DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

ETHICAL ISSUES FOR DEFENSE ATTORNEYS: 10/4/00

Moderator: Thomas P. Fay

Panelists: Patrick T. Hoey
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HYPOTHETICAL ONE

The insurance company sold a policy of automobile insurance with a $50,000 policy limit to Defendants, an employed couple of modest means who own their own home. However, the assets of Defendants clearly exceed the $50,000 policy limits.

The Defendants are involved in a motor vehicle accident with Plaintiff, who is claiming a total disability due to a closed head injury. Defendants were at fault in the accident. Plaintiff has demanded $250,000 to settle the case.

Plaintiff's emergency room records reveal an intracranial bleed, but a subsequent EEG and CT scan are negative. Plaintiff is claiming cognitive deficits, but has never undergone neuropsychological testing. Furthermore, an investigation into Plaintiff's background reveals a history of pre-existing psychological problems.

Defense counsel, who is employed by the insurance company, believes that a good damage defense can be mounted. Defense counsel thinks that the intracranial bleed may have resolved and that any symptoms complained of by Plaintiff were the result of previously existing psychological problems. He believes that the best damages defense would require the scheduling of an examination by a neurologist, a neuropsychologist, and a psychiatrist, which would cost a total of $10,000 unless their trial testimony was taken, in which case it would cost more.

Defense counsel's employer insurance company, however, is currently reducing costs by limiting the amounts spent on expert examinations and evaluations. Defense attorney is reluctant to recommend the three examinations in view of the company litigation expense reduction campaign and the low policy limits, but the Defendants themselves are collectable for amounts in excess of the policy.

What should the lawyer tell his client under the circumstances, and what should the lawyer tell the insurance company under the circumstances?

HYPOTHETICAL TWO

Daughter, Joan, drives to Dad's (Bob) house for a visit on a winter day. She parks in the driveway which has a steep drop down a ravine on the passenger's side. While visiting her parents a snow storm begins. Joan completes the visit and decides to leave. She enters her car and begins to rock it in order to free herself from the snow which has accumulated around her car. She cannot free it so she returns to the house in order to get Bob's help. During the course of helping, Bob is severely injured by a piece of plywood which is jettisoned into his shins by the front wheel drive vehicle.

On the day of the accident, Joan reports to her auto carrier that it was her idea to use the plywood; that she put it under the front wheels and told her father to stand behind the car as she attempted to rock it.

On the day after the accident, Bob voluntarily agrees to give his PIP carrier a statement over the telephone. His statement contradicts Joan's to the extent that he claims that the use of the plywood, its placement and his location to the rear of the car are attributable to him. In other words, it was his idea.

Bob sues Joan to recover for his personal injuries.

Scenarios

1. During pre-trial discovery, Bob's story changes. His answers to interrogatories and deposition testimony now mirror Joan's as it concerns the etiology of the plan involving the plywood. Joan's answers and deposition testimony are consistent with initial story to her insurance carrier on the day of the accident

Questions: What should Joan's defense counsel do relative to her representation of a client who may be providing perjured testimony in order to help her father recover against the insured's carrier.

*How does, or can, defense counsel ethically advise the carrier of her suspicions?

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*What remedies are available to defense counsel if she is uncomfortable with continuing to represent Joan?

2. During pre-trial discovery, Joan and Bob continue to insist that their version of the planning is correct. Trial begins. Bob testifies first and claims the plan was formulated by Joan. Counsel does not use the recorded statement to impeach Bob--as she plans to introduce it during her defense and leave it to Bob to explain it away.

Just before taking the stand, Joan tells her counsel that she does not want her to utilize Bob's recorded statement for any purpose during the trial. Joan testifies, having been called as a witness by her father. When Joan is asked whose idea it was to use the plywood and where to stand, she sticks to her story: It was her idea.

Questions:

*Can defense counsel claim surprise and impeach Joan with her deposition testimony and answers to interrogatories.

*Can defense counsel report to the carrier, during the next recess, that Joan has changed her story?

*Can defense counsel utilize Bob's (authenticated) recorded statement to "refresh" Joan's recollection?

*Is counsel bound by Joan's instruction not to utilize Bob's recorded statement for any purpose

*If there is a judgment against Joan, what is the carrier's remedy, if any.

HYPOTHETICAL THREE

Defense attorney is assigned by an insurer to represent the owner of a large residential apartment building in a personal injury action brought by a tenant who allegedly sustained injuries when she fell on an oily substance on a public staircase in the building. The owner-client has a poor reputation with the tenants for the maintenance and care of this property and a history of housing code violations. However, the owner-client asserts that the plaintiff's claim is not true and that it is an attempt to extort money from him. He expresses concern that if the plaintiff prevails in her case, others would be encouraged to file similar claims. He advises the defense counsel that he wants the case tried to verdict and does not want to settle. However, defense counsel is advised by the insurer of its intention to settle the case.

Must defense counsel advise the insurer of the client's interest not to settle? What advice, if any, should defense counsel give the client on this issue? Is there an obligation for defense counsel to advise clients of the authority of an insurer to settle a case and the insured's options if he does not agree?

HYPOTHETICAL FOUR

At all times relevant, the insured had an automobile liability policy with a $100,000 limit. The insured, as operator of his vehicle was involved in an automobile accident with a vehicle driven by the plaintiff. This accident occurred at an intersection controlled by a traffic signal. Each driver contended that he had the green light. There were no independent witnesses to the accident and the physical evidence did not support one version of the accident over the other. Although, the damage to the two vehicles was comparatively extensive, both drivers were able to exit their respective vehicles at the accident scene. The plaintiff was able to exchange information with the insured, but while at the scene complained of neck and back pain. Accordingly, an ambulance was called and the plaintiff was taken to the local hospital. The plaintiff denied a loss of consciousness to ambulance personnel and also to the emergency room staff at the hospital. The records further revealed that the plaintiff was alert and oriented times three while at the hospital. There was no complaint made by the plaintiff in the hospital that he struck his head or was otherwise feeling symptoms associated with a concussion. He was diagnosed by hospital personnel as having suffered a back and neck sprain, and he was released with the recommendation to see his own doctor.

The plaintiff then began a course of treatment with an orthopedist several days later and after several months of conservative therapy, MRIs of the cervical and lumbar spine were ordered. The cervical MRI proves normal, but the lumbar MRI showed a herniation at level L5-S1 with some degenerative changes as well. The plaintiff continued to treat with his orthopedist for the better part of a year, until he was cut off by the PIP carrier. He served a narrative report from the orthopedist during discovery which contained the opinion that the herniated disc was causally related to this accident. This doctor further opined that the plaintiff, who was 37 years of age at the time of the accident, might be a candidate for disc surgery in the future. The plaintiff, however, never pursued such surgery.

Four months after the accident, during his treatment with the orthopedist, the plaintiff for the first time complained of headaches, sensitivity to light, forgetfulness, word finding problems, and problems with comprehending and communicating. As a result of these complaints, the plaintiff was sent to a neuropsychologist for evaluation. He was given a battery of written and visual tests, and the neuropsychologist opined that the results of these tests were consistent with the plaintiff suffering a mild traumatic brain injury from the subject accident. The plaintiff then began a course of cognitive therapy to help him cope with his closed head injury, which continued for an additional 12 months. At the conclusion of this therapy, the plaintiff showed little improvement and on repeat testing, cognitive deficits were still present, according to his expert. The plaintiff was employed as a machinist at the time of the accident. He missed four months from work due to his back problems. Although he returned to work thereafter, he has contended that his back continues to bother him and that he is not as productive due to his closed head injuries.

The defense retained its own experts who have concluded that the plaintiff has not sustained either a closed head injury or a lumbar herniated disc as a result of this accident. According to defense experts, the plaintiff sustained nothing more than neck and back sprains which have resolved.

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The plaintiff's attorney sent a "Rova Farms" letter to staff counsel defending the case, demanding settlement for the policy limit of $100,000. The insured was notified of the foregoing and requested staff counsel to recommend settlement to the insurer for the policy limit. Although, the insured had been previously informed that he had the right to retain personal counsel to monitor the case, he never did so.

Staff counsel prepared an evaluation of the case for the insurer, advising of the "Rova Farms" letter. He noted that if the plaintiff and his doctors were to be believed, a jury would likely award a sum in excess of $100,000. However, he opined that there were a number of shortcomings to the plaintiff's medical proofs, emphasizing the degenerative changes shown on the lumbar MRI film, and the lack of any complaint of head trauma within the first four months following the accident. He further noted that there were liability issues in the case which arguably should further reduce settlement value. He ultimately suggested a compromise settlement value range for the case, extending from $25,000 to $50,000.

The insurer initiated settlement discussions with plaintiff's counsel prior to trial and ultimately offered $50,000 to settle this case. Plaintiff's counsel rejected this offer and never wavered from his policy demand. The case was accordingly tried and the jury ultimately returned a verdict of $150,000.

The insured then brought suit against his insurance company for the excess amount of the verdict, contending that the insurer acted in bad faith to settle the case for the policy limit prior to trial.

HYPOTHETICAL FIVE

Two young boys, Adam and Robert, live in adjacent homes in an affluent suburban neighborhood. They have had a contentious relationship for years, often getting into pushing and shoving matches in the neighborhood and at school. Robert usually gets the best of Adam. The boys' fathers Alan and Richard, respectively, have had words about the fact that Robert teases Adam and this has led to fisticuffs between the boys. Richard has never been able to stop Robert from picking on Adam.

One day Alan sees Robert chasing Adam down the street with a golf club. Alan immediately runs over to intercede. He berates Robert and yells at him at the top of his lungs. Robert runs home and tells Richard that Alan yelled at him and that he was afraid that Alan was going to hit him.

Richard, who is licensed to carry a handgun, walks over to Alan's home in order to discuss the tone that was taken with his son. Alan answers the door. The discussion soon becomes heated. Insults and expletives begin to fly. The fathers begin to push one another. Richard's handgun falls out of his ankle holster. Both men go for the gun. As they struggle to gain control, each fearing what may happen if the other one gets it, the gun fires. Alan is killed by the gunshot.

The criminal investigation by the local authorities results in Richard being enrolled in a pre-trial intervention program. If he successfully completes the program the homicide charges will be dismissed and expunged.

Alan's estate sues Robert for his wrongful death. The counts in the complaint allege negligence and intentional acts, including malice aforethought. Punitive and compensatory damages are being sought.

Richard had a homeowner's policy issued by his carrier, Fortuity Property and Casualty Company. It was in effect on the date of the shooting. Fortuity has offered to provide a defense to Richard, defending the negligence counts, in return for Richard's execution of a "non-waiver" agreement. Fortuity's position is that it may be able to deny coverage to Richard based upon "intended or expected acts" and/or criminal acts exclusions contained in the policy.

Hypothetical Five:
Scenarios:

1. If Richard executes the "non-waiver" agreement.

Questions:

*Can Fortuity's staff counsel accept this referral and defend Richard on the negligence counts?

*Should the case be referred to panel counsel, bypassing staff counsel? Why?

*Assume the matter is tried and the jury finds that Richard intended to wound Alan because he (Richard) thought Alan intended to kill him. The carrier denies coverage based upon the "intended/expected" exclusion. Is the carrier estopped from denying coverage by virtue of its having controlled the defense and the verdict being consistent with Richard's explanation from the beginning of the case?

2. Richard refuses to execute the non-waiver agreement. He hires personal counsel to defend him. He demands that the carrier reimburse him, or pay personal counsel directly.

Questions:

*If the carrier refuses to pay for the defense, what is personal counsel's reporting obligations to the carrier during the course of discovery?