client state:**

**1. Providing information to the insurer may lead to destruction of the privilege.**

Though it may not be ideal, a reality of insurance representation is that the insurer likely will seek to discuss the case with defense counsel even if counsel represents the insured alone. Stephen L. Cope, Unholy Alliance: Defending The Client On The Insurer's Dime, California Litigation Report at 4-5 (September 2008). This type of conversation is permissible, provided that informed consent has been given by the insured, but an "attorney must understand that he is speaking to a third party [when speaking to the insurer] and make sure that no confidential or privileged information is disclosed in that conversation." Unholy Alliance: Defending The Client On The Insurer's Dime.

Similarly, the client should take caution not to unwittingly destroy privilege. As a matter of

course, counsel should inform individual clients that the insurance company may approach them for information, but any disclosure could result in a waiver of privilege with regard to both the current adverse party and the insurer, should litigation arise against the insurer in the future. Pine Island Farmers Coop v. Erstad & Riemer, P.A., 696 N.W.2d 444, 452 (Minn. 2002) (discussing the implications and risks involved with creating dual representation); see Pearson v. Miller, 211 F.3d 57, 67 (3d Cir. 2000) ("Federal courts have never recognized an insured-insurer privilege as such.") (quoting Linde Thomson Langworthy Kohn & VanDyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508 (D.C. Cir. 1993) (internal quotations omitted)). In theory, the insurer should not approach the client if an adversarial relationship exists; however, an insurer may seek information from a client prior to an adversarial relationship forming. Because of these considerations, clients should be informed that neither federal law nor the vast majority of states recognize any type of insurer-insured privilege. Giller, Confidentiality and Privilege in the Insurer–Policyholder–Defense Counsel Relationship. Therefore, anything the client tells the insurer, even if pursuant to a requirement under the policy, can destroy privilege.

The premise for handling these matters should be simple and straightforward: just don't disclose information that should not be disclosed. However, the roles of the tripartite relationship can place the attorney in an awkward position. On one hand, the attorney owes his professional ethical duties to his client: the insured. On the other hand, a tension can arise from a likely business relationship between the attorney and the insurer. As such, the attorney needs honor his or her duty of loyalty to the insured, while providing the insurance company with the information it desires, so that the company will retain the attorney to represent insureds when future needs arise.

While certainly more easily said than done, counsel faced with these circumstances should revert back to the rules of professional conduct. In particular, counsel should always seek to "represent a client zealously within the bounds of the law." ABA Canon 7. Counsel should recognize that "[a]ny persuasion or pressure on the advocate which deters him from planning and carrying out the litigation on the basis of 'what, within the framework of the law, is best for my client's interest?' interferes with the obligation to represent the client fully within the law." Thode, The Ethical Standard for the Advocate, 39 Tex. L. Rev. 575, 584 (1961). Perhaps the best way to approach this dilemma is to explain to the insurance company a lawyer's ethical obligations at the outset of the relationship. Clearly defining these ethical obligations from the beginning should help reduce the likelihood of the lawyer being placed in a difficult position.

**2. Use of the insurer as a lawyer's representative could avoid destruction of the privilege.**

One possibility to ensure preservation of the attorney-client privilege while facilitating communications to the insurer is to utilize the insurer as a lawyer representative. See, e.g., Ala. R. Evid. 502(b). This workaround is premised on the idea that "privileged persons" include "communicating" and "representing" agents of an attorney. Restatement (Third) of the Law Governing Lawyers § 120. In jurisdictions that have accepted this premise, statements of the insured made to an insurer investigating the matter at the request of a lawyer with the intent that the information will be subsequently communicated to the lawyer in preparation for litigation are privileged. As the Kentucky Supreme Court stated, "an insured would normally confide in counsel" following a claim-triggering event, however the insured "has paid an insurance company to exercise that choice for him"; therefore, the insured "should not be penalized for his prudence" in communicating with the insurer. Asbury v. Beerbower, 589 S.W.2d 216, 217 (Ky. 1979).

In order for privilege to apply under this workaround, the agent must be working on behalf of an attorney, not simply gathering information that may be used by an attorney in the future. E.g., Pasteris v. Robillard, 121 F.R.D. 18, 21-22 (D. Mass. 1988). This reasoning echoes that of those states discussed supra that have refused to apply attorney-client privilege when the communication was not for the dominant purpose of the defense. This problem often

arises when information is shared early in the investigation prior to the insurer hiring counsel for the insured. To avoid this type of issue, insurance providers should consider either immediately retaining counsel when a claim is reported or training frontline investigators to recognize attorney-hiring triggers—situations that would necessarily require the preservation of privilege.

Though this approach has its perks, ultimately, communications considered privileged in the context of the dispute between the united insured-insurer and a third party may lose that privilege when those same communications are offered in a subsequent dispute between the insured and the insurer. E.g., Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986). While this might not pose a problem in many cases, when an insurer defends under a reservation of right, insureds may unwittingly divulge information to a wolf in sheep's clothing. To combat this problem, counsel should discuss the risks associated with the client and analyze the likelihood that the parties will become adverse at some point in the future.

**3. Utilizing a state's common interest or joint defense doctrine may preserve the privilege.**

While not a privilege itself, the "joint defense" or "common interest" doctrine protects information shared among parties engaged in the joint defense of a claim who are represented by separate counsel. G. Andrew Rowlett, The Common Interest Doctrine: Key Practices for Maintaining Confidentiality, Subrogator 72 (2011). The common interest and joint defense doctrines were "established to facilitate communications between aligned parties to protect their common interests in a litigated matter with respect to communications designed to further that joint legal effort" by allowing disclosure of "privileged information to one another without destroying the privileged nature of those communications." Giller, Confidentiality and Privilege in the Insurer–Policyholder–Defense Counsel Relationship. To utilize this strategy, parties should consider entering into a joint defense agreement, expressly "acknowledging that the carrier and the policyholder are aligned in their desire to work together to evaluate and assess the risks of the underlying litigation in order to resolve that litigation as efficiently, expeditiously and economically as possible." Richard C. Giller, D&O Insurance: The cooperation clause and privileged communications, 27 Westlaw Journal Corporate Officers & Directors Liability (2011) (available online at http://www.alston.com/Files/Publication/9e7d279c-1cd8-4768-95cd-158030aa8ad3/Presentation/PublicationAttachment/f69c928d-4933-4382-b410-1768fb56cffd/Giller2.pdf) (discussing In re Imperial Corp. of Am., 167 F.R.D. 447 (S.D. Cal. 1995)). To further express the intent that the communications be considered privileged, the parties can also consider entering into a confidentiality agreement. Id. Finally, procedures should be implemented (just as in any other case) to safeguard the information from inadvertent disclosures that would destroy privilege. Id. Of course, each situation should be evaluated to determine the best approach based upon the facts and the governing law. In some instances such agreements need to be in writing, while in other situations, oral agreements are allowed, and indeed preferred, to minimize the risk of the agreement being subject to discovery.

**B. When in a dual-client state:**

Typically, counsel operating in a dual-client jurisdiction would have optimal conditions for sharing information because of the theory's protective nature. While litigating under this theory allows for free-flowing communications between the tripartite parties, it also will open up both insurer and insured to non-privilege should they become adverse to one another. As discussed supra, "where the same attorney represents two parties having a common interest, and each party communicates with the attorney, the communications are privileged from disclosure at the instance of a third person. Those communications are not privileged, however, in a subsequent controversy between the two original parties." Simpson v. Motorist Mut. Ins. Co., 494 F.2d 850, 855 (7th Cir. 1974).

Some states have predicated the existence of a

dual representation on the grounds that the insured received an explanation of the advantages and risks associated with entering into a dual-client relationship with an attorney. Pine Island Farmers, 649 N.W.2d at 452. That premise has even been extended such that an attorney may be held liable to a client who suffers damages caused by the destruction of privilege when the attorney failed to make a full disclosure of the risks involved in a dual-client relationship. Lysick v. Walcom, 65 Cal. App. 2d 136, 147 (1968). Regardless of whether the dual-client state imposes such liability, attorneys should provide the insured with a complete disclosure to best protect the client's—and his or her personal—interests.

**III. A Reservation of Rights has Profound Effects on Privilege.**

As touched on throughout this article, the issue of attorney-client privilege in the tripartite relationship comes to a head when the insurance company and the policyholder become adverse parties. While some circumstances are easily recognized as adverse, an insurance company's decision to defend the original claim under a reservation of rights represents the possibility that the parties could become adverse. As a result of the reservation of rights, the insurer and the insured have a joint interest during the defense of the original claim, but the insurer could later sue the insured to recover any monies paid to a third party when the claim should have been denied. Amber Czarnecki, Ethical Considerations Within the Tripartite Relationship of Insurance Law – Who is the Real Client?, 74 Def. Couns. J. 172, 183-84 (April 2007). Some courts have found that, in this situation, the attorney-client privilege does not prevent the use of statements made by the insured for purposes of defending the original claim in the subsequent dispute between the insurer and insured. E.g., Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (E.D. S.C. 1964) (action by insured against insurance company for bad faith failure to settle); Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958) (action for bad faith and negligence on part of insurer); Brasseaux v. Girouard, 214 So. 2d 401 ( La. Ct. App. 3d Cir. 1968) (communications made by insured to insurer's counsel during period of simultaneous representation are not privileged); Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781 (N.H. 1971). This creates a number of potential conflicts of interest, including that "the insurer may gain access to confidential or privileged information which it may later use to its advantage." Danny M. Howell, Defense Counsel and Coverage Implications of the Tripartite Relationship, 13 Coverage (Nov/Dec 2003).

The dilemma is even further exacerbated when the privileged information includes facts indicative of fraud or intentional acts that would result in a denial of coverage. Czarnecki, 74 Def. Couns. J. at 184. In jurisdictions that subscribe to the dual-client theory of representation, which likely coincides with recognition of a tripartite privilege, commentators have noted "[t]here can be no secrets in the tripartite relationship. When either client imparts relevant information, it must do so with the understanding that defense counsel can share the information with the other client." Id. (quoting Danny M. Howell, Defense Counsel and Coverage Implications of the Tripartite Relationship, 13 Coverage (Nov/Dec 2003)). From a practical standpoint, this circumstance places counsel in a difficult position because of the duties owed to clients with conflicting interests.

**A. Appointing independent counsel may be necessary.**

One of the first solutions for handling this dilemma is by determining whether the jurisdiction's laws require the appointment of independent counsel. The law for independent counsel can be generally categorized two ways: automatically applying or applying only to prevent unauthorized access.

**1. When independent counsel automatically applies:**

Some courts have stepped in to protect attorney-client privilege by granting an insured the automatic right to independent counsel whenever an insurer defends under a reservation of right. Jurisdictions adopting this approach include Alabama, Arizona, Florida, Kentucky, Louisiana, Massachusetts, Missouri, Texas, and Washington. See L&S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298 (Ala. 1987); United Services Auto. Assoc. v. Morris, 741 P.2d 246 (Ariz. 1987); F.S.A. §627.426(1)(b)(3) (2005); Medical Protective Co. v. Davis, 581 S.W.2d 25 (Ky. App 1979); National Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986 (5th Cir. 1990); Three Sons, Inc. v. Phoenix Ins. Co., 257 N.E.2d 774 (Mass. 1970); State Farm Mut. Auto. Ins. Co. v. Ballmer, 899 S.W.2d 523 (Mo. 1995); Rhodes v. Chicago Ins. Co., 719 F.2d 116 (5th Cir. 1983);

Britt v. Cambridge – Mut. Fire Ins. Co., 717 S.W.2d 476 (Tex. Ct. App. 1986); Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133 (Wash. 1986). Understandably, this method is the easiest to implement because it either applies or it does not—if a reservation of rights is enacted, the insurer gets independent counsel.

**2. When a treat to the insured's defense requires independent counsel:**

Other jurisdictions are less clear, though. Within the tripartite relationship, the danger exists that the insurer will seek to influence the defense in a manner so as to uncover information that would typically be privileged, but is not because of the tripartite relationship. Because of this risk, courts in some jurisdictions have found independent counsel is due to be appointed in cases where the insurer may be defending with an ulterior motive of obtaining privileged information. For example, when a claim involves both negligent and intentional claims, a court will not allow a common defense of the negligence claim because it would result in the insurance company obtaining information about the intentional tort which could then be used in a denial of coverage claim. Jurisdictions that have adopted this approach to handling reservation of rights include California, Illinois, New York, and Pennsylvania. See Cal. Cal. Civ. Code §2860(b); Illinois Masonic Med. Center v. Turegum Ins. Co., 522 N.E.2d 611 (Ill. Ct. App. 1988); Public Service Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810 (N.Y. 1981); Pennbank v. St. Paul Fire & Marine Ins. Co., 669 F. Supp. 122 (W.D. Pa. 1987); St. Paul Fire & Marine Ins. Co. v. Roach Bros. Co., 639 F. Supp. 134 (E.D. Pa. 1986).

While these jurisdictions certainly provide for the appointment of counsel, the case law does not provide a blueprint for arranging such counsel. The responsibility appears to be placed on the attorney to recognize the existence of a potential conflict and then take appropriate actions to obtain independent counsel for the client. Whether this means the original attorney stays with the insurer or the insured is a matter of the arrangement between the insurer and the attorney. From an ease-of-operation standpoint, attorneys in a jurisdiction that takes this approach should have a pre-arranged plan for when such situations arise.

**B. A cooperative defense and privilege can coexist.**

A reservation of rights does not necessarily mean that a cooperative defense and sharing information must cease. Given appropriate measures, the insured and insurer can work together to win the suit against the outsider and avoid the necessity of subsequent litigation.

**1. When independent counsel is assigned:**

A reservation of rights that results in appointment of independent counsel does not necessarily mean the end of shared information between insurer and insured. In fact, in terms of privileged communications, the arrangement can be treated just as the tripartite would be treated in a state subscribing to the single-client theory of representation. As discussed supra, communications can be facilitated through the use of a lawyer's representative or by communicating under the common interest exception to the general attorney-client privilege rule. However, care should be taken by the insured's counsel to make certain that the insured makes no comments during the course of open communications which would result in a denial of any claim by the insurance company.

**2. When the tripartite remains intact:**

Even if independent counsel is not assigned, the Model Rules of Professional Conduct and most states require that the lawyer's allegiance be to the insured client because a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Model Rules of Prof'l Conduct R. 5.4(C). It follows then that in some jurisdictions, an attorney may disclose to the insurance company some facts as they relate to whether the company will continue to defend the client. However, an attorney may not reveal confidential information to the insurer if that information goes to prove that the insured actually is not entitled to coverage for the claim. American Mut. Liab. Ins. Co. v. Sup. Ct., 38 Cal. App.3d 579, 592 (1974); Employers Casualty

Company v. Tilley, 496 S.W.2d 552 (Tex. 1973); Ill. Rules of Prof'l Conduct R. 1.8(b) and (f) and 5.4(c); Opinions of Committee on Professional Ethics, New York County Lawyers Association, No. 669 (89-2). In fact, some courts have held that if an attorney representing dual clients tells the insurance company such information, the insurer is estopped from denying coverage. See, e.g., Parsons vs. Continental National American Group, 550 P.2d 94 (Ariz. 1976); Employer Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973).

This type of representation is particularly problematic to the attorney because the determination of what may or may not be revealed to the insurer lies squarely on the attorney. What may seem like an innocent enough statement could lead to prejudicing a party. Therefore, counsel must take great care to evaluate all information that is potentially impactful to a denial of coverage claim prior to revealing that information to the insurer.

**Conclusion**

Prior to agreeing to become an attorney in a tripartite relationship, counsel should methodically determine how the jurisdiction treats the attorney-client privilege within the relationship. Laying out expectations at the relationship's inception will potentially save a lot of heartache—for both counsel and client—later on, whether against a common opponent or in subsequent litigation between insurer and insured. By understanding how the jurisdiction treats the relationship and taking steps to protect the information shared within, counsel can not only protect information from discovery, but also develop a means for facilitating the common defense: a win for all involved.

# *Faculty Biography: Lee Hollis*

**Partner | Lightfoot Franklin & White | Birmingham, AL**

205.380.9166 | lhollis@lightfootlaw.com
http://www.lightfootlaw.com/alabama-lawyer/lee-m-hollis

In order to be the best trial lawyer you can be, you have to love what you do and work hard at it. Lee prides himself on doing just that and in getting excellent results for clients. Those attributes are reflected in the reviews of his peers:

AV rated by Martindale-Hubbell; Best Lawyers—commercial litigation; Alabama Super Lawyers—personal injury defense; and Benchmark Litigation—"future star"

Lee has tried numerous serious wrongful death, personal injury and commercial cases to defense verdicts. Currently, Lee spends most of his time defending high exposure personal injury cases. He is frequently retained by major excess insurance carriers as high exposure cases approach trial. In that role, Lee serves as either trial counsel or appellate counsel at trial. He also spends a significant amount of time handling commercial cases on behalf of plaintiffs and defendants. He is admitted to practice in all State and Federal courts in Alabama, as well as the Eleventh Circuit Court of Appeals and the United States Supreme Court, and frequently practices pro hac vice in courts around the country. Lee has been recognized by the Alabama edition of Super Lawyers since 2010 for product liability defense and by the Alabama edition of Best Lawyers for commercial litigation.

**Representative Matters**

- Won a $70 million jury verdict on behalf of a major chemical manufacturer in a breach of contract case.
- Won a defense verdict in a Mississippi Federal Court trial involving 15 deaths and 15 injuries arising out of a bus crash, in spite of the fact that sanctions imposed because of the conduct of the case before he was retained severely restricted the arguments the defense was allowed to make.
- Defended a class action on behalf of Fortune 10 company in Louisiana state court arising out of allegedly infected endoscopes.
- Successfully brought a breach of contract case on behalf of a Swedish air carrier arising out of defective modifications to three Boeing 737-300 aircraft.
- Defended multiple automobile manufacturers in dealer litigation.
- Won a defense verdict in a wrongful death product liability case involving a tractor rollover.
- Won a defense verdict in a wrongful death product liability case involving a fall from a utility pole.
- Tried a double wrongful death case on behalf of a road builder to a hung jury in a county that had not had a defense verdict in a civil case in 20 years. (Believe me, the client considered the hung jury a win.)
- Served on one of 5 designated trial teams for a Fortune 10 company in nationwide pharmaceutical litigation.
- Serves as national coordinating counsel for the nation's largest biomedical services company, handing cases throughout the country.
- Defended a Fortune 100 pharmaceutical company in a birth defect case.

**Education**

- B.S., Washington & Lee University, 1986 cum laude
- J.D., Vanderbilt University Law School, 1992