AVIATION SECTION NEWSLETTER
STATE BAR OF GEORGIA

AVIATION LAW SECTION

WINTER 2006

PREFLIGHT

Chairman's Message

Inside this issue:

The annual meeting of the Aviation Section took place at the Downwind Restaurant at the DeKalb-Peachtree Airport on Friday, January 6, 2006. Unlike previous years, we did not spend $500 or more to conduct the meeting at an expensive hotel with elaborate meals and costly sound and audio systems. There was camaraderie and joviality as we met. Relationships were developed and renewed.

Chris Anderson flew in from Athens, and Mark Stuckey flew our speaker from Savannah to the airport for the meeting. *En route*, Mark had a momentary loss of power in his aircraft, declared an emergency, and eventually regained power before making a precautionary landing at the Covington Airport. Of all the people attending the luncheon meeting, Mark had the best war story for the day.

Bob Baron Fields a Question During His Presentation

Bob Baron, our luncheon speaker, gave an excellent talk on pilot decision-making. While this area is covered during flight instructor refresher courses, Bob did a more thorough and complete job than one normally sees in seminars or presentations. He has given the matter a great deal of thought and has conducted extensive research on the topic. If one had a case involving faulty pilot decision-making, Bob could be a valuable resource to evaluate the factors impacting on the decision-making of a pilot. He has a profound knowledge of the psychological principles that go into the equation of pilot decision-making.

For the next two years, the officers of the Section will be yours truly as Chairman, Lisa McCrimmon as Vice Chair, Keith Wood as Secretary, and Mark Stuckey (having cheated the jaws of death, again) will continue to serve as the Editor of our newsletter.

Hopefully, the year 2006 bodes well for the members of the Aviation Section of the State Bar of Georgia.

Happy Landings,

Alan

FROM THE EDITOR: HUMAN FACTORS, RELATIONSHIPS AND EMBRY RIDDLE

I hope this issue finds you well. I think that all who attended the Aviation Luncheon enjoyed Bob Baron's presentation regarding human factors. Many of Bob's points are also contained in his published papers, which can be found on his company's website, The Aviation Consulting Group, www.tacgworldwide.com. Bob is an experienced pilot and teaches courses in Aviation Safety, Physiology, Psychology and Human Factors. His breadth of experience came through in his easy manner of addressing questions with real-world scenarios and examples. I would encourage anyone who is considering a human factors issue to contact Bob to see if his expertise would be useful to your client's situation.

I also wanted to commend to you Embry-Riddle's 17th Annual Aviation Law and Insurance Symposium, which was held last month in Orlando. Our own Nicole Stout was one of the speakers, and her paper (in shortened format) is featured in this month's newsletter. We heard from speakers regarding trial technology, military crashes, Part 135 concerns for flight departments, and municipal aviation issues. The presentation regarding problems faced by some lawyers pursuing offshore cases was very enlightening, especially when it was discussed that some attorneys were arrested and deported after showing up in Cyprus after the Helios 522 crash last year! There was an excellent turnout from across the country, and I would encourage you to attend next year's symposium in January 2007. Even if one is well-versed in these areas, the experience and quality of the speakers would definitely make this symposium a worthwhile annual trip. ※

Bob Baron Discusses Human Factors at the Luncheon

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THE TRIPARTITE RELATIONSHIP

By Nicole Wolfe Stout

The relationship between an insurer, an insured, and the attorney who is hired by the insurer to defend the insured is often referred to as the "tripartite relationship." Given the myriad of actual and potential conflicts that arise in this relationship, it could be more accurately characterized as the "Bermuda triangle." It has been said that the relationship creates problems that "would tax Socrates, and no decision or authority . . . furnishes a completely satisfactory answer." Hartford Accident Indem. Co. v. Foster, 528 So.2d 255, 273 (Miss. 1988). In the aviation context, and in insurance generally, understanding the framework of the relationship is paramount to all participants in order to avoid conflicts.

The relationship between the insurer and the insured is contractual and is defined primarily by the insurance policy. The specific duties of the insurer vary depending on the type of policy, but there are some provisions that are contained in almost of every contract. Most importantly, for purposes of this discussion, the insurer has a duty to defend the insured for claims brought against the insured that may be covered by the insurance policy. Most conflicts in the tripartite relationship arise from the duty to defend. Insurance policies generally place a duty on the insured to cooperate with the insurer in its investigation of the claim and defense. The insurer's relationship with defense counsel varies depending on the parties involved. An insurer may have a long-standing relationship with defense counsel or the insurer and the attorney may be in a new association whereby the parameters of their interaction may not be as defined. The relationship between defense counsel and the insured it is hired to defend begins oddly enough with an agreement between the insurer and defense counsel. Typically, the insurer advises counsel that a claim has been made against its insured in which a lawsuit may have been filed. The insurer asks counsel to agree to defend the interests of the insured. If litigation has begun, the attorney would appear on behalf of the insured, and represent the insured in all pre-trial and trial proceedings. Only once counsel agrees to accept the assignment from the insurer, does he or she contact the insured, which is often the first contact between the insured and counsel.

Nicole Stout Prior to Her Presentation at the ERAU Symposium

To Whom Is the Defense Counsel's Duty Owed

The question of to whom the defense counsel hired by the insurer to defend the insured owes his or her duty, is not simply answered. Does the attorney represent either the insurer and the insured, or both? Does the lawyer have an attorney-client relationship with either, or both? Unfortunately, there is little to no Georgia case law providing guidance on issues arising in the tripartite relationship. Other jurisdictions, which have dealt with the conflicts that can arise, provide guidance. Under the dual representation or "dual client" approach, defense counsel owes a duty to both the insured and the insurer. See, e.g., Spratley v. State Farm Mut. Auto. Ins. Co., 2003 UT 39, 78 P.3d 603 (2003); Gafcon, Inc. v. Ponsor & Associates, 98 Cal. App. 4th 1388, 1406, 120 Cal.Rptr.2d 392 (2002); Gulf Ins. Co. v. Berger, et.al., 93 Cal.Rptr.2d 534, 542 (Cal.Ct.App. 2000). Although defense counsel's primary duty is to the insured that he or she is hired to defend, there may be an attorney-client relationship with the insurance company. Even where the insurer is not considered a "client" of the attorney under traditional attorney-client concepts, the attorney may still owe a duty to the insurer. Paradigm Ins. Co. v. Langerman Law Offices, 200 Ariz. 146, 24 P.3d 593 (2001). In cases where there is no question regarding the adequacy or existence of coverage, defense counsel would represent both the insurer and the insured. Defense counsel while giving "primary allegiance" to the insured owes a duty to the insurer to protect it in fair and good faith. Id. 594. Under this theory, in the absence of any conflict, defense counsel will have no difficulty because the goals of all involved are the same. Of course, a different situation arises where the insurer has entered a defense

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Tripartite Relationship (cont).

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under a reservation of rights.

Other jurisdictions hold that defense counsel hired by an insurer to defend a claim against its insured represents the insured and "owes a duty of undivided loyalty to the insured and must faithfully represent the insured's interests." See Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 449 (Minn. 2002); see also Koster v. June's Trucking, Inc., 244 Mich.App. 162, 625 N.W.2d 82 (2001); Barefield v. DPIC Co., Inc., 215 W.Va. 544, 558, 600 S.E.2d 256 (2003). Since there is always the potential for conflict, the "single-client" states have attempted to remove the ambiguities for defense counsel as much as possible so that the duty to the insured is upheld. While some single-client jurisdictions hold that defense counsel's duty lies with the insured, there still may be an attorney-client relationship between the insurer and defense counsel. Some jurisdictions prohibit, however, an attorney-client relationship between defense counsel and the insurer. See, e.g., First Am. Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990); Higgins v. Karp, 239 Conn. 802, 687 A.2d 539, 543 (1997); In re Rules of Prof'l Conduct, 299 Mont. 321, 2 P.3d 806, 814 (2000).

Even in single-client jurisdictions, however, defense counsel may represent both the insurer and the insured where there is no conflict of interest, i.e. coverage is not at issue, and the insured consents to the dual representation after consultation. See Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 449 (Minn. 2002); Shelby Mut. Ins. Co. v. Kleman, 255 N.W.2d 231, 235 (Minn. 1977). Under this approach, which is grounded in Rule 1.7 of both the American Bar Association's Model Rules of Professional Responsibility and Georgia's Rules of Professional Conduct, unless the insured expressly consents to the dual representation after discussing the issues with defense counsel, the sole duty of defense counsel lies with the insured. First, defense counsel consults with the insured "explaining the implications of dual representation and the advantages and risks involved," and then, after consultation, if the insured gives express consent to the dual representation, defense counsel may represent both the insured and the insurer. This approach protects the insured from being disadvantaged when a conflict of interest exists yet allows dual representation when the risk of conflict is low and the insured is aware of potential problems.

Reporting To The Insurer

It is standard practice in the insurance defense context for defense counsel hired to represent an insured to report regularly to the insurer regarding the progress of the case. This may include providing deposition summaries, recommending certain defense strategies, and reporting the "facts" of the claim. While this regular practice may seem innocuous in the context of the tripartite relationship, it is rife with conflict. When the interests of the insurer and insured are not aligned, defense counsel who represents both the insurer and the insured may find himself in "an exceedingly awkward position." Pine Island Farmer's Market Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 450 (2002). If a conflict of interest arises, there is a danger due to the nature of the tripartite relationship that defense counsel will tend to favor the insurer. This possibility of defense counsel's favoritism toward the insurer is precipitated by the fact that the insurer pays defense counsel's bills and may be a source of future business for defense counsel.

Nicole Stout at the ERAU Symposium

Despite the divergent views regarding to whom defense counsel owes his or her duty, defense counsel may not use information gleaned during representation of the insured in order to defeat coverage. "A lawyer hired by an insurer to represent an insured owes an unqualified duty of loyalty to the insured and must act at all times to protect the insured's interest." Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 788 N.E.2d 522, 540 (2003); see also Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., L.P., 336 F.Supp.2d 610, 615-616 (S.C.Dist. 2004); Higgins v. Karp, 239 Conn. 802, 687 A.2d 539 (1997); Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691 (Tenn. 2002). It is a violation of ethics and professional standards for defense counsel to use his position in the attorney-client relationship to investigate the insurer's coverage defenses. See Parsons v. Continental Nat'l American Group, 550 P.2d 94 (Ariz. 1976). If during the course of the litigation, the attorney discovers facts unsolicited, which may give rise to a coverage defense, the attorney may not alert the insurer to the coverage defense. What if the fact giving rise to a coverage defense comes out in a discovery deposition? Does the attorney report this fact to the insurer? In that situation, a conflict of interest would in fact arise because the attorney has knowledge that the insurer would like to know, i.e. that there is no coverage. However, the attorney cannot report or highlight this information to the insurer. Where the attorney and insurer engage in such conduct, courts have held that the insurer is estopped from denying coverage. See Employers Cas. Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973), see also Parsons v. Continental Nat'l Am. Grp., 550 P.2d 94 (Ariz. 1976). There is no prohibition against the attorney providing a copy of the deposition transcript

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of the insured, but the attorney would violate his duty to the insured should he intimate, hint, or otherwise suggest that there is new information that may create a coverage defense. It is the obligation of the insurer to independently investigate coverage and hire separate coverage counsel. This practice alleviates the potential for the insurer to be tempted to ask defense counsel to discuss coverage issues.

Control Of Litigation And Authority To Settle

An insurer often retains a right in the insurance contract to assume exclusive control over the defense of the insured. Although the insurer's right to control the defense is contractual, "litigation guidelines" can cause conflicts of interest in the tripartite relationship because defense counsel must have the discretion to exercise independent judgment when defending the insured so that if liability could be passed along to the insured due to a coverage defense or that the amount claimed exceeds the policy limits, the insured is not prejudiced by the insurer's right to control the defense. In recent years, insurance companies have attempted to limit costs by requiring defense counsel to obtain their permission before conducting legal research, preparing motions, serving written discovery, taking depositions, and the hiring of experts. By this, the insurer may control the litigation and costs, but it can place a conflict upon defense counsel who believes that the handling of the case requires action for which the insurer refuses to pay. It must be remembered that "the insurer's desire to limit expenses must yield to the attorney's professional judgment and his or her responsibility to provide competent, ethical representation to the insured." Finley v. Home Ins. Co., 90 Hawaii 25, 34, 975 P.2d 1145 (1998) (citations omitted).

The upside of the independence of defense counsel is that generally an insurer cannot be held vicariously liable for the malpractice of defense counsel since defense counsel has autonomy to exercise his independent judgment. State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (1998); Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.,. 963 F.Supp. 452, 454-455 (M.D.Pa. 1997); Merritt v. Reserve Ins. Co., 34 Cal.App.3d 858, 100 Cal.Rptr. 511, 526 (Cal.Ct.App. 1973); Aetna Cas. & Sur. Co. v. Protective Nat'l Ins. Co., 631 So.2d 305, 306-307 (Fla.Ct.App. 1993); Barefield v. DPIC Co., Inc., 215 W.Va. 544, 600 S.E.2d 256 (2003); Petition of Youngblood, 895 S.W.2d 322, 328 (Tenn. 1995).

Most liability insurance policies give the insurer the sole right to settle the case within policy limits. However, certain professional liability policies provide that the insurer will not settle a claim without the insured's written consent. Some courts hold that defense counsel must inform the insured of all settlement offers that affect him, Rogers v. Robson, Masters, Ryan, Brumand & Belom, 74 Ill.App.3d 467, 392 N.E.2d 1365 (1979), while others do not as long as the defense is not undertaken under a reservation of rights. Mitchum v. Hudgens, 533 So.2d 194 (1988).

Malpractice Claims

To whom defense counsel owes her duty is crucial in the determination of who may bring a malpractice claim against the attorney. Generally if the attorney did not have a dual relationship, i.e. represent both the insured and insurer, the insurer may not bring a malpractice claim against the attorney. Some courts allow the insurer as a "non-client" to sue the lawyer for malpractice with respect to matters where there is no conflict between the insured and insurer. See General Security Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F.Supp.2d 951, 956 (E.D.Va. 2005); Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 154-155, 24 P.3d 593 (2001). Many jurisdictions allow the insurer to step in the shoes of the insured and bring the malpractice claim against defense counsel under the doctrine of equitable subrogation or directly, see Atlanta Intern'l Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294, 298-299 (1991); Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A., 271 F.3d 1272 (11th Cir. 2001)(applying Florida law) while others do not, Pine Island Farmers Coop, 649 N.W. at 452; Swiss Reinsurance America Corp., Inc. v. Roetzel & Andress, 163 Ohio App.3d 336, 837 N.E.2d 1215 (2005). The rationale for allowing the insurer to bring a malpractice claim against defense counsel is that the insurer who hires counsel to defend the insured and pays

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Tripartite Relationship (cont.)

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defense counsel's bills should have a remedy against the lawyer whose malpractice results in a higher verdict, more defense costs, or more exposure in excess of the policy limits. It has been stated as well that allowing such malpractice actions by the insurer promotes the enforcement of defense counsel's duty to the insured because the insured is often the primary person harmed by the malpractice.

Courts' denial of an insurer's claims for malpractice against defense counsel is because allowing such actions could "drive a wedge between counsel and the insured to the inexorable detriment of the attorney-client relationship." Swiss Reinsurance America Corp., Inc. v. Roetzel & Andress, 163 Ohio App.3d 336, 837 N.E.2d 1215 (2005). The tripartite tension felt by defense counsel is magnified where equitable subrogation or direct action is allowed because on the one hand he is liable to the insured for malpractice due to the attorney-client relationship, and on the other hand, would be forced to face possible suit from the insurer. If the duty to the insured is paramount, then acknowledging such a right on the insurer, seems to compromise the duty owed to the insured in jurisdictions that do not allow insurers to bring malpractice actions against hired counsel. The rationale applies for claims by an excess insurer against defense counsel hired by the liability insurer as well. See American Continental Ins. Co. v. Weber & Rose, P.S.C., 997 S.W.2d 12 (Ky.Ct.App. 1998). Notably, the courts want to avoid the excess insurer bringing malpractice claims against counsel every time the exposure exceeds the limits of the primary policy. Id. at 14.

The key to avoiding problems for all participants in the tripartite relationship is for each to understand the limits of their relationship with the others. Defense counsel and the insurer must also understand the law in their jurisdiction concerning any duties between them,, and to what extent an attorney-client relationship may exist. ※

Nicole Wolfe Stout is a partner with Strawinski & Stout, LLP in Atlanta, Georgia. She is originally from Tennessee and is a graduate of the Emory University School of Law. Ms. Stout regularly defends lawsuits involving aviation accidents, products liability, premises liability and coverage disputes. She may be contacted at nws@strawlaw.com, or 404-264-9955.

IN MEMORIAM

The Aviation Section wishes to extend their condolences to the family of George O. Haskell, III, a Macon attorney and pilot who died in a plane crash after diverting from Macon to Peachtree City on January 1, 2006. George was a talented attorney and pilot who was a consummate professional, easy to work with, and who loved to share his interest in aviation whenever he could. He will be sorely missed.

SKYNOTES

Feb 22-26—LPBA Winter Meeting at Amelia Island (55J) www.lpba.org

Feb 23-34—SMU 40th Annual Air Law Symposium at Dallas www.smu.edu/lra

March 17-19—IAC Keystone Aerobatic Contest (42J) www.iac.org

March 18-19—Thunder in the Valley Airshow at Columbus (KCSG) www.thunderinthevalleyairshow.com

March 25—Cherry Blossom Balloon Fest & Airshow at Macon (MAC) www.cbfmacon.com

April 4-10—Sun –n- Fun (KLAL) www.sun-n-fun.org

April 22—WWII Day at Peachtree City (KFFC) www.dixiewing.org

April 29—Atlanta NAS Airshow featuring the Blue Angels

April 29-30—Vidalia Onion Festival Airshow featuring the Canadian Snowbirds (KVDI) www.vidaliaonionfestival.com

May 4-6—IAC Sebring Aerobatic Contest (KSEF) www.iac23.org

May 8—Angel Flight Golf Tournament of Angels at Chateau Elan www.angelflight-ga.org