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I. INTRODUCTION

The unique nature of the tripartite relationship, created when an insurer hires a lawyer to represent an insured, has created confusion on the part of many insurance defense attorneys. In such circumstances, it can be unclear how to ethically proceed with insurance defense litigation in order to avoid the pitfalls of malpractice liability. Although intended to simplify the ethical dilemmas for lawyers, a tripartite relationship often creates a situation in which the lawyer retained by the insurer to represent the insured does not know who her client is—the insurer, the insured, or both. Often, the divergent interests of the insurer and the insured magnify the attorney’s dilemma of loyalty.

In the absence of concrete and consistent common law decisions regulating the procedural aspects of insurance defense, some courts have recently begun to rely heavily upon the newly enacted Restatement (Third) of the Law Governing Lawyers (“Restatement”) to determine the ethical boundaries of lawyer conduct.

1. See Charles Silver & Kent Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 DUKE L.J. 255, 262–63 (1995) (“Insurance defense lawyers are integral parts of the engine that drives civil litigation, and the rules that govern their conduct are both extraordinarily vague and often wrong.”).


   The question of whom the lawyer represents in such cases is not new. It was implicit in articles written by Professor (now Judge) Robert Keeton beginning more than forty years ago. But it has been raised again with unusual intensity in response to publication of a recent draft of the Restatement (Third) of the Law Governing Lawyers.


3. See, e.g., Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 600 (Ariz. 2001). Although it is still too early to know just how much of an impact the Restatement
Unfortunately, inconsistencies among some jurisdictions have only perpetuated the problems in this area of the law. One prominent author has noted, “[t]he rules [surrounding insurance defense litigation] fail to provide clear and defensible answers to the most basic questions, such as whether an attorney-client relationship exists between the insurance company and the lawyer retained to handle the lawsuit against the insured.” Consequently, “the obvious danger is that insurance defense lawyers will act improperly, even when they attempt to adhere to the law.”

Recently, some courts have unsuccessfully attempted to clarify both the procedural standards governing insurance defense litigation and the ethical boundaries of the attorney-client relationship. Paradigm Insurance Co. v. Langerman Law Offices, decided by the Arizona Supreme Court in June of 2001, is such a case. Although the Langerman court may have achieved an equitable result, it failed to advance the proper analysis in reaching its result. If the inconsistent procedural standards are not clarified, uncertainty and ambiguity regarding the duties of insurance defense attorneys will continue to result in inconsistent representation and possible injury to the insurer, the insured, and especially the attorney. Insurance defense lawyers will continue to flounder as to whom they actually represent and where their duties of loyalty lie.

Part II of this Note reviews the facts and the reasoning of the court surrounding the Langerman decision. Part III discusses the history of the tripartite relationship between the insured, the insurer, and the lawyer hired to represent the insured. In order to elucidate (Third) of the Law Governing Lawyers (“Restatement”) will have on the formation of law, some scholars believe “its impact will be great.” Charles Silver & Michael Sean Quinn, Are Liability Carriers Second-Class Clients? No, but They May Be Soon—A Call to Arms Against the Restatement (Third) of the Law Governing Lawyers, COVERAGE, Mar.–Apr. 1996, at 21.

The American Law Institute, the sponsor of the Restatement (Third) of the Law Governing Lawyers, is an enormously influential organization. Its various Restatements, which blend consensus with reform, have gained widespread adoption by state courts and have sometimes changed the face of the American law. For example, the Restatement (Second) of Torts greatly facilitated the spread of strict liability law and, hence, the growth of enterprise liability theory. Id.

4. Silver & Syverud, supra note 1, at 263.
5. Id.
7. Langerman, 24 P.3d at 594.
the basic procedural standards that should govern this area of the law, this Note will discuss the origin of the tripartite relationship itself, the attorney-client privilege, the potential conflicts of interest unique to the tripartite relationship, and the definition of a client. Part IV reviews the scholarly thought with regard to attorney liability in the insurance defense context, asserting that the retainer agreement should define the scope of liability for the attorney. Part V will apply the retainer agreement theory and will discuss the application of this theory to *Langerman*. This Note ultimately concludes that the retainer agreement should be the operative document all parties in the tripartite relationship look to for clarification regarding an insurance defense attorney’s duties to the client. Such a standard is critical in minimizing attorney malpractice liability for lawyers engaged in the risky business of the tripartite relationship.

II. BACKGROUND AND FACTS SURROUNDING *LANGERMAN*

The issue before the Arizona Supreme Court in *Langerman* was “whether an attorney may be held liable to an insurer, which assigned him to represent an insured, when the attorney’s negligence damage[d] only the insurer.” The plaintiff, Paradigm Insurance Company (“Paradigm”), had issued an insurance policy covering medical malpractice liability to Dr. Benjamin A. Vanderwerf, Medical Director of Samaritan Transplant Service. Renee Taylor, one of Vanderwerf’s patients, brought a malpractice suit against him and included Samaritan Health Services (“Samaritan”) as a defendant, claiming that Vanderwerf was acting as an agent for Samaritan at the time the alleged malpractice occurred. Under Vanderwerf’s liability policy, Paradigm was responsible (1) for paying the doctor’s liability to Taylor if such liability was found, and (2) for paying for the legal defense of any liability claims against the doctor. At the time the complaint was filed against Vanderwerf, Paradigm hired an attorney, Langerman, to represent Vanderwerf; Vanderwerf consented to this...
“During the course of representation, Langerman advised Paradigm that it believed there was no viable theory of liability against Samaritan. Langerman, however, failed to investigate whether Vanderwerf was covered by Samaritan’s liability insurance and, thus, was unable to advise Paradigm whether the defense could be tendered to Samaritan.”

When Paradigm later learned that Langerman had a conflict of interest with Paradigm, Paradigm terminated Langerman as Vanderwerf’s counsel and hired a new attorney. The new counsel discovered that, in addition to being covered by Paradigm, Vanderwerf was also covered by Samaritan Insurance Funding (“SIF”) and that SIF was Vanderwerf’s primary coverage. However, when Vanderwerf’s new counsel attempted to tender the claim to SIF, SIF rejected the claim “on the grounds that the tender was untimely,” leaving Paradigm with the obligation to pay Dr. Vanderwerf’s entire liability. Although Langerman’s negligence did not injure Dr. Vanderwerf (the insured) it allegedly increased Paradigm’s (the insurer) costs tremendously by forcing Paradigm to take sole responsibility of the settlement without the opportunity of turning to SIF for contribution or indemnification. Thus, when Langerman requested payment for his services, Paradigm refused to pay, citing Langerman’s negligence as justification. Langerman then sued for collection of his fees, and Paradigm filed a counterclaim for damages.

The trial court, in granting summary judgment, “held that because there was no express agreement that Langerman could represent both Paradigm and Vanderwerf, no attorney-client relationship existed between Langerman and Paradigm.”

14. Id. at 594–95.
15. See id. at 595.
16. See id. Recognizing the potential benefits of Dr. Vanderwerf’s dual coverage, the Arizona Supreme Court stated, “At least hypothetically [being covered by both a primary and a secondary carrier] would be of some benefit to Vanderwerf: if SIF was determined to be the primary and Paradigm the excess carrier, Vanderwerf’s malpractice protection for Taylor’s [sic] claim would be increased to the combined limits of the two policies.” Id.
17. Id. Taylor’s claim against Vanderwerf “was eventually settled for an amount within Paradigm’s policy limits.” Id.
18. Id.
19. See id.
20. Id.
court accordingly found that “Langerman owed no duty of care to Paradigm and could not be held liable for negligence that injured only Paradigm but not Langerman’s sole client, Vanderwerf.” The court of appeals reversed in part on the theory of an implied, rather than express, attorney-client agreement, holding that where no “real or apparent conflict between the insured and the insurer” existed, insurance defense counsel actually represented both, thus creating a duty of care on the part of the attorney not only to the insured but also to the insurer. Because the trial court had granted summary judgment in Langerman’s favor, the Arizona Supreme Court assumed that Langerman was actually negligent in causing financial harm to Paradigm.

Although the court left some issues unresolved, like whether Langerman’s failure to determine the primary provider actually constituted an act of negligence, the Arizona Supreme Court identified three main issues discussed in this Note: (1) whether an express agreement is necessary to form an attorney-client relationship, (2) whether potential and actual conflicts of interest arise with the insurer as client, and (3) whether a duty to a non-client exists. In its holding, the Arizona Supreme Court ruled that when the interest of the insurer and the insured coincide, the lawyer has a duty to the insured and the insurer, and can therefore be liable to the insurer even if the insurer is considered to be a non-client. The next three sections of this Note will articulate the reasoning of the Langerman court concerning these three main issues. The wisdom of the court’s analysis, however, will be challenged later in this Note.

A. Formation of Attorney-Client Relationship Through an Express Agreement

The Langerman court relied upon the Restatement and other Arizona cases to hold that an express agreement was not required to establish an attorney-client relationship. The plaintiff, Langerman, argued to the contrary that no duty of care could be created between

21. Id.
22. Id.
23. See id. at 594.
24. See id. at 602.
25. See id. at 596.
the lawyer and the insurer if an attorney-client relationship did not exist; furthermore, Langerman argued, if the lawyer had no duty of care to the insurer, he could not be liable for alleged negligent conduct which injured the insurer but not the insured. In rebutting Langerman’s arguments, the court cited Restatement § 14, which states, “A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and . . . (a) the lawyer manifests to the person consent to do so . . . .” Additionally, the Langerman court defined an attorney-client relationship as being created when “an ordinary person would look to the lawyer as a protector rather than as an adversary.” Thus, an alleged client’s reasonable and objective “belief that [the lawyer] was [his] attorney” is necessary to establish an attorney-client relationship, in this case, between the insurer and the lawyer.

B. Potential and Actual Conflicts of Interest Between Insurer and Insured

Perhaps one of the most debated issues surrounding the insurance defense attorney liability question regards the analysis of how and to what extent conflicts of interest between the insurer and the insured affect procedural rules governing the lawyer’s relationship to the client(s). Although the Langerman court refused to determine whether both Paradigm and Vanderwerf were Langerman’s clients, it did hold that “when an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer’s services are ordinarily intended to benefit both insurer and insured when their interests coincide.”

However, the Langerman court repudiated the “view that the lawyer automatically represents both insurer and insured until the conflict [of interest] actually arises” by relying on Restatement...
section 121 and the basic rule prohibiting conflicts: A conflict of interest exists “if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to . . . a third person.”\textsuperscript{32} Agreeing with Langerman, the court reasoned “that actual conflicts between insured and insurer are quite common and that the potential for conflict is present in every case.”\textsuperscript{33} However, the court concluded that the interests of the insurer and the insured do not inherently conflict but “frequently coincide.”\textsuperscript{34} For example, both the insured and the insurer share an interest in “presenting a strong defense to a claim that they believe to be unfounded as to liability, damages, or both.”\textsuperscript{35} The Langerman court suggested that in such cases, there is a high probability that “the potential for conflict may never become substantial,”\textsuperscript{36} and will, consequently, never satisfy the Restatement’s definition of a conflict of interest.

\textbf{C. Duty to Non-Clients}

Instead of classifying the insurance company as a second client, which would have essentially required the court to delve into uncharted legal terrain, the Langerman court held that even if the insurer were not a client to the attorney, the attorney, depending on the facts of the case, might still be liable to the insurer.\textsuperscript{37} The court relied upon the Restatement section 51(3) to show that even if the insurer were a non-client, an attorney may be liable to the insured in some cases:

\begin{quote}
[A] lawyer owes a duty of care . . . to a nonclient when and to the extent that:
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} Id. at 597 (quoting \textsc{Restatement (Third) of the Law Governing Lawyers} § 121 (1998)).
\item \textsuperscript{33} Id. The court made a short list, albeit not exhaustive, of the potential conflicts of interest that may be present between the insurer and the insured. Id. Such conflicts included the scope of the coverage, how the case is to be defended, how information is shared, and the desirability of settlement. Id. See \textit{infra} Part III.B for a more in depth discussion of these and other potential conflicts that are relevant to the debate regarding whether an attorney should be liable to the insurer.
\item \textsuperscript{34} \textit{Langerman,} 24 P.3d at 598.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 600.
\end{itemize}
\end{footnotesize}
(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient; 

(b) such a duty would not significantly impair the lawyer’s performance of obligations to the client; and 

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely.38

Furthermore, the court explained that a lawyer owes a duty to the insurer when the interests of the insurer and the insured are not in conflict, “whether or not the insurer is held to be a co-client of the lawyer.”39 Ultimately, the following statement proved compelling for the Langerman court: “Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act[s] of the lawyer.”40

III. HISTORY OF INSURANCE DEFENSE COUNSEL LIABILITY AND THE TRIPARTITE RELATIONSHIP

Understanding the origin of the tripartite relationship is crucial to analyzing Langerman. In the context of insurance defense litigation,41 “most insurance policies accord to the insurer the duty to defend the insured and the right to control the insured’s defense. When the insurer appoints counsel to defend an insured, the triad of insurer, defense counsel and insured”42 is what is known as the tripartite relationship. This relationship has been further explained as “a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of

38. Id. (quoting Restatement (Third) of the Law Governing Lawyers § 51(3) (1998)).

39. Id. (quoting Restatement (Third) of the Law Governing Lawyers § 51 cmt. g).

40. Id. (quoting Restatement (Third) of the Law Governing Lawyers § 134 cmt. g).

41. “The vast majority of liability insurance policies cover both risks, obligating the insurance company to defend lawsuits against the insured, to pay the costs of defense, and to indemnify the insured for judgments and settlements up to a specified limit.” Silver & Syverud, supra note 1, at 264.

the claim or litigation against the insured." The debate regarding this controversial relationship between the insurer, the attorney hired by the insurer, and the insured is not new. In the 1940s through the 1960s Professor (now Judge) Robert E. Keeton brought the issues surrounding the tripartite relationship to the forefront of scholarly attention, however, during the 1970s and 1980s the “subject dropped off the radar screen insofar as most academics were concerned.” In recent years, however, the pronouncement of the Restatement (Third) of the Laws Governing Lawyers, the political attention directed toward the insurance industry, and the drastic increase in insurance malpractice suits have all contributed to a resurgence of the tripartite debate.

Current attempts to explain the unique ethical issues of the tripartite relationship have, for the most part, proven fruitless. One author described the tripartite relationship as “ethically sanctioned ‘duality of representation.’” Another author noted that the Restatement’s analysis of the relationship was “conceptually impoverished,” while the American Bar Association recognized that “[t]he Model Rules of Professional Conduct offer virtually no guidance as to whether the lawyer retained and paid by an insurer to defend its insured represents the insured, insurer, or both.” Such issues are at the heart of the tripartite relationship itself. Another author, after trying to define the ethical duties and boundaries of insurance defense lawyers, explained:

45. Id.
46. Id.
47. One author has referred to the complex issues of the tripartite relationship as an “ethical minefield.” Dacey, supra note 42, at 203.
49. Silver & Quinn, supra note 3, at 21, 39; see also Morgan, supra note 2, at 15.
If this rudimentary compass seems inadequate, that is because it is. The eternal triangle has vexed insurance defense practitioners for years and navigation is getting no easier. Emerging conflict of interest issues pose new problems, and even a minor error in direction or judgment can throw defense counsel hopelessly off course.51

The difficulty in wading through the tripartite quagmire originates from the ethical dilemmas regarding representation posed to insurance defense attorneys. Such dilemmas include, but are not limited to, issues of loyalty to the client and conflicts of interest between the insurer and the insured. The following hypothetical illustrates a typical conflict of interest in the tripartite: Dr. Jones is sued for malpractice by her patient. Concerned about her medical reputation, Dr. Jones desires that the case go through trial so that she can be vindicated of any wrongdoing. She does not want to settle the claim because she fears that doing so may subject her to review before the licensing board. Furthermore, she knows her premiums will skyrocket if she settles. The insurance company, on the other hand, prefers to settle the claim for as little as possible rather than go through trial. It knows that any court decision could have long-lasting effects not only on its business but also on the entire industry, and it fears having to pay the potentially enormous damages award if it loses at trial. Conflicts of interest such as this exist in almost every liability insurance tripartite relationship.

Due to a deficit of judicial and legislative direction regarding the procedural requirements of loyalty to one's client and the ambiguities surrounding the question of just who the client is in the tripartite context, insurance defense attorneys are currently left unguided and unprotected from malpractice liability.52 Indeed, in the


52. Professors Silver and Syverud have summarized the issues as follows: Insurance defense lawyers are integral parts of the engine that drives civil litigation, and the rules that govern their conduct are both extraordinarily vague and often wrong. The rules fail to provide clear and defensible answers to the most basic questions, such as whether an attorney-client relationship exists between the insurance company and the lawyer retained to handle the lawsuit against the insured. Consequently, the rules are almost entirely unhelpful when more complicated questions arise. The obvious danger is that insurance defense lawyers will act improperly, even when they attempt to adhere to the law. The less obvious danger is that the procedural system, broadly understood as encompassing all the rules and
context of the *Langerman* decision, it is especially important to consider both the lawyer’s responsibility to the insurer\(^{53}\) and the procedural standards that should be established to protect the lawyer from unknowingly violating a duty of ethical conduct. The tripartite relationship “requires a delicate balance of rights and duties,”\(^{54}\) A good starting point for examining these rights and duties is the attorney-client relationship.

**A. The Attorney-Client Relationship and the Establishment of Liability**

Typically, only a client or an entity in privity of contract with the lawyer is authorized to sue the lawyer for malpractice (or negligence).\(^{55}\) Although privity was, historically, a fixed requirement for claims of negligence, many jurisdictions, including New York, continue to adhere to this privity rule.\(^{56}\) However, in the context of the tripartite relationship, general privity analysis has, for the most part, been augmented by the rules of professional responsibility and the question of whether an attorney-client relationship has been formed between the insurance defense attorney and the insurer.\(^{57}\)

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56. See id. at 85. States have adopted other theories that reject the privity requirement: Jurisdictions that, rejecting privity, hold that a lawyer may owe a duty of care to non-clients take a number of approaches. Some . . . apply a balancing-of-factors approach giving substantial weight to whether the situation is one in which it is reasonably foreseeable that a lawyer’s absence of due care will directly harm a third person . . . . Other jurisdictions . . . limit the duty of care for negligent lawyer conduct to situations in which the lawyer’s services are intended to influence or benefit specific third persons.
57. Most scholars agree that, in the context of the tripartite relationship, the question of whether an attorney-client relationship has been formed between the insurance defense attorney and the insured is clear: “The relationship between defense counsel and the insured is simply that of attorney and client, and the relationship imposes on defense counsel the same duty of unqualified loyalty as if personally retained by the insured.” Gilbreath, *supra* note 43, at 145.
The preeminent question in determining the extent of an insurance defense lawyer’s responsibilities and liabilities within the tripartite relationship is whether the lawyer has an operative attorney-client relationship with the insured, the insurer, or both. Who the lawyer represents has significant ethical ramifications. In fact, much of the tripartite debate centers on the number of clients an insurance defense attorney represents: “one (the insured) or two (the company and the insured).”58 This section will briefly discuss the rules of professional responsibility, including the rules governing the attorney-client privilege, which may clarify the ethical conflict of interest issues present in the tripartite relationship.59

The ABA’s Model Rules of Professional Conduct (“Model Rules”) offers little direction concerning the conduct of a lawyer who represents two clients. Simply stated, “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client,” unless the lawyer reasonably believes that the representation will not be adversely affected and that each client consents to such representation.60 Further, a lawyer may not represent a client if such representation is “materially limited” when the lawyer represents an additional party.61 In the insurance defense context, this instruction from the Model Rules allows the practitioner great discretion in determining whether the insured’s interest will be adversely affected. To avoid losing clientele, practitioners will most likely err on the side of the insurer, finding no material limitations in the representation. Such discretion combined with the inherent conflicts of interest leave the practitioner vulnerable to malpractice liability.

The Model Rules stress the importance of loyalty to one’s client. Such loyalty has arguably been a hallmark of successful lawyering in this country. For example, the Model Rules require a lawyer faced with a potential conflict of interest between clients to either decline representation or withdraw from the representation.62 However, “a possible conflict does not itself preclude the representation.”63

58. Silver & Syverud, supra note 1, at 273.
59. See infra Part III.B for a discussion regarding the relative weight judiciaries ought to give to conflict of interest issues that exist in the tripartite relationship.
60. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1)–(2) (2001).
61. Id.
62. See id. R. 1.7 cmts.1–2.
63. Id. R. 1.7 cmt. 4.
Indeed, “[t]he critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment . . . .” 64 If the lawyer is paid by a source other than the client, as in the case of the lawyer who is hired and paid by the insurance company, the Model Rules allow representation only if the client gives informed consent to such representation. 65 Client consent is usually not difficult to obtain because the client initially comes to the table seeking legal protection against future liability. If the client refuses to consent, the client’s only other option is to forgo liability insurance. Unfortunately, the Model Rules offer little further assistance in defining the ethical parameters of representation in the conflict-of-interest-ridden tripartite relationships.66

The Model Rules do, however, highlight the importance of the attorney-client relationship. The first critical question is whether the lawyer has established an attorney-client relationship with the insurer. If the insurer is not a client, the insurer will have more difficulty establishing privity with the attorney. An attorney-client relationship67 is created to “protect[] confidential communications concerning legal advice between attorney and client.”68 Since the late eighteenth century,69 legal scholars have assumed that “[j]ustice could best be served if clients [were] encouraged to fully confide in

64. Id.
65. See id. R. 1.7(b)(4).
The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.
(citations omitted).
68. JOHN WILLIAM GERGYACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.06 (3d ed. 2001).
69. Id. § 1.04.
their legal advisers. Assured confidentiality through the privilege is the source of that encouragement.70

Opponents of attorney liability to the insurer use the attorney-client privilege rationale to bolster their argument that because inherent potential conflicts of interest exist in the tripartite relationship (between the insured and the insurer), the insurance defense counsel should not be helplessly juxtaposed between two potential sources of liability without the ability to protect against it.72 Such advocates of protecting the sacredness of the attorney-client relationship would vigorously oppose the Langerman decision because, in general, Langerman allows a third party (insurer) to distract the attorney’s duty of loyalty to the client (insured).

The Restatement (Third) of the Law Governing Lawyers provides introductory guidance to insurance defense counsel, but fails to set forth clear rules to determine whether and in what contexts insurance defense counsel owes the insurer the same duty of care it owes the insured. For example, section 14 of the Restatement establishes:

A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .73

The Langerman court determined that “either intent or acquiescence may establish the relationship.”74 Comment c, however, states that the intent may be manifest by explicit “facts” and

70. Id. § 1.06.
71. The efficacy of the attorney-client privilege is not debated in this Note. Relatively little research has been performed to confirm whether the attorney-client privilege is effective in eliciting client confidence and communication. Id. “Nonetheless, it is worth noting the few empirical studies that have been undertaken. One focused on nonlawyer attitudes toward professional confidences. It found that approximately 50% of those surveyed said that their communications with counsel would be less candid without the privilege.” Id. In another study, corporate executives indicated that “trust and confidence in a particular attorney” was the most important factor in eliciting client communication other than the attorney-client privilege. Id.
72. For a more thorough analysis of this argument, see Morgan, supra note 2.
74. Langerman, 24 P.3d at 596.
“circumstances” such as a retainer agreement. Furthermore “[n]o written contract is required in order to establish the relationship;” however, “paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else.” Thus, in the context of the tripartite relationship, where a general retainer agreement between the attorney and the insured does not necessarily establish the insurer as a client, the Restatement is ambiguous as to whether a relationship exists between the attorney and the insurer. Yet it does state that, “due consideration should be given to the unreasonableness of a claimed expectation of entering into a co-client status when a significant and readily apparent conflict of interest exists between the co-clients.”

Once a lawyer-client relationship is established, a lawyer has a duty to “act in a manner reasonably calculated to advance a client’s lawful objectives,” to “avoid impermissible conflicting interests,” and to “fulfil [sic] any valid contractual obligation to the client.” Under the Restatement’s scheme, these duties are only present once an

75. Restatement (Third) of the Law Governing Lawyers § 14 cmt. c.
76. Id.
77. Id. An attorney-client relationship may arise when the client “reasonably relies on the lawyer to provide services, and the lawyer” reasonably knows or should know of the reliance. Id. at cmt. e, illus. 2. In the context of the tripartite relationship, an insurer may have reason to rely on the attorney to perform for the benefit of the insured, which often is for the benefit of the insurer as well. However, if the retainer agreement does not establish that the insurer is a client, the attorney may assume that she has a fiduciary relationship only to the insured. The assumption of the attorney in this scenario would be in accordance with the current majority rule in most jurisdictions. See infra Part III.C.2. Thus, the attorney may not reasonably know of the insurer’s reliance and, therefore, should not be held to have a duty of care to the insurer.
79. A draft of the Restatement explains the rationale behind a lawyer’s duty to a client:
[A] lawyer is a fiduciary, that is, a person to whom another person’s affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the fiduciary’s loyalty and care are therefore vital, are provided by law, and would presumably be provided by contract in any event by sophisticated persons in matters warranting the burdens of negotiation.

Restatement (Third) of the Law Governing Lawyers § 28 cmt. b (Tentative Draft No. 5, 1992). Both lawyers and insurance companies are attuned to the legal risks placed upon parties who assume liability. Both parties would probably be classified as “sophisticated persons” in the phraseology of the Restatement and, therefore, should be required to enter into a retainer agreement, detailing the intricacies of their relationship within the tripartite triangle. Retainer agreements are often vague.
attorney-client relationship is created.\textsuperscript{80} The \textit{Restatement} seems very hesitant to eliminate the rules that currently protect clients from disloyal counsel. For example, section 28 advises that a lawyer cannot act “beyond the scope” of the representation without client permission and construes an attorney’s power broadly so as to avoid any temptation for the lawyer to use his power to abuse the client. Interestingly, the \textit{Restatement}’s emphasis of the scope of the lawyer’s representation suggests that the scope of representation is useful in determining whether a relationship exists that would lead to a duty of care between the attorney and the insurance company. The \textit{Restatement} instructs, “A lawyer must exercise care in pursuit of the client’s lawful objectives in matters within the scope of the representation. The lawyer is not liable for failing to act beyond that scope.”\textsuperscript{81}

Another way to characterize the issue in \textit{Langerman} could be to analyze whether representing the insurance company was within the scope of the retainer agreement between Langerman and Paradigm. If the representation was within the scope of the agreement, then Langerman most likely had a duty of care to the insurance company; thus, his liability to the company would be justified. If the retainer agreement did not contemplate such an arrangement, then perhaps Langerman was incorrectly burdened with liability. At any rate, since “all jurisdictions permit clients to sue[,] . . . [i]t . . . makes sense to ask whether a company and an insured can qualify as clients before considering other theories that may entitle them to sue.”\textsuperscript{82}

The \textit{Langerman} court based part of its ruling on the fact that the insurance company, as a third-party payor, was a non-client. The \textit{Restatement} suggests that a lawyer may owe a duty of care to a non-client when the non-client relies on the fact that the lawyer offers legal services to the client, that are intended to benefit the non-client, and the lawyer knows of such reliance on the part of the non-client.\textsuperscript{83} However, a lawyer’s duty to a non-client only exists when “such a duty would not create inconsistent duties significantly

\textsuperscript{80} Restatement (Third) of the Law Governing Lawyers § 14 cmt. a (1998).
\textsuperscript{81} Restatement (Third) of the Law Governing Lawyers § 72 cmt. d (1997).
\textsuperscript{82} Charles Silver, \textit{Does Insurance Defense Counsel Represent the Company or the Insured?}, 72 Tex. L. Rev. 1583, 1592 (1994).
\textsuperscript{83} See Restatement (Third) of the Law Governing Lawyers § 73(2)–(3) (1994).
impairing the lawyer’s performance.” The Langerman court argued that the insurance company, as a non-client, had no recourse if Langerman had no duty of care to the company. Although it would be bad policy to allow an attorney’s negligence to injure a party that reasonably relied upon the attorney’s representation, it seems unfair to make the attorney liable to the insurer in cases where the retainer agreement between the lawyer and the insurer does not clearly define the lawyer’s duty. Without adequate procedural guidance governing an insurance defense attorney’s relationship with the insurer, the attorney could reasonably assume that his sole duty of care is to the insured.

Finally, but no less important than the other Restatement provisions detailing how an attorney-client relationship is formed, Restatement section 134 indicates:

A lawyer’s professional conduct on behalf of a client may be directed by someone other than the client if: (a) the direction does not interfere with the lawyer’s independence of professional judgment; (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and (c) the client consents to the direction . . . .

In the insurance defense context, insurance companies who hire and pay for insurance defense counsel walk a fine line between relinquishing too much control to the attorney, which often results in excessive attorney fees and harmful settlements, and seizing too much control from the attorney, which often impairs the attorney’s ability to represent the primary client—the insured. Professor Silver has suggested that “[w]hen thinking about the question ‘Who may sue the lawyer?’, it is important to keep firmly in mind that a person who claims the right to sue thereby claims either the authority to control how defense counsel acts or an entitlement to some sort of consideration or performance from defense counsel.”

84. Id. § 73(3).
86. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134(2)(a)–(c)(1998). The comments in RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (1998) provide similar language as § 134. Therefore, this Note will not duplicate that analysis.
87. Silver, supra note 82, at 1592.
Although the Restatement does not comment on the relationship between the insurer and the insured, this relationship is governed by the policy contract agreed upon at the inception of coverage. The downside of exclusive company control is that the company may exercise so much control over the lawyer that the lawyer feels an economic incentive to “lick the hand that feeds it.” Obviously, this is a great risk to insureds who may feel the loyalty of their attorney swayed by the payor of the attorney’s fees. The Restatement contemplates this adverse effect and prohibits third-party payors from exercising exclusive control over the attorney’s activities if the direction interferes with the attorney’s professional judgment. Ultimately, it is clear that the insurance defense attorney has an attorney-client relationship with the insured. The insurer, however, is not entitled to such a relationship “simply by the fact that it designates the lawyer, a client of the lawyer.”

89. See Morgan, supra note 2, at 24.
90. See Restatement (Third) of the Law Governing Lawyers § 134(2).
91. Restatement (Third) of the Law Governing Lawyers § 51 cmt. f.
malpractice if either (1) a lawyer-client relationship is created between the insurer and the attorney under Restatement section 14, or (2) the attorney owes a duty of care to a non-client under Restatement sections 51 and 72.

The insured arguably benefits by allowing the company to have exclusive control over the direction of the litigation and through the symbiotic relationship that exists between the insurer and the insured regarding their mutual need for defense counsel.

Why would a company want the right to defend and demand exclusive control of defense and settlement decisions? The reasons usually given for the right—the need to defeat unwarranted claims, the desire to minimize outlays on valid claims . . . and the need to prevent collusion between claimants and insured—emphasize the value the company derives from the right to defend. However, it is important to see that the insured also benefits from the rule of exclusive company control. The insured is protected by the company’s financial resources, expertise, and efficiency in dealing with claims, and by its risk-neutrality, bureaucratic structure, reputation, bargaining skill, and ability to select and monitor defense counsel, all of which enable the company to react to claims better than the insured. [Arguably], insureds understand these advantages and appreciate the value of the arrangement.

It is debatable whether insureds truly appreciate this arrangement as Professor Silver suggests. For the most part, insureds probably feel that, because they are coughing up their hard-earned cash—usually a large sacrifice—the insurer is obligated to provide quality liability

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92. Restatement (Third) of the Law Governing Lawyers § 134 cmt. f, indicates that if these two conditions exist and if “the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer.”

93. Restatement (Third) of the Law Governing Lawyers § 51 states, in pertinent part, the following:

A lawyer owes a duty to use care . . . to a nonclient when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient; (b) such a duty would not significantly impair the lawyer’s performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely. . . .

94. Silver, supra note 82, at 1595–96 (citations omitted).

95. Id.
protection. Nevertheless, from an objective standpoint, mutual benefits are conceivable.

Despite the mutual benefits of exclusive company control, under the Restatement approach (the approach relied on in Langerman), if an insurance company is a third-party payor, the insurance company gives up the right to claim liability for attorney malpractice when it exercises exclusive control over the litigation. Arguably, when such control is exercised and the professional judgment of the lawyer is compromised, a conflict of interest is created between the insurer and the insured, which conflict requires the attorney to give her utmost loyalty to the insured at the expense of the insurer. Furthermore, in cases of exclusive control, the company essentially destroys its relationship status with the attorney, thereby eliminating the attorney’s duty of care to the insurer.

The Restatement’s guidelines do not sufficiently answer Langerman’s real question: How is insurance defense counsel expected to know that it owes a duty of care to the insurance company when the case is one of first impression for the court and when the Model Rules of Professional Conduct and the Restatement are equally ambiguous? Nevertheless, assuming that the attorney-client relationships are clearly defined, the inherent conflicts of interest between the insurer and the insured make joint representation in the tripartite context unethical.96

B. Conflicts of Interest Between Insurer and Insured

As explained previously, disagreements do arise between insurers and insured, which often result in conflicts of interest between insurer and insured.97 Such conflicts of interest can be the source of malpractice liability for insurance defense lawyers.98 The Restatement prohibits a lawyer from representing a client where such

96. The ABA has argued that “[a]lthough defense lawyers must be sensitive to the economic interests of the insurance companies . . . and cognizant of the fact that costs of litigation ultimately are borne by insureds through premiums, they must not allow their professional judgment or the quality of their legal service to be compromised materially by the insurer.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 421, at 46 (2001).


representation would involve a conflict of interest.99 “A conflict of interest is involved if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected. . . .”100 The Restatement defines a “substantial risk” as a “significant and plausible [risk], even if it is not certain or even probable that [it] will occur. The standard requires more than a mere possibility of adverse effect.”101 An “effect” is “material” if it affects the obligations agreed to in the retainer agreement.102

Many potential conflicts of interest could emerge in the tripartite relationship.103 For example, if the insurer knows it will not be vicariously liable to the insured, it may attempt to undercut the pay or the quantity of the attorney’s hours necessary to provide proper representation.104 Conversely, “retained counsel . . . could manipulate the trial strategy to benefit one client [over] the other.”105 The defense attorney “may [also] become aware of information damaging to a client through confidential communication with the other client.”106 Such disagreements between insured and insurer may arise for four reasons:

1. the insured no longer bears the risk of paying the judgment or settlement;
2. the insurer, and not the insured, bears the cost of providing the defense;
3. the insurer has “an additional stake in the outcome beyond the amount paid”; or
4. each party attempts to take strategic advantage over the other to its ultimate benefit.107

100. Id.
101. Id. cmt. c(iii).
102. Id. cmt. c(ii).
103. See, e.g., Douglas R. Richmond, Emerging Conflicts of Interest in Insurance Defense Practice, 32 TORT & INS. L.J. 69, 70 (1996) (examining the following emerging conflicts of interest, all of which create dilemmas regarding the attorney’s duty of loyalty to the insurer: “issue” or “positional” conflicts, the representation of former clients, insurer insolvency, “flat fee” or “fixed fee” agreements between insurers and their regular counsel, and insurers’ use of outside counsel guidelines to manage litigation”).
104. See Rigby, supra note 89, at 671.
105. Mizuo, supra note 2, at 681.
106. Id.
107. Silver & Syverud, supra note 1, at 266–67. However, Professors Silver and Syverud acknowledge, “Unfortunately, it is defense counsel who often must sort out these disagreements between the company and the insured in particular lawsuits. Generally, the disagreements arise after counsel has been retained by the insurance company (usually without a formal written retainer agreement) to defend the case.” Id. at 267–68. They argue that if the parties placed more emphasis on creating a retainer that specifically defined the scope of the
Unfortunately, an end to such conflicts of interest is not in sight. “Although a general framework of rules and guidelines has developed over time to govern this [tripartite] relationship, there remains a paucity of specific practical guidelines for the proper handling of problems raised by conflicts of interest.”\textsuperscript{108} One author expressed the frustration in the lack of judicial guidance as follows:

Even were there such a [foolproof] compass, new or emerging conflicts pose difficult navigational problems. With limited precedent to provide direction in most new areas of conflicting interests, defense counsel are left to rely largely on the Model Rules and fact-specific decisions of varying worth in order to find their professional way. Bon voyage.\textsuperscript{109}

Such expressions of hopelessness are not encouraging to insurance defense lawyers.

In dealing with emerging conflicts of interest, the judicial majority agrees that the interests of the insured should be sustained over the interests of the insurer, whereas the minority of courts “generally accept[s] either the premise that counsel represents the insured exclusively upon being retained . . . or that . . . counsel primarily or exclusively serves the insured.”\textsuperscript{110} The next section discusses the theories regarding how these potential conflicts of interest should be mitigated.

C. Determining Who the Client Is—Insurer, Insured, or Both

With all the uncertainty regarding the procedural rules governing relationship between the insurer and the attorney and if the courts respected the retainer agreement and used it to identify liable parties, then the burden of deciphering legal ambiguities would be taken off the shoulders of the insurance defense counsel and onto the parties who form the initial agreements. Other conflicts of interest are also inherent in the tripartite relationship:

Potential conflicts are by no means limited to issues involving the attorney-client privilege. They can arise when the claimed damages exceed policy limits, thus exposing the insured to personal liability; when counsel represents multiple insureds whose own interests may diverge; when punitive damages, (insurable in several jurisdictions and specifically excluded in many policies) are claimed; when the proofs at trial could result in non-coverage, e.g. a finding that the insured was not acting “within the scope of employment,” and many other areas . . . .

\textsuperscript{108} Gilbreath, supra note 43, at 144.
\textsuperscript{109} Richmond, supra note 103, at 86.
\textsuperscript{110} Mizuo, supra note 2, at 682–83.
the tripartite relationship, it is not surprising that lawyers find such circumstances unnerving. Scholars on this issue agree that “[e]xperienced and thoughtful defense lawyers disagree on whether the company is a client. Some claim to represent only the insured. Some claim to represent the company for some purposes but not others, or they regard the company as an employer but not as a client.”111 But, rarely, because of frequent conflicts of interest, do insurance defense attorneys default to the assumption that they represent both the insurer and the insured in every instance. In a recent ethics opinion, the ABA admitted that “[t]he question whether the insurance company may be deemed a ‘client’ who can direct the scope and extent of the representation is unsettled . . . .”112 However, several theories contribute to the jurisdictionally diverse but vexing debate regarding tripartite relationships: the two-client theory, the one-client theory, and the third-party-payor (or one-and-a-half-client) theory.113

1. Two-client theory

The two-client theory is currently the majority view among courts in the United States.114 It advocates that both the insurer and the insured are clients of the insurance defense counsel. Thus, under the two-client approach the attorney owes a duty of care to both the insured and the insurer. The rationale behind this theory, as promoted mostly by the insurance industry in this country, is that both the insured and the insurer are beneficiaries of the company’s

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111. Silver, supra note 82, at 1603.
113. Jorgensen, supra note 98, at 98. The Langerman court seemed to use a combination of the third-party-payor approach and the two-client approach. It discussed both the reliance issue and the fact that the insurer was economically concerned, being the party to foot the costs of representation and settlement. See, e.g., Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 599–601 (Ariz. 2001). It also briefly acknowledges the existence of company control in the fiscal management of the litigation. Id. at 596.
exclusive control over the litigation. Further, the consent requirement makes managing the litigation more difficult. “The [insurance] industry argues that in the majority of cases that settle quickly and within policy limits, the insured does not need to know whether counsel was appointed, much less to consent to that appointment.” Although the Langerman court recognized the existence of potential conflicts of interest inherent in the tripartite relationship, it discounted the mere existence of a potential conflict where no actual conflict existed; thus, it found that the attorney was liable to the insurer—a result that would similarly be reached under the two-client analysis.

Apart from the tripartite context, the general law regarding joint clients is relatively clear on its face: “Clients may jointly retain (or one client may retain for the joint benefit of others) the services of an attorney as their common agent on a legal matter of common interest, and the attorney-client privilege will protect their confidential communications with that attorney.” Advocates of the two-client view discount the notion that conflicts of interest dominate the insurer/insured relationship and bolster the idea that “companies and insureds usually enjoy a substantial commonality of interests, even when their interests do not perfectly align.” Again, by holding that the attorney had a duty to the insurer only when conflicts of interest arose between insurer and insured, the Langerman court implicitly agreed with the notion that the interests of insured and insurers are usually in harmony with each other.

2. One-client theory

Although the two-client view is currently the majority rule, the judicial trend leads to “increasing the supremacy of the attorney’s obligation to the insured.” The rationale behind this movement

115. See supra Part III.A.
116. See Morgan, supra note 2, at 17.
117. Id.
118. Langerman, 24 P.3d at 597.
119. PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8:16 (2d ed. 1999).
120. Silver, supra note 82, at 1609.
121. Dacey, supra note 42, at 205; see also Jill B. Berkeley, Confidential Communications Among the Insured, the Insurer, and Defense Counsel, 26–SPG BRIEF 22, 26 (1997) (supporting the notion that a lawyer’s fiduciary duty of loyalty to the insured endorses the one-
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seems to be a greater emphasis on the integrity of the lawyer’s service to one client—the insured:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer’s personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client.122

The Michigan Supreme Court advanced the one-client view in Atlanta International Insurance Co. v. Bell,123 where the plurality found that an insurance company had not established an attorney-client relationship with the insurance defense counsel “even though the company hired the lawyer, paid the lawyer’s fee, and bore the brunt of the lawyer’s misconduct.”124

The Bell court chose the one-client theory based on the doctrine of equitable subrogation.125 Finding a happy medium in the application of this theory, the Bell court thought it too harsh to allow the insurer an attorney-client relationship with defense counsel because allowing such a relationship would dilute the attorney’s loyalty to the primary client—the insured.126 However, the Bell court also felt uneasy about barring the insurance company from any source of recourse for damages sustained.127 Rather than choosing one of these two extremes, the court, basing its holding on the theory of equitable subrogation, allowed the insurer to sue for malpractice only in circumstances where the insured was injured by the attorney’s negligence.128 By embracing the inviolability of an attorney’s absolute loyalty to her client, the Bell court strengthened the validity of the one-client theory. The language of the Restatement129 regarding the

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122. Jorgensen, supra note 98, at 95.
123. 475 N.W.2d 294 (Mich. 1991) (plurality opinion).
124. Silver, supra note 82, at 1584 (citing Bell, 475 N.W.2d at 297).
125. Bell, 475 N.W.2d at 298 (defining equitable subrogation as “the substitution of one person in the place of another with reference to the lawful claim or right”).
126. Id. at 298–99.
127. Id.
128. Id.
129. The draft of the Restatement (Third) of the Law Governing Lawyers was issued
number of an attorney’s clients illustrates the American Law Institute’s current favoritism of the one-client view.  

3. Third-party payor or one-and-a-half-client theory

The third-party-payor theory advocates that “the lawyer be deemed to represent both the insurer and the insured until something goes wrong, at which time the insurer would no longer be a client, at least in the usual sense.” The Langerman court also based its decision upon the third-party-payor theory, a theory premised on the assumption that, although undivided loyalty is required to the insured, the company is in the best position to manage and control the litigation and often relies on the attorney to protect its economic interests. If such litigation management can be done without compromising the loyalty an attorney owes to the insured, then the attorney can and should owe the insurer a duty of care. Under the third-party-payor theory, the insurer, although not necessarily considered as having established an express attorney-client relationship with the attorney, relies upon the attorney’s representation to the insured. The insurer is thus permitted to sue the attorney who acts negligently. Consistent with the doctrine of promissory estoppel, the predominant underlying premise of the third-party-payor approach is the concept of economic reliance on the part of the insurer. Because most insurance policy agreements give insurance companies the right to control the management of litigation, insurance companies have tremendous incentive to minimize costs. And indeed, some argue that the insurer’s direct financial concerns should justify its ability to

several months before the Michigan Supreme Court issued its opinion in Bell. See Silver, supra, note 82, at 1588. Moreover, the proposed language in the Restatement “may turn out to be the most influential endorsement of the one-client view.” Id. at 1589.

130. See id. at 1588–89. Certain headings in the Restatement, “Lawyer’s Obligation to Third Persons” and “Fee Payment by a Third Person,” “leave little doubt as to the ALI’s estimate of the number of clients defense counsel represents.” Id. at 1588.


133. The Restatement states that in some instances, “the lawyer’s duty arises from the principle of promissory estoppel, under which promises inducing reasonable reliance may be enforced to avoid injustice.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 illus. 2 (1998).
sue the insurance defense lawyer for malpractice. As the Langerman court indicated, insurance defense negligence can have an enormous economic impact on the insurance company while it may have little or no effect on the insured. Although insurance companies may believe this theory would allow them to sue for malpractice while still maintaining exclusive control over the litigation, the Restatement “imposes limitations on the control that a third person may exercise over the lawyer’s work.” The consequence of these limitations are that, under the third-party-payor view, insurance companies will not be able to enjoy the full range of benefits and rights of control they desire.

IV. SOLUTION—LOOK TO THE RETAINER AGREEMENT

The tripartite relationship makes all players in an insurance defense suit—insured, insurer, and insurance defense attorney alike—vulnerable to uncertainty and possible injury. To mitigate potential damage to the insurance company, most insurance policies provide for some degree of company control over potential claims against the insured. Nevertheless, even after companies have taken proactive steps to protect themselves, insurance companies still find themselves vulnerable to economic injury.

Although some courts, like Bell, apply the doctrine of equitable subrogation and allow the company to become an injured party only when the insured has been injured by the attorney’s negligence, questions still arise when the insured is not injured by attorney negligence. The Langerman court held that the attorney is liable because the insurer is, as a third-party payor, in a position of economic reliance and will be offered no other avenues of redress. Although the Langerman holding may have been an equitable result for the insurer in this particular case, it still generally leaves the insurance defense attorney in the dark regarding the attorney’s question of “to whom do I owe a duty of care?” It seems clear that the uniqueness of the tripartite relationship, currently governed under the laws of professional responsibility, provides no adequate solution to protect all parties simultaneously.

134. See Quinn, supra note 53, at 182.
137. Langerman, 24 P.3d at 600.
Because neither the one-client, two-client, or third-party-payor views are inherently flawed per se, the parties ought to be able to create whatever type of arrangement they desire.138 However, in order to fill the ambiguous gaps within the tripartite relationship, courts should adopt a rule allowing the retainer agreement, formed between the insurer and the attorney, to become the operative document in judicial interpretation of the tripartite relationship.139 The retainer agreement is usually created without a formal written document.140 This proposed “retainer rule” would not require a complete overhaul of the insurance defense system as it exists today, but it would encourage insurers and attorneys to form express retainer agreements that actually explain the intended relationship.

As stated earlier in this Note, there are benefits to the insurance company controlling the scope of liability claims against the insured.141 Whereas the policy agreement or “liability contract” dictates the scope of the insurer’s indemnification of insured’s liability,142 the retainer agreement defines the scope of the relationship between the insurer and the attorney.143 In emphasizing the perilousness of absolute adherence to either the one-client or two-client approaches, Professors Silver and Syverud contend:

[D]efense counsel has as many clients as the participants decide counsel should represent. Defense counsel has one client if and when the retainer agreement provides that counsel shall represent only the insured; defense counsel has two clients if and when the retainer agreement requires counsel to represent the company as well. Because attorney-client relationships arise consensually,

138. See Silver & Syverud, supra note 1, at 274.
139. Of course, such a rule would require the retainer agreement to be an express agreement. Currently the Restatement (Third) of the Law Governing Lawyers § 14 only requires a manifestation of consent. Although it is contrary to the rule this Note proposes, the Langerman court held that an attorney-client relationship did not require an express agreement. 24 P.3d at 595.
140. Silver & Syverud, supra note 1, at 267–68.
141. See Silver, supra note 82, at 1592, 1595–96. The company benefits from its right and its duty to defend the insured. “[I]t is important to keep firmly in mind that a person who claims the right to sue thereby claims either the authority to control how defense counsel acts or an entitlement to some sort of consideration or performance from defense counsel.” Id. at 1592.
142. Silver & Syverud, supra note 1, at 269.
143. See id. at 270.
whether defense counsel has one client or two depends upon the agreement that counsel enters into when retained.\footnote{144 See id. at 274.}

The retainer theory is premised on the notion that both the insurer-attorney relationship and the attorney-client relationship are consensual in nature. Both the attorney-client relationship and the law of agency rely upon the formation of agreements.\footnote{145 See id. at 275.} Thus, locking the parties into one arrangement theory when they may want to form another is unreasonable. Because only a party who has established an attorney-client relationship can sue the attorney for malpractice, allowing the insurer and the attorney to establish the privity relationship formally in the retainer agreement gives both parties the right to sue. “[T]he retainer agreement determines whether the attorney represents the company and for what purposes. The retainer may require the attorney to represent the company and the insured, the company alone, or only the insured. Or, it may create a hybrid of these alternatives.”\footnote{146 Silver, supra note 82, at 1604.} Because the duties of the insurance defense attorney are capable of being consensually altered by agreement, “the retainer agreement is of overwhelming importance in deciding what defense counsel’s responsibilities are to be.”\footnote{147 Silver & Syverud, supra note 1, at 270–71.} Finally, although the retainer agreement is useful to the insurer and insured, it also provides insurance defense attorneys with a direct source from which to determine the scope of their duties to the insurer.\footnote{148 See id. at 272–73.} Once the insurer and the insurance defense attorney create a retainer agreement, “judges should respect their decision.”\footnote{149 Id. at 279.} Clearly, all parties involved in the tripartite relationship, including judges who are forced to interpret the scope of the unique relationships within this insurance triangle, would benefit by the retainer rule.

A common criticism of the retainer rule is that “the tripartite relationship is really no different from any other multi-client representation in which the clients agree to allocate among themselves the responsibilities of managing the litigation and decision making.”\footnote{150 Katherine E. Giddings & J. Stephen Zielezinski, Insurance Defense in the Twenty-First Century: The Florida Bar’s Proposed Statement of Insured Client’s Rights—A Unique} Even though these critics acknowledge that an
attorney in such a multi-client relationship must “be cognizant of the potential for ethical risks,” they fail to appreciate the extent of the ethical risks uniquely inherent in the tripartite relationship. As discussed previously in this Note, it cannot be assumed that the insurer will always allow the insurance defense attorney to act in the insured’s best interest.

Professor Stephen Pepper alleges that another weakness of the retainer agreement theory is that, because “there are obvious potential conflicts of interest between the [insurer and the insured] at the inception of the relationship,” it may be difficult, if not impossible to obtain the informed consent from both parties, especially the insured. However, juxtaposing the three alternative relationships between the insurer and the attorney (the one-client, two-client, or third-party-payor models) and the potential responses the insured may have to each of these relationships shows that informed consent should not be difficult to obtain from the insured.

The three different relationships can be analogized to different products offered on the insurance market to customers desiring various levels of protection. When the retainer agreement expressly adopts the one-client model, the insured is provided with the highest level of liability protection. The insured knows and has complete confidence that the attorney’s duty is solely to protect its (the insured’s) interests. In the event that the retainer agreement expressly adopts the two-client model, the insured is aware that, although the attorney is representing its interest in the litigation, it also has a duty to the insurer who is financially responsible for providing the liability coverage for the insured. If the retainer agreement expressly adopts the third-party-payor model, the insured knows that, although the attorney’s sole duty is to represent its interests, the attorney may also be liable to the insurer if the insurer detrimentally relies on the attorney’s representations and is economically damaged as a result. An informed insured will understand that even in the third-party-payor

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151. Id. at 858, 861.
152. Giddings and Zielczinski incorrectly suggest that “settled law” has already resolved the legal dilemmas regarding the tripartite relationship in the insurance defense context. See id. at 856–60.
153. See supra Part III.B.
154. Pepper, supra note 97, at 29.
155. See Silver & Syverud, supra note 1, at 262–63.
model, the attorney will feel pressure to adhere to the directions of the insurer, but perhaps not to the same degree as it would under the two-client model.

Currently, the procedural standards established by the courts, including the Langerman court, seek to impose upon customers of liability insurance one of these three models as the governing regime in all circumstances. Under the retainer agreement standard, however, insurance liability customers are free to “shop the market” for their desired level of liability protection. Indeed, as is the case “in all other contexts,” including the health insurance context, insurance customers can choose between a plethora of levels of liability protection. The greater the protection, the more the product will cost to the consumer. Nevertheless, consumers (insureds) have the final choice regarding the level of liability protection they purchase; insureds will most likely give their informed consent to the insurance policy (with the corresponding duties) they purchase. Under the retainer agreement standard, all parties in the tripartite relationship will clearly know and understand their respective rights and duties. Ultimately, informed consent should not be a formidable barrier to implementation of the retainer rule.

V. CONCLUSION

It is difficult to predict whether the Arizona Supreme Court’s decision in Langerman would have been altered had the court examined the retainer agreement between Paradigm and the Langerman Law Offices. Because of the procedural posture of Langerman, the Arizona Supreme Court viewed the facts in the light most favorable to Paradigm and assumed that malpractice by Langerman actually occurred and that such malpractice had injured Paradigm. Thus, by failing to even mention the existence of a retainer agreement between Langerman and Paradigm, the facts are insufficient to determine whether the Arizona Supreme Court’s decision would have been any different from its outcome had the retainer agreement been relied upon. However, although the retainer

156. Id.
157. The trial court judge that heard Langerman granted summary judgment in favor of Langerman. 24 P.3d 593, 600 (Ariz. 2001). Therefore, the Arizona Supreme Court, hearing the case on appeal, took the facts in the light most favorable to Paradigm. See id. at 594.
158. Id.
rule may not have changed the eventual outcome, the court’s use of the retainer rule in its analysis would have established concrete procedural standards for future cases. Essentially, the three main issues examined by the Langerman court—(1) whether an express agreement is necessary to form an attorney-client relationship, (2) whether there are potential conflicts of interest if the insurer is a second client, and (3) whether the lawyer has a duty to a non-client—would have been non-issues because the retainer agreement would most likely have resolved each issue.

Laws of professional responsibility govern conduct between lawyer and client, which, depending on the scope of the retainer agreement, can be the insured, the insurer, or both. The retainer rule requires that contract law, in addition to the rules of professional responsibility, influence the resolution of conflicts that frequently arise in the tripartite relationship. Neither the laws of professional responsibility nor the laws of contracts should operate independently, rather, in this unique tripartite realm of insurance defense litigation, both are needed to offer all parties, including the oft unaided defense attorney, proper procedural guidance. Such guidance, for the lawyer, is critical to avoiding malpractice liability and maintaining high ethical standards of representation. With the issue in Langerman being one of first impression in Arizona, the court failed to clarify the procedural standards governing whether an attorney is liable to an insurer for negligence. The Langerman court, on a fact-specific basis, determined that the attorney was liable, but it failed to give adequate direction for insurance defense lawyers who seek to avoid such pitfalls in the future.

Without procedural clarification, insurance defense lawyers will continue to traverse the obscurity of the tripartite relationship—directionless. Utilizing the retainer agreement to define the duties of insurance defense counsel will minimize unwarranted risk in the unnecessarily risky business of lawyering in the tripartite relationship.

Nathan Andersen

160. See Silver, supra note 82, at 1627 (“It is important . . . to be open to the suggestion that occasionally the law of professional responsibility should give way.”).