Confidentiality in the Tripartite Relationship

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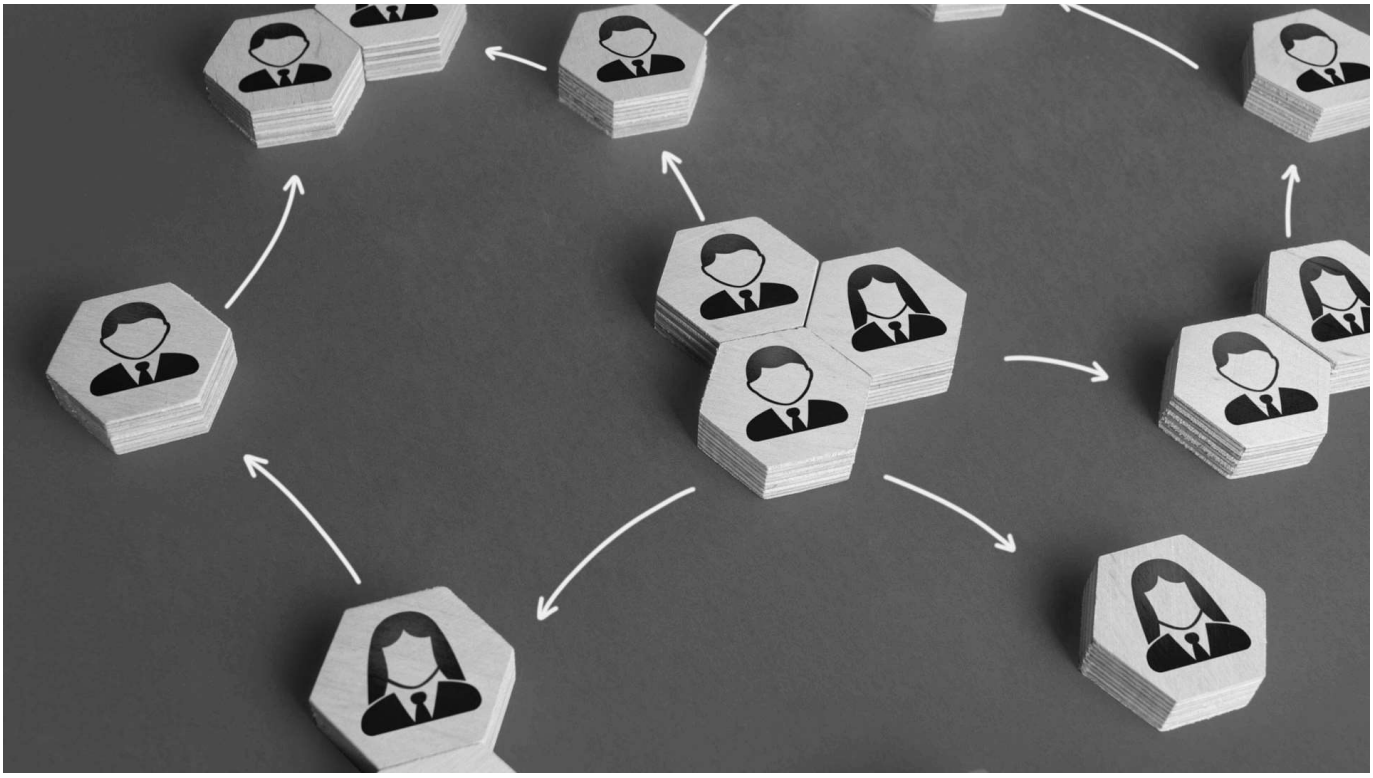
Summary

- As there is no co-client exception to a lawyer's duty of confidentiality, a conflict of interest may arise when joint clients do not agree to share information.
- When the insured's confidential information relates solely to the defense of the case, the insured impliedly authorizes the lawyer's disclosure to the insurer.
- When the lawyer has a dual client relationship with the insured and the insurer, there is no implied consent to share confidential information related to coverage issues.
- In *Cosgrove*, the insurer was estopped from denying coverage based on subcontractor information it learned from the insured's attorney before it was publicized.



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Conflicts of interest have long been a concern in insurance defense practice. In this area, as in others, conflicts of interest are partly predicated on lawyers' duty of confidentiality. A lawyer's duty to maintain client confidences is essential to the attorney-client relationship. Almost all jurisdictions have adopted Rule 1.6(a) of the American Bar Association (ABA) Model Rules of Professional Conduct, which provides that "[a] lawyer shall not reveal information relating to the representation of a client" unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or one of the exceptions listed in Model Rule 1.6(b) applies. [1] Lawyers' duty of confidentiality under Model Rule 1.6(a) and equivalent state rules, while not absolute, is exceedingly broad. The duty applies to *all* information related to a client's representation. [2] Any exceptions that rules of professional conduct provide are narrow. [3]

A lawyer with multiple clients in a matter owes each client an equal and undivided duty of confidentiality. Unlike the attorney-client privilege, there is no co-client exception to the duty of confidentiality. Generally, for a lawyer to be able to share a co-client's confidential information with another co-client, the clients must so agree.

Some authorities, however, essentially presume that a lawyer may share co-clients' confidential information with each other. [4] These authorities reason that this approach is consistent with the co-client exception to the attorney-client privilege. There are several crippling problems with this position. First, this presumption contradicts Model Rule 1.6(a). The counterargument is that a presumption of shared confidence exists because

the lawyer owes each client an equal duty of loyalty and each client has the right to be told about anything bearing on the representation that might affect that client's interests. But it is because of this bilateral duty of loyalty that a lawyer should "advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."[5] Counseling lawyers to so advise clients and to tell clients that failing to consent to the sharing of information related to the representation may result in the lawyer's disqualification refutes the notion that co-clients' confidences may presumptively be shared. Second, accurately predicting a typical client's expectations in any given situation is challenging at best. Third, even where one client's information is material to the joint representation, it may be detrimental to that client or adverse to the other client, such that the first client does not want the lawyer to share it with the other client. To recognize the claimed presumption in that circumstance would gut the first client's expectation of confidentiality, destroy the clients' community of interests, place the lawyer squarely in a conflict of interest, and harm the client whose information was revealed in the process.[6] In sum, lawyers should never assume that they may share one co-client's confidential information with another.

Returning now to the principle that there is no co-client exception to the ethical duty of confidentiality, the clear lesson for a lawyer representing joint clients is to explain to the clients at the outset of the representation the need to share information that is material to their representations and obtain their consent to do so. In most cases, it is sufficient for the lawyer to state in the engagement letter for the matter that there will be no confidences between the co-clients and then explain what this means from a practical perspective. The clients' agreement to the lawyer's joint representation after being so informed reflects their consent to the sharing of their confidences related to the matter. The better practice, however, is for the lawyer to also personally explain to the clients how the duty of confidentiality operates.

Confidentiality in the Insurance Defense Context

Independent duties to multiple clients may become a problem in the insurance defense context, where a defense lawyer must keep both the insurer and the insured informed about the status of a case. Even where the insured is the defense lawyer's sole client, insurers' outside counsel guidelines typically require defense lawyers to inform the insurer of significant case developments and to report after specified events, such as depositions. If the insured reveals confidential information to the defense lawyer, can the lawyer pass along that information to the insurer? Consider two situations: First, the insured shares with the lawyer information the insured considers confidential that does

not affect coverage but is material to the defense of the case. Second, the insured shares with the lawyer information that affects coverage.

Confidential information material to the defense. Foundationally, a defense lawyer should explain to the insured up front the lawyer's relationship with the insurer and the lawyer's obligation to keep the insurer informed about the status of the case. This is a logical component of the lawyer's explanation to the insured of the scope of the representation. The lawyer should also outline her duty of confidentiality and how that duty may factor into the insured's representation. For instance, the insured needs to understand that the lawyer is impliedly authorized to disclose to the insurer information that is necessary to carry out the insured's representation. [7] The lawyer should further explain the insured's duty to cooperate in the defense of the lawsuit and the effect a failure to cooperate may have on coverage or on the insurer's defense obligation. The insured needs all this information regardless of whether the insurer is a co-client of the defense lawyer or the insured is the defense lawyer's sole client.

When the lawyer is asked to represent codefendants in a case, the lawyer must further explain her duty of confidentiality to each codefendant and obtain their consent to the mutual sharing of information that is material to the defense. If the defendants do not agree to share such information with one another, this is a sign that there perhaps is a conflict of interest that requires the defendants to have separate counsel.

It is generally accepted that because the scope of the defense lawyer's representation is limited to defending the insured in the third-party action, the lawyer has no obligation to disclose to the insurer any information that bears on coverage. [8] This is true even where the insurer is also a client of the defense lawyer. [9] For example, section 11(2) of the *Restatement of the Law of Liability Insurance* states that an insurer "does not have the right to receive any information of the insured that is protected by . . . a defense lawyer's duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured." [10] A comment to section 134 of the *Restatement (Third) of the Law Governing Lawyers* similarly provides:

> When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question without explicit informed consent of the insured. That follows whether or not the lawyer also represents the insurer as a co-

> client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured. [11]

The lawyer needs to advise both the insured and the insurer of this limitation on the lawyer's duty to communicate early on.

An insurer that is a client of the defense lawyer under the dual client doctrine is not entitled to obtain from the lawyer information relevant to coverage on the rationale that such disclosure is impliedly authorized to carry out the insurer's representation. Implied authority applies only when the lawyer reasonably believes that disclosure is necessary to protect the interests of the client whose information will be disclosed. [12] In other words, it is the insured's implied authority that counts here, not the insurer's. It is not logical to believe that an insured would authorize the defense lawyer to disclose to the insurer information that might deprive the insured of coverage. To the same point, a client may never be presumed to have impliedly authorized the disclosure of information adverse to its interests. [13]

When the insured's confidential information relates solely to the defense of the case, the insured should be understood to have impliedly authorized the lawyer's disclosure to the insurer even if the insured did not expressly authorize it. The insured will surely be agreeable to the defense lawyer's disclosure to the insurer in any event. An insured may not welcome disclosure, however, where the lawyer is representing the insured and another codefendant and the codefendant will also receive the information the lawyer plans to disclose to the insurer.

Assume, for example, that a company and its employee are sued in connection with a serious accident and the employee is an insured as defined in the company's commercial general liability policy. The company's insurer appoints a lawyer to jointly defend the company and the employee. The case proceeds smoothly until the employee confides in the lawyer that unbeknownst to everyone—including the company and, so far, the plaintiff, because the employee has yet to be deposed—he was intoxicated when he allegedly caused the accident. The insurer needs to know this information because it may prompt the insurer to settle the case before the employee's impairment is revealed and inflates the case's value. The employee is fine with the lawyer's disclosure of his impairment to the insurer, but he does not want the information revealed to the company because he anticipates that the company will fire him for violating its substance-free workplace policy. Yet, the company needs to know the information because it potentially affects the plaintiff's case against it. Where does that leave the lawyer?

The lawyer should remind the employee that he consented to the lawyer's disclosure of any information material to the case to the company at the outset of the representation. The lawyer should also advise the employee that the information will likely come out at his deposition, which a company representative may attend, and that the employee cannot lie under oath to conceal his impairment. The lawyer further needs to inform the employee that disclosure of his impairment to the insurer may not end there because the insurer might reveal the information to the company. If the lawyer did not previously obtain the employee's consent to the disclosure of information related to the joint representation, however, she will be hard-pressed to seek consent now because the information is adverse to the employee's interests; indeed, the lawyer may well decide that she cannot seek the employee's consent given the downside. Even knowing that his intoxication may come out at his deposition, the employee will likely refuse to consent to any disclosure absent assurance that the company will not fire him for violating its substance-free workplace policy. Unfortunately, the lawyer cannot realistically seek that assurance from the company without revealing the employee's violation. No exception to confidentiality listed in Model Rule 1.6(b) permits the lawyer to reveal the employee's intoxication to the company without the employee's consent. [14]

If the employee consented to the lawyer's disclosure of case-related information to the company at the start of the representation, he could revoke his consent. If the employee did not consent in advance to the disclosure of his confidential information to the company and now refuses to permit disclosure or, alternatively, revokes any consent previously given, the lawyer has a conflict of interest that requires her to withdraw from the case. [15] The same result follows where the lawyer did not obtain the employee's consent to disclosure at the outset of the representation and decides that she cannot later seek consent. In any event, the lawyer cannot tell the company why she must withdraw beyond saying that ethical considerations mandate her withdrawal even though her reticence may frustrate the company. The lawyer cannot say more than that to the insurer, either, lest she make a disclosure that is harmful to the employee. Finally, the lawyer cannot give the court any reason for her withdrawal beyond (1) citing the governing ethics rule (Model Rule 1.16(a)(1)), [16] or (2) reporting that professional or ethical considerations necessitate her withdrawal, or that there has been an irreconcilable breakdown in the attorney-client relationship with the employee that prevents her continued participation in the case. [17] The solution for the insurer after this episode is to appoint separate counsel for the employee and the company.

Confidential information that affects coverage. Next, consider the disclosure of information to the insurer in a case where the defense lawyer has a dual client relationship with the insured and the insurer. Assume that the insured's corporate representative is being deposed regarding an accident on the insured's property and,

during the deposition, the corporate representative discusses prior accidents. [18] If the insured was asked about prior accidents on the application for the policy under which coverage is being provided and did not disclose them, the insurer may be able to rescind the policy based on the insured's misrepresentation. In all probability, the defense lawyer will not know the contents of the insured's application and therefore would have no reason to withhold this information when reporting on the deposition to the insurer. [19] In addition, the prior accidents may be relevant to the insured's defense, so sharing this portion of the corporate representative's testimony with the insurer seems natural.

If, however, the defense lawyer has reviewed a copy of the application or otherwise recognizes the threat to coverage that the corporate representative's testimony potentially poses, trouble is percolating. If the prior accidents are not relevant to the insured's liability—they might be dissimilar to the accident at issue or occurred on distant areas of the property—the defense lawyer can avoid reporting the corporate representative's testimony to the insurer because coverage issues are outside the scope of the defense lawyer's representation. But if the prior accidents *are* relevant to the insured's liability, they are precisely the sort of information the insurer expects to receive from the defense lawyer. And because of the coverage implications, the lawyer cannot assume that the insured has impliedly authorized the lawyer to disclose the prior accidents to the insurer. It is no answer to say that the lawyer can report the testimony to the insurer without the insured's consent because the accidents became "public knowledge" through the deposition. Lawyers' duty of confidentiality under Model Rule 1.6(a) encompasses information that may be considered a public record or that is thought to be in the public domain. [20]

Assuming that the prior accidents are relevant to the defense of the current case, the lawyer should explain the situation to the insured, inform the insured of the conflict, and encourage the insured to consult with a coverage lawyer. Unless the insured agrees that the defense lawyer may reveal the prior accidents to the insurer or the insured's coverage counsel does so (perhaps having concluded that rescission is not available to the insurer), the lawyer's inability to disclose the corporate representative's testimony to the insurer creates a conflict of interest that requires the lawyer to withdraw from the representation.

Of course, any replacement lawyer will face the same conflict as the first lawyer unless the second lawyer treats the insured as the lawyer's sole client. If the second lawyer solely represents the insured and does not report the testimony about the prior accidents to the insurer, that omission may implicate the insured's duty to cooperate in the defense, but the lawyer will not be laboring under a conflict of interest.

An Illustrative Case: *Cosgrove v. National Fire & Marine Insurance Co.*

Cosgrove v. National Fire & Marine Insurance Co. [21] illustrates the challenges that a defense lawyer's duty of confidentiality can present for both the lawyer and the insurer. In that case, Karen Cosgrove hired WTM Construction, which was owned by William and Lana Mitzel, to remodel her house. Believing that WTM did a poor job, Cosgrove sued WTM and the Mitzels in Arizona state court. WTM was insured by National Fire & Marine Insurance Co., which hired lawyer Richard Righi to defend WTM under a reservation of rights. National reserved its rights based on a "Subcontractors Exclusion" in its policy, which provided in relevant part:

> This insurance does not apply to "bodily injury," "property damage," or "personal or advertising injury" arising out of operations performed for you by independent contractors or subcontractors unless:
>
> (1) Such independent contractors or sub-contractors agree in writing to defend, indemnify, and hold harmless you and your affiliates, subsidiaries, directors, officers, employees, agents, and their representatives from and against all claims, damages, losses, and expenses attributable to, resulting from, or arising out of the independent contractor's or sub-contractor's operations performed for you, caused in whole or in part by any act or omission of the independent contractor or sub-contractor or any one directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by you . . . . [22]

On June 2, 2009, Righi wrote to Anne Rohling, the National adjuster handling the case, to report that he had met with Mr. Mitzel to prepare the defense of Cosgrove's lawsuit and that he would try to gather as much information as possible regarding Cosgrove's claims and the nature of WTM's work at her home. Righi promised Rohling that he would provide her with an initial case analysis as soon as he had this information. [23]

On June 30, 2009, Righi gave Rohling his initial evaluation. Righi advised Rohling that he had learned that all work on Cosgrove's home other than framing was performed by subcontractors and that he was unable to locate any subcontracts. Righi would later testify that he thought he learned this information both from Mr. Mitzel and from reading

the job file. Although the job file was eventually produced in discovery in the state court suit, the file had not been produced at the time of Righi's initial evaluation. [24]

A few weeks later, Righi informed Rohling that even the framing of Cosgrove's home was performed by a subcontractor. Righi further advised Rohling that "[w]e have been unable to locate written contracts between WTM and th[e] subcontractors who performed work on the project. At this point, we are doubtful any such contracts exist." [25] When he was later questioned about how he reported developments in the case to Rohling, Righi testified:

> We provide information that is out there in the public domain . . . Certainly nothing secretive, nothing privileged in the sense that it could harm the client. . . . [W]e report all the facts, all the developments, everything that happens, because what we're reporting is . . . in the record. It's in a deposition or disclosure or it's in a depository. It's out there for public consumption. So if that's the case, we report it. . . . [But] if a client tells me something privileged, tells me something important, I'm not going to report that. [26]

Righi did not consider the information about the subcontracts to be confidential or privileged because it "was very clear in the documents. It was published to everyone." [27]

In April 2010, Righi filed a third-party complaint against seven subcontractors who worked on Cosgrove's home. In the third-party complaint, WTM asserted common law implied indemnity claims against the subcontractors. Righi obviously pleaded common law implied indemnity claims as opposed to contractual indemnity claims because there were no written subcontracts indemnifying WTM. [28]

At some point, Rohling calculated that National had an 80% chance of defeating coverage based on the subcontractors exclusion. In reaching this conclusion, she relied on Righi's reports that subcontractors had done all or most of the work on Cosgrove's home and that WTM had no contracts with any of them. [29]

Rohling's determination that there was an 80% chance of National prevailing on coverage affected settlement negotiations in the state court suit. For instance, when Righi recommended settling the suit for $110,000, Rohling would not offer more than $23,000 based on her coverage analysis. Likewise, when Cosgrove later made a $109,000 offer of

judgment, Rohling refused Righi's request for up to $109,000 in authority to attempt to negotiate a lower settlement and rejected the offer of judgment. [30]

Cosgrove, WTM, and the Mitzels finally settled their dispute through a nonexecution agreement and stipulated judgment for over $443,000. The state court held a reasonableness hearing and reduced the judgment to around $304,000. Cosgrove then sued National in an Arizona state court for breach of contract and bad faith. National removed the case to federal court, where the parties filed competing motions for partial summary judgment. [31]

Cosgrove's motion was based on the Arizona Supreme Court's decision in *Parsons v. Continental National American Group*, where the court held:

> When an attorney who is an insurance company's agent uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy . . . such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy. [32]

The *Parsons* court also held that a reservation of rights is immaterial when the same lawyer represents "conflicting clients." [33] Furthermore, the Arizona Supreme Court explained that an insurer does not have "the right to engage an attorney to act on behalf of the insured to defend a claim against the insured while at the same time build a defense against the insured on behalf of the insurer." [34]

Cosgrove contended that National violated *Parsons* by denying coverage based on information that Righi learned from Mr. Mitzel (acting as WTM's agent) during the attorney-client relationship. [35] National countered that *Parsons* only applies where the defense lawyer discloses the insured's confidential or privileged information, which the missing subcontracts were not. [36] National specifically argued:

> [A]ll Mr. Righi learned was the identity of who had performed the work on the project and that WTM had no written agreements with its subcontractors. . . . [T]here is no evidence that suggests that WTM intended to keep this information confidential or that Mr. Mitzel relayed this information to Mr. Righi in confidence. In short, . . . the information about the subcontractors was simply routine information and . . . this information

> in a construction defect case is almost always a known fact based on the insured's job file. . . . Mr. Righi testified that he thought he learned this information both from Mr. Mitzel and from a "review of the job file." Thus, . . . it [was] not even clear that Mr. Righi learned the information about the subcontractors from Mr. Mitzel. . . . [National] could have learned this information if it had . . . completed its own investigation rather than relying on the information it received from Mr. Righi. If it could have learned this information on its own, then . . . this information cannot possibly be considered confidential information. [37]

The court, however, believed that National was reading *Parsons* too narrowly. Here, Righi used his attorney-client relationship with WTM to collect information that he passed on to National, which National then used to WTM's detriment. When Righi disclosed the subcontractor information to Rohling, he either knew or reasonably should have known that WTM's policy contained the subcontractors exclusion and that National might attempt to deny coverage on that basis. [38] Nonetheless, Righi provided Rohling the very information that National would need to deny coverage based on the subcontractors exclusion. Indeed, in his June 2, 2009, report to Rohling, Righi expressly said that he would try to gather information concerning WTM's use of subcontractors on Cosgrove's project. As the *Cosgrove* court saw things, Righi owed his full loyalty to WTM, but his loyalty to WTM "was diluted by his allegiance" to National. [39] According to the court, this was a clear *Parsons* violation. [40]

The court further explained that *Parsons* does not require the information at issue to be independently confidential. Liability under *Parsons* only requires that the insurer obtain the information through the defense lawyer's attorney-client relationship with the insured and that the disclosure of the information be detrimental to the insured. [41]

The court recognized that the subcontractor information formed the basis for WTM's third-party complaint, which then made the information freely available. By the time Righi filed WTM's third-party complaint, however, he had already crossed the *Parsons* line. Righi disclosed the information about the subcontractors to Rohling in 2009, long before he filed the third-party complaint in April 2010. The court rejected National's argument that finding a *Parsons* violation would mean that Righi could not have filed a third-party complaint. As the court explained, "[a] lawyer must obtain his client's consent to disclose information in pleadings." [42] Disclosing the subcontractor information by filing a third-party complaint with WTM's consent would not have violated *Parsons*. [43]

The court acknowledged that precluding National from invoking the subcontractors exclusion might seem punitive. But, if National had done its own investigation of WTM's situation rather than relying on the information disclosed by Righi, it could have safely denied coverage based on the subcontractors exclusion. Instead, because National learned the subcontractor information from Righi and then used it to WTM's detriment before it was publicized, National was estopped from relying on the information to deny coverage. [44]

In conclusion, the court awarded Cosgrove partial summary judgment. In granting her motion, the court allowed National to argue against coverage for any reason other than the subcontractors exclusion.

Looking back on *Cosgrove*, Righi was in a difficult position. If he received a copy of National's reservation of rights letter or was familiar with subcontractor exclusions by virtue of his practice, he should have recognized the challenges posed by Mr. Mitzel's revelation that WTM had no written agreements with the subcontractors who worked on Cosgrove's home. Although the lack of written subcontracts likely would have emerged in discovery because Cosgrove would have sought production of WTM's job file to pursue her own claims against the subcontractors or for other purposes, that prospect did not empower Righi to reveal the subcontractor information to National without WTM's express consent. In addition, Righi could not file a third-party action against the subcontractors alleging common law implied indemnity claims without WTM's express consent because filing that action would highlight the missing subcontracts. At the same time, *not* filing a third-party action seeking contractual indemnity would have equally alerted National to the missing subcontracts.

National could have avoided estoppel if Rohling had asked WTM for copies of the subcontracts rather than relying on Righi to provide the information. If Mr. Mitzel would have asked Righi how to respond to such a request, Righi should have advised him that he could not give coverage advice and urged Mr. Mitzel to obtain coverage counsel.

Navigating Conflicts of Interest

Cosgrove aside, conflicts of interest attributable to an insured's confidential information fortunately are rare. A defense lawyer can avoid or mitigate many of them through appropriate disclosures at the outset of the representation. When they do surface, conflicts and other problems related to an insured's confidential information can be incredibly nuanced and require significant care to navigate.

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Endnotes

1. Model Rules of Pro. Conduct r. 1.6(a) (Am. Bar Ass'n 2024). A few jurisdictions have varied their confidentiality rules. For example, California's version of Rule 1.6(a) states: "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule." Cal. Rules of Pro. Conduct r. 1.6(a) (2024). The statute cited in the rule makes it a lawyer's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e)(1). New York's version of Rule 1.6(a) prohibits lawyers from "knowingly reveal[ing] confidential information," subject to certain exceptions. N.Y. Rules of Pro. Conduct r. 1.6(a) (2024). The rule defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." *Id.*

2. State v. Gonzalez, 234 P.3d 1, 11 (Kan. 2010); State Bar of Nev. Comm. on Ethics & Pro. Resp., Formal Op. 41, at 3 (2009).

3. *In re* Bryan, 61 P.3d 641, 656 (Kan. 2003).

4. *See* William T. Barker & Charles Silver, Professional Responsibilities of Insurance Defense Counsel § 10.02, at 10-7 (2012 & Supp. 2017) (stating that "the normal rule is that (unless the clients agree otherwise) all information may be shared with both clients"); Restatement (Third) of the L. Governing Laws. § 61 cmt. l (Am. L. Inst. 2000) ("Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected.").

5. Model Rules of Pro. Conduct r. 1.7 cmt. 31.

6. Fla. State Bar Ass'n Comm. on Pro. Ethics, Op. 95-4, 1997 WL 307142, at *4 (1997).

7. *See* Model Rules of Pro. Conduct r. 1.6(a).

8. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 08-450, at 6–7 (2008). In fact, the defense lawyer has no duty or right to share with the insurer any information of the insured that is unrelated to the defense of the lawsuit.

9. *See* Cal. State Bar Comm. on Pro. Resp. & Conduct, Op. 1995-139, 1995 WL 255397, at *3 (1995) ("[E]ven where the attorney . . . considers insurer an important 'client,' . . . it is the obligation to protect the insured's confidences and secrets which is paramount. Thus, if, for example, the attorney gains information during the course of representation which the attorney believes demonstrates that the insured is actually not entitled to coverage, the attorney nevertheless owes a duty to the insured/client not to reveal this information to the insurer."); Barker & Silver, *supra* note 4, § 10.03[1], at 10-9 to -10 (offering examples of information bearing on coverage

that need not be disclosed to the insurer because it is irrelevant to liability or damages in the third-party action).

10. Restatement of the L. of Liab. Ins. § 11(2) (Am. L. Inst. 2019).

11. Restatement (Third) of the L. Governing Laws. § 134 cmt. f (Am. L. Inst. 2000) (citations omitted).

12. ABA Formal Op. 08-450, *supra* note 8, at 6.

13. *Id.*

14. *See* Model Rules of Pro. Conduct r. 1.6(b) (Am. Bar Ass'n 2024).

15. *See* ABA Formal Op. 08-450, *supra* note 8, at 5 (discussing a conflict of interest caused by a lawyer's inability to share information between co-clients and referring to Model Rule 1.4(b)).

16. *See* Model Rules of Pro. Conduct r. 1.16(a)(1) (mandating withdrawal where "the representation will result in violation of the Rules of Professional Conduct or other law," in this instance a violation of Model Rule 1.7).

17. *See* Cal. State Bar Comm. on Pro. Resp. & Conduct, Op. 2015-192, 2015 WL 1308145, at *8 (2015); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1057, 2015 WL 4592234, at *3 (2015).

18. *See* Barker & Silver, *supra* note 4, § 10.02, at 10-9 (providing this example).

19. *Id.*

20. *See* People v. Braham, 470 P.3d 1031, 1044 (Colo. 2017) (stating that Rule 1.6 "contains no exception permitting the disclosure of previously disclosed or publicly available information"); *In re* Anonymous, 654 N.E.2d 1128, 1129–30 (Ind. 1995) (holding that the lawyer violated Rule 1.6(a) by revealing information "readily available from public sources"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 766 (Iowa 2010) (holding that "confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available"); *In re* Bryan, 61 P.3d 641, 656 (Kan. 2003) (explaining that just because a former client's alleged "history of making false claims" had been publicly disclosed in court pleadings did not mean that the lawyer's disclosure regarding the same to a store manager and a loss prevention manager was not the disclosure of information protected as confidential by Rule 1.6); Sullivan Cnty. Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 758 (N.H. 1996) ("[A]n attorney's duty to protect confidential information gleaned from a client does not disappear simply because portions of that information have been included in public documents or discussed in public forums."); Law. Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861–62 (W. Va. 1995) ("The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it."); ABA Comm. on Ethics & Pro. Resp., Formal Op. 480, at 4 (2018) ("Rule 1.6 does not provide an exception for information that is 'generally known' or contained in a 'public record.'"). *But see In re* Lim, 210 S.W.3d 199, 201–02 (Mo. 2007)

(reasoning that the lawyer's letter to the INS saying that his former clients "lack[ed] the good moral character needed to obtain immigration benefits" because they had "lied and deceived" him and owed him more than $7,000 did not violate Rule 1.6(a) in part because "the outstanding debt was a matter of public record by virtue of the [lawyer's] collection action"); Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 620 (Va. 2013) (concluding that the lawyer had a First Amendment right to blog about his criminal defense clients' court cases without the clients' consent and that doing so did not violate the lawyer's duty of confidentiality under Rule 1.6).

21. No. 2:14-cv-2229-HRH, 2017 WL 11437374 (D. Ariz. Apr. 10, 2017), *vacated*, No. 2:14-cv-2229-HRH, 2017 WL 11490239 (D. Ariz. May 5, 2017) (approving the parties' stipulation to vacate the April 10, 2017, order because the case settled).

22. *Id.* at *1.

23. *Id.* at *2.

24. *Id.*

25. *Id.* (alterations in original) (quoting Righi).

26. *Id.* at *3 (quoting Righi).

27. *Id.* (quoting Righi).

28. *Id.*

29. *Id.* at *4.

30. *Id.*

31. *Id.*

32. 550 P.2d 94, 99 (Ariz. 1976).

33. *Id.*

34. *Id.*

35. *Cosgrove*, 2017 WL 11437374, at *6.

36. *Id.*

37. *Id.* at *7 (footnote omitted).

38. *Id.*

39. *Id.* (quoting Lake Havasu Cmty. Hosp., Inc. v. Ariz. Title Ins. & Tr. Co., 687 P.2d 371, 384 (Ariz. Ct. App. 1984), *disapproved on other grounds by* Barmat v. John & Jane Doe Partners A–D, 747 P.2d 1218, 1223 (Ariz. 1987)).

40. *Id.*

41. *Id.*

42. *Id.* at *8.

43. *Id.*

44. *Id.*

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