



**Tuesday, October 21**  
**4:30 pm-6:00 pm**

## **707 The Right to Select Counsel: A New Twist in Insurance Company Negotiations**

**Bjorn Honda**

*Executive Vice President*  
RJF Agencies, Inc.

**Thomas Mielenhasen**

*Partner*  
Lindquist & Vennum PLLP

**Randy Sharbono**

*Vice President and Assistant General Counsel*  
The Schwan Food Company

## Faculty Biographies

### **Bjorn Honda**

Bjorn Honda is an executive vice president and partner at risk-management consultancy RJF Agencies in Plymouth, MN. He oversees RJF's Management Liability Group, which is responsible for advising, structuring, and procuring financial- and professional-lines insurance for organizations ranging from nonprofit agencies to multibillion-dollar corporations. Mr. Honda has extensive domestic and international experience and previously held underwriting, management, and technical positions with the Chubb Group, where he focused on helping clients manage large, complex risks.

Bjorn is an active member of the Professional Liability Underwriters Society and frequently speaks about directors' and officers' liability.

Mr. Honda received a BS from Allegheny College.

### **Thomas Mielenhausen**

Thomas Mielenhausen, a senior partner in Lindquist & Vennum's Minneapolis office, chairs the firm's insurance recovery practice group. For more than 20 years, he has devoted his practice exclusively to resolving insurance coverage disputes in favor of commercial policyholders throughout the US. Mr. Mielenhausen has obtained successful outcomes for many types of businesses through negotiation, alternative dispute resolution, and litigation in trial and appellate courts.

Mr. Mielenhausen began his career as a clerk to the Hon. K. David Harris of the Iowa Supreme Court.

Mr. Mielenhausen volunteers on the Minnesota Supreme Court's legal services planning committee, and recently received the court's commendation for his accomplishments as chair of the Minnesota Lawyer's Trust Account Board.

Mr. Mielenhausen received a BA from the University of Notre Dame and is a graduate of Georgetown University Law Center.

### **Randy A. Sharbono**

Randy A. Sharbono is currently vice president and division counsel for Schwan's Home Service, Inc., a subsidiary of The Schwan Food Company, located in Marshall, MN. His responsibilities include management of the company's claim portfolio, including personal injury, product liability, and worker's compensation cases. Mr. Sharbono is also responsible for overseeing the litigation, including early case assessment, development of litigation strategy and budgets; ensuring the cost-effective use of outside counsel, through the use of preferred providers, technology, alternative fee arrangements, etc.; supervising, monitoring and evaluating the company's outside counsel and providing strategic

direction and guidance; participates in the negotiation and settlement of claims and lawsuits; attends settlement conferences, mediations and trials; and coordinates with insurance carriers, insurance agents, human resources, DOT compliance, and other appropriate departments in managing the claims against the company.

Prior to joining Schwan's, Mr. Sharbono was with the law firm of Meagher & Geer in Minneapolis, MN. At Meagher & Geer, he specialized in insurance defense litigation and insurance coverage. Mr. Sharbono also served as a law clerk for the US District Court for the District of North Dakota before joining Meagher & Geer.

Mr. Sharbono is a graduate with distinction from the University Of North Dakota School of Law.



## **Policyholder's Right To Select Defense Counsel**

### **Key Authorities – see:**

- ABA Model Rules of Professional Conduct
  - Rule 1.7 (“concurrent conflict of interest”)
  - Rule 1.8(f) (“compensation from third-party”)
- Westlaw Key Number Digest
  - Insurance: 217 k 2929



## **Proposition #1**

An insurer-proposed defense counsel must obtain the policyholder's informed consent to the representation in nearly all circumstances:

- Regardless of whether the insurer is a “client” of the defense counsel, and
- Regardless of whether the defense counsel concludes there is no conflict.



## **Rule 1.8(f) (compensation from insurer)**

- Insurer-proposed defense counsel shall not accept insurer's compensation for representing policyholder if:
  - The *confidentiality* of any information relating to the representation will not be protected as required by Rule 1.6, or
  - There will be any *interference* with the lawyer's independence of professional judgment or with the client-lawyer relationship.



## **Rule 1.7(a) (concurrent conflict)**

- Except as provided by Rule 1.7(b), the insurer-proposed defense counsel shall not represent the policyholder if:
  - There's a *significant risk* that the representation will be *materially limited* by the counsel's responsibilities to:
    - another past or former client,
    - a third party, or
    - personal interest.



### Rule 1.7(b) (exceptions)

- Notwithstanding a concurrent conflict under Rule 1.7(a), the insurer-proposed defense counsel may represent the policyholder if:
  - Counsel *reasonably* believes she will be able to provide competent and diligent representation, and
  - The policyholder has given counsel its *informed consent* to her representation, confirmed in writing.



### Does Informed Consent Rule Apply When Insurer-Proposed Defense Counsel Concludes There's No Rule 1.7(a) Conflict?

- As practical matter, yes.
  - Common-law fiduciary duties:
    - Full disclosure
    - Unquestioned fidelity
    - Subjective good faith irrelevant



- What would disinterested lawyer do?
- Informed consent enables lawyer to avoid risk of “unconscious disloyalty.”
- More disclosure is better than less.



### Proposition #2:

Informed consent means “informed” consent.



## Informed About All Coverage Issues

Are there coverage issues involving facts that could be developed during the course of the defense?



## "Red Flag" Coverage Issues

- Knowledge
- Expectations
- Intent
- Fortuity
- Insurance-application misrepresentation
- Rescission
- Late notice
- Trigger
- Recoupment
- Apportionment
- Choice of law
- Independent settlements
- Leverage
- Etc.



## Informed About Ways Confidentiality Could Be Jeopardized

- Reporting to insurer
- Waiver via disclosure to adversary



## Informed About Divergent Interests Regarding Settlement

- Competing business goals
- Defense costs within limits
- Multiple insureds
- Reputational concerns
- Settlement at or just under policy limits



### Informed About Relationship Between Defense Counsel And Insurer

- Closeness
- "Client"
- Connections
- Coverage counsel
- Panel counsel
- Legal services provided
- Express or implied responsibilities
- Financial arrangements
- Financial pressure or other leverage
- Etc.



### CNA — "Conflict Policy For Counsel"

"CNA is contacted daily by excellent firms seeking to provide legal services. You and your firm should be cognizant of the fact that CNA has expended a great deal of time and energy in establishing a relationship with your firm. In view of the fact that CNA is sending business to your firm in lieu of other firms, you should recognize that **CNA does not look favorably upon its defense counsel pursuing actions that are adverse to CNA's financial interests.**"

—CNA, October 2006



### Informed About Insurer Limitations On Authorization and Payment

- Litigation guidelines
- Fee & expense restrictions
- Internal & external audit procedures
- Write-off practices
- Etc.



### Proposition #3:

The policyholder has a right to select defense counsel in nearly all circumstances.



### **Typical Circumstance: Insurer's Non-Disclosure of All Coverage Issues**

- Opportunity for insurer-proposed defense counsel to shift liability to non-covered claims or damages, unconsciously or not?
- Reservation of Rights – *see Addendum B*
- No estoppel rule – insurer's right to "lie in the weeds"



### **Other Circumstances**

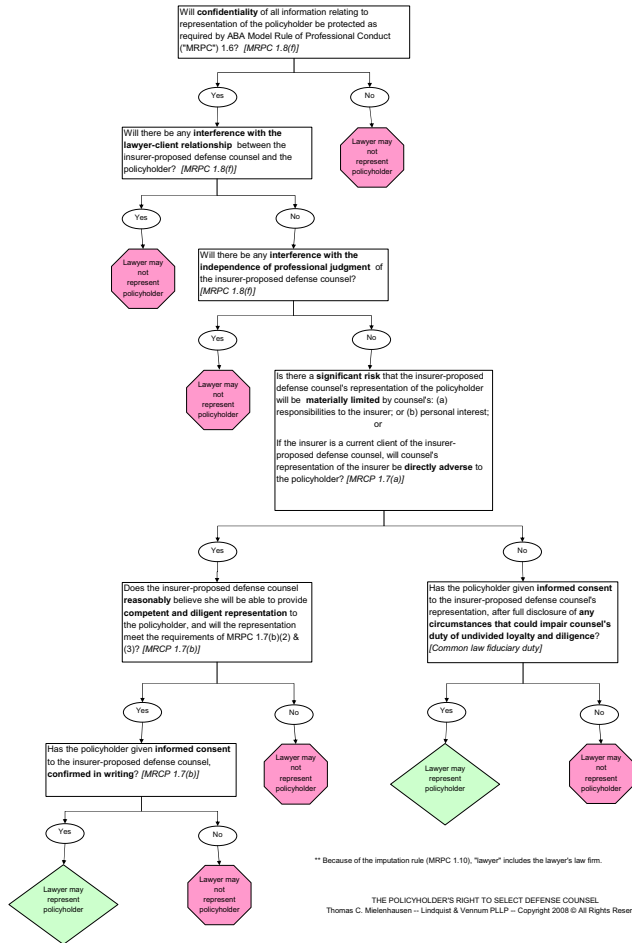
- Confidentiality jeopardized
- Insurer and defense counsel "too close for comfort"
- Insurer limitations on authorization and payment



### **Bottom Line**

- Duty to defend = duty to pay for a defense that complies with the Rules of Professional Conduct and fiduciary law
- This duty trumps the insurer's contractual right to select defense counsel

**ADDENDUM A: Conflict Analysis and Informed Consent Requirements When Liability Insurer Proposes Lawyer To Defend Policyholder\*\***



**ADDENDUM B: Is There An Opportunity For Insurer-Proposed Defense Counsel To Shift Liability To Non-Covered Claims or Damages, Even If Inadvertently or Unconsciously?**

	... without a reservation of rights		... under a reservation of rights		
	Express written waiver of any all coverage-reducing and coverage-eliminating issues, known or unknown, including any recoupment claims	Silent as to future assertion of coverage issues or recoupment claims	Close-ended reservation of rights with express written waiver of any and all coverage issues (including recoupment claims), known or unknown, that are not asserted	Reserved coverage issues do not involve facts or strategies that could be developed by defense counsel (even if inadvertently or unconsciously)	Open-ended reservation of rights
insurer agrees to defend all claims ...	Little or No Opportunity	Opportunity	Little or No Opportunity	Opportunity	Opportunity
insurer agrees to defend only some claims ...	X	Opportunity	Opportunity	Opportunity	Opportunity

THE POLICYHOLDER'S RIGHT TO SELECT DEFENSE COUNSEL  
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