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SERVING TWO MASTERS –
THE TRIPARTITE RELATIONSHIP

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WHAT IS THE TRIPARTITE RELATIONSHIP?

The tripartite relationship arises when the insurance carrier hires a defense attorney to defend a lawsuit against the insured/policy holder. There is a relationship between the insurance carrier and the defense attorney and a relationship between the attorney and the insured/policy holder and those relationships are not the same. In many states, there is a dual representation where the attorney represents the carrier and the insured. In other states, the insured is considered the “primary client” which seems to imply that the attorney has at least a secondary obligation to the carrier. Not in Texas. In Texas, there is one and only one client and that is the policy holder/insured.

The duty owed by defense counsel was well established by the Texas Supreme Court in *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973). The attorney hired by the insurance company to represent the insured becomes the attorney of record and the legal representative of the insured, and as such owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured. If a conflict arises between the interest of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict. *Id.*

Another widely cited case discussing the duty owed by defense counsel is *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). Davidson was involved in an accident with Klause. Both were insured by State Farm. Jordan was a passenger in Klause’s vehicle and sued both drivers. State Farm retained counsel to represent Davidson. Settlement attempts failed and the case went to trial and Davidson was found 100% negligent. An excess judgment was taken against Davidson, who passed away shortly after trial. Traver, her executor, sued State Farm alleging they were negligent, breached the duty to defend Davidson, breached the *Stowers* duty, breached the duty of good faith and fair dealing and violated the DTPA. Traver specifically alleged that the attorney retained by State Farm to represent Davidson committed malpractice and that State Farm deliberately orchestrated this malpractice to avoid potential *Stowers* liability to Klause arising from the settlement negotiations. The trial court rendered summary judgment for State Farm. The court of appeals reversed in part.

The Texas Supreme Court held that a defense attorney, as an independent contractor, has discretion regarding the day-to-day details of conducting the defense and is not subject to the client’s control regarding those details. While the attorney may not act contrary to the client’s wishes, the attorney is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to the control of the court, if he is not permitted to act as he thinks best. *Id.* Because the lawyer owes unqualified loyalty to the insured, the lawyer must at all times protect the interests of the insured if those interests would be compromised by the carrier’s instructions. *Id.* Accordingly, the court found that State Farm was not vicariously liable for the actions of the attorney.

Justice Gonzalez filed a concurring and dissenting opinion which was joined by Justice Abbott. Recognizing the inherent problems that can arise in the tripartite relationship, the Justice Gonzalez wrote the following:

> The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle. There is a lot of wisdom in the old proverb: He who pays the piper calls the tune. The lawyer wants to provide a competent defense, yet knows who pays the bills and who is most likely to send new business. This so-called tripartite relationship has been well documented as a source of unending ethical, legal, and economic tension.
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> In 1973, we clearly define the tripartite relationships in terms of professional ethics. *See Employers Cas. Co. v. Tilley,* 496 S.W.2d 552, 558–59 (Tex.1973). Under *Tilley,* the lawyer owes unqualified loyalty to the policy holder. *Id.* at 558. Defining the attorney's allegiance was designed to make everyone's role in the relationship clear. This rule has existed for twenty-five years and serves well in perhaps a majority of cases. It allows the attorney to provide a single-minded defense to the insured. That was my view when I wrote in *Ranger County Mutual Insurance Co. v. Guin,* 723 S.W.2d 656, 660–63 (Tex.1987) (Gonzalez, J., dissenting). In *Ranger,* I argued that insurance companies should not have the full spectrum of vicarious liability that goes with a true principal-agent relationship. *Id.* at 663. I adhere to that view today, but it may be necessary to modify the rule in *Tilley* to account for current trends in insurance defense law practice.
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> Since *Tilley* and *Ranger,* in part because of tort reform of the 1990s, the business of insurance and the practice of insurance defense have undergone revolutionary changes. In the last two decades, the insurance industry has seen fierce competition, a changing investment climate, and constant pressures to contain costs. To weather changing market forces and dramatic shake-outs within the industry, companies have changed the way they operate. I am concerned that these changes have weakened the protection *Tilley* envisioned.

Id. at 633.

So why are we serving two masters? Because the dynamics of the relationship are not always as clear cut as we would like to believe or as clear cut as they should be. Complications arise in the relationship when the carrier agrees to defend the insured under a reservations of rights. This arises when there are claims asserted that are covered and claims that are not covered. The carrier agrees to provide a defense but reserves its right to deny indemnity (ie, carrier will defend the lawsuit but does not necessarily agree to pay if there is a judgment against the insured). For example, a lawsuit may make allegations of negligence (covered under the policy) and intentional

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