Who does your lawyer represent?

Key words: Attorney/client privilege, conflict of interest, insurance.

Over the summer, one of the most frequently requested legal cases in Massachusetts was the case of Trementozzi vs. Safety Insurance Co. The case described the duties of a lawyer selected by an insurance company to represent the insured and not the insurance company. The court in Trementozzi made clear that although the insurance company may pay the bills, the lawyer represents the insured. Both the lawyer and the insurance company are obligated to act in the best interests of the insured.

Earlier this year, newspaper reports indicated a multimillion dollar verdict in favor of a nurse anesthetist against an insurance company. The nurse anesthetist claimed that the insurance company, which also insured the hospital, had tried to make the nurse anesthetist the scapegoat for a medical malpractice claim. The cases illustrate the obligations owed by insurance companies, and the lawyers they hire to represent and act in the best interest of the insureds.

Kerry Trementozzi had been one of four passengers in a car driven by Paul Whooten which was involved in an accident. Kerry became a quadriplegic as a result of the accident. Paul Whooten's insurance company appointed a lawyer to defend him. Kerry Trementozzi's lawyer demanded the policy limit of $10,000 for bodily injury per person and that the insurance company pay Trementozzi's medical bills under the policy's personal injury protection portion. When the insurance company failed to pay the demand, Kerry Trementozzi's lawyer sent another demand letter, this time claiming that the insurance company's refusal to settle violated Massachusetts' consumer protection statutes.

The insurance company's claims adjuster then conferred with the very same lawyer who was representing Whooten, their insured. The problem was that Whooten and the insurance company had totally different exposures. The insurance company's exposure was limited by its policy limits but Whooten's liability was unlimited; he was liable for whatever damages a jury might award. In the case of an accident rendering a 16-year-old girl a quadriplegic, these damages could be very large. Instead of trying to reach a settlement with Trementozzi, the insurance company, under the guidance of the same lawyer representing Whooten, settled with the other passengers, paying the policy limit and ending its liability. Whooten claims that the lawyer should have tried to enter into a settlement with the injured passengers which gave Trementozzi most of the recovery because she had been the most injured and she could get the biggest jury award. If they could have settled with Trementozzi, even if they left the smaller claims unresolved, Whooten would have been better off.
After the settlement with the other passengers, Whooten's lawyer tried to settle the case against Whooten if Trementozzi would also settle her claim against the insurance company. This strategy was not in Whooten's interest either. Whooten had not engaged in unfair settlement practices. Only the insurance company had been guilty of that. Once more, by putting the insurance company's interest ahead of Whooten, the lawyer probably left Whooten in a more hazardous position.

Model Code of Professional Responsibility

Lawyers are not supposed to represent clients with different interests at the same time. The Model Code of Professional Responsibility prepared by the American Bar Association has been adopted by many states. It provides that:

"The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client... Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant."

Eventually Whooten and the insurance company retained different lawyers. Trementozzi received a jury verdict of $3,325,000 plus interest. To help pay Trementozzi part of what the jury awarded, Whooten assigned to her his claims against the insurance company for bad faith settlement practices and his claims against his first lawyer for malpractice. The case has not yet been reached for trial.

Attorney/client privilege

In the preparation of the case, some interesting questions have come up. Trementozzi (now suing the insurance company in the place of Whooten) had asked to examine various documents in the lawyer's file to prove that the lawyer was representing the insurance company when he should have been representing Whooten. The insurance company took the position that Trementozzi could not examine these documents because they were covered by the attorney/client privilege.

The attorney/client privilege protects one of the oldest confidential relationships in society. It grows out of the need of attorneys and their clients to have open, full and frank discussions. What happens to this privilege when the attorney is representing conflicting clients? The attorney/client privilege only protects documents and disclosures which are not disclosed to third parties. If someone discloses information to persons with whom there is no privilege, then it is not confidential and it is not privileged even if disclosed to his attorney.

The court ruled that certain documents that the insurance company did not want Trementozzi to examine were not confidential and not privileged because the insurance company had disclosed these documents to Whooten's lawyer. (Well, at the time he was acting as the insurance company's lawyer, too; but if they had wanted to keep the documents confidential they should have retained an independent lawyer.) Even if two clients have the same interest, disclosures made to a common lawyer are not privileged in a controversy between the two parties.

A similar factual situation involving a nurse anesthetist was reported in various newspapers earlier this year. A jury awarded $20 million to a CRNA because, as he told the newspapers, the hospital tried to change a surgical mishap to an anesthesia mishap and blame the nurse anesthetist. The patient went into a coma during a tubal ligation. Forty minutes after intubation and thirty minutes into the procedure, both blood pressure and pulse dropped abruptly. Cardiopulmonary resuscitation was commenced 2 minutes later when no pulse or pressure could be ascertained. Less than 10 minutes later, blood pressure and pulse had been stabilized, but the patient was in a coma from which she never recovered. However, there was another incident involving the same patient. Three days after surgery, the nasotracheal tube was pulled out during a chest x-ray, and it was improperly reinserted. There was a dispute as to whether the patient had already suffered irreparable damage by the time the nasotracheal tube was dislodged or whether it was this incident which resulted in the death of the patient.

Jury finds for the plaintiff

The insurance company appointed a lawyer to represent both the hospital and the nurse anesthetist. The nurse anesthetist believed that the lawyer failed to pursue the second incident, was not properly keeping the nurse anesthetist informed of important dates, and seemed negative toward the nurse anesthetist. After the nurse anesthetist's personal attorney got involved, the insurance company appointed another attorney to represent only the nurse anesthetist. Even then the nurse anesthetist felt that the insurance company did not fully cooperate. The nurse anesthetist's new lawyer also had a long history of representing the insurance com-
pany. At trial, the jury found for the plaintiff against the hospital and exonerated the nurse anesthetist.

Unfortunately, the story did not end there. The hospital fired the nurse anesthetist, and the insurance company cancelled the nurse anesthetist's insurance because of his "loss experience." Frustrated and out of work, the nurse anesthetist filed suit against the insurance company. In addition to the things they had done to him, the nurse anesthetist also claimed that the insurance company and the hospital were trying to cover up what had actually happened. The jury awarded $25,000 in actual damages, $100,000 for intentional interference with business relations, $5,000,000 for intentional infliction of emotional distress and $15,000,000 for punitive damages. A local paper quoted the nurse anesthetist's first attorney as saying that the charge of a cover-up was irresponsible.

Both of these cases illustrate the need for nurse anesthetists to be aware of and be involved in their legal defense. Even knowledgeable health care defense attorneys may not be familiar with the capabilities of nurse anesthetists. Second, the insurance companies may find themselves with multiple defendants. Nurse anesthetists must be vigilant that their interests are being protected. Nurse anesthetists should know that they are entitled to a defense by the corporation. At trial, the jury found for the plaintiff against the hospital and exonerated the nurse anesthetist.