ethics perspectives

by John Travis

[redacted]partite Relationship

A lawyer defending a policyholder represents the interests of both the policyholder and the insurer. *Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App. 2d 65, 1971 Ohio App. LEXIS 386. The relationship between the insurance company, the policyholder and the defense lawyer is sometimes referred to as a "tripartite relationship." *United States Fidelity & Guaranty Co. v. Pietrykowski*, Erie App. No. E99-38, 2000 Ohio App. LEXIS 460.

Representing two clients, however, can raise questions about the loyalty of the lawyer. Indeed, almost 2,000 years ago a writer observed: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one and despise the other." Matthew 6:24.

In keeping with that observation, Canon 5 of the Code of Professional Responsibility mandates that a lawyer should exercise independent professional judgment on behalf of a client. Moreover, EC 5-18 lists typical circumstances where differing interests may exist, including cases where a lawyer is asked to represent a policyholder and his or her insurer. (Although Ohio lawyers currently are subject to the Code of Professional Responsibility, a task force appointed by Chief Justice Thomas J. Moyer has recommended replacing that Code with some form of the Model Rules of Professional Conduct; no replacement is likely until at least 2005.)

This article will summarize a 1974 concurring opinion of Chief Justice William O'Neill in which he suggests an ethical solution to potential conflicts facing a lawyer; discuss a later concurring opinion of Chief Justice Frank Celebrezze on that topic; canvass relevant lower court cases; and conclude by noting the ethical obligations of a lawyer in a tripartite relationship.

Chief Justice O'Neills' Concurring Opinion in Pildner

Thirty years ago, the Supreme Court in *State Farm Fire & Cas. Co. v. Pildner* (1974), 40 Ohio St.2d 101, *rev'd. sub nom. Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, considered a case in which State Farm's policyholder fired a rifle and injured another. The policyholder was convicted of shooting with intent to wound and imprisoned for that offense. When sued in negligence by the victim of the shooting, the policyholder tendered the case to State Farm. The high court held State Farm had a duty to defend the policyholder. This curious holding was later reversed in *Preferred Risk Ins. Co. v. Gill*, supra, but Pildner continues to be cited, not for the majority opinion, but for the concurring opinion of Chief Justice William O'Neill, who focused on the ethical obligations of the lawyer under Canon 5.

O'Neill asserted there was an "undeniable conflict" between the insurer and the policyholder because the insurer was alleging there was no coverage because of the intentional conduct of the policyholder, but the policyholder desired to show that his liability was based on negligent conduct covered by the policy. The Chief Justice opined:

> *Under these facts, I believe that DR 5-105, which is mandatory, dictates that the insurance company not be allowed to select counsel to defend the insured. The adversity between the insurance company, and the insured, coupled with the pressure which the insurance company could exert on counsel selected by it, simply presents too great a possibility that counsel's loyalty to the insured will be diluted.*

The Supreme Court has not in any majority opinion revisited the view expressed by O'Neill. Another Chief Justice, however, and several lower courts, have addressed the ethical issues which can arise in a tripartite relationship.

Chief Justice Frank Celebrezze's Concurring Opinion

In *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78, the Supreme Court held that a homeowner's insurer had to defend its policyholder, who had an altercation with his landlord, in part because the policyholder alleged he had acted in self defense. In his concurring opinion Chief Justice Frank Celebrezze said on remand "the parties in this appeal should, in my opinion, also consider . . . Chief Justice O'Neill's concurrence in *State Farm Fire & Cas. Co. v. Pildner*. . . " Id. at 83.

Lower Court Cases Citing Pildner

The plaintiff in *Belcher v. Dooley*, Montgomery App. No. 10444, 1988 Ohio App. LEXIS 508, sued Dooley alleging a malicious and negligent assault. The Second District Court of Appeals, citing Canon 5 as well as the concurring opinion in *Pildner*, held:

> *As indicated in the Pildner opinion, the proper course of conduct for the insurance company was to inform Dooley to obtain his own counsel at the expense of the insurance company. Such a procedure would insure that counsel's interests and the clients would be identical and remove any conflict of interests that would exist between counsel and his client.*

Other appellate courts have recognized Pildner without following it. For example, the Third Appellate District Court of Appeals in *Westfield Ins. Co. v. Grange Mut. Cas. Co.*, Wyandot App. No. 16-85-7, 1986 Ohio App. LEXIS 9117, adjudicated a declaratory judgment between Westfield and Grange. That court concluded that Grange owed the policyholder a defense, and stated the following in a footnote:

As to any possible conflicts of interest which may exist between the position Grange must assert at trial on behalf of Dean and that which Grange may wish to assert at a later date as to the issue of coverage, we invite attention to Chief Justice O'Neill's concurring opinion in ***State Farm v. Pildner*** *(1974), 40 Ohio St.2d 101, 105, and the concurring opinion of Chief Justice Celebrezze in* ***Preferred Mut. Ins. Co. v. Thompson*** *(1986), 23 Ohio St.3d 78, 83.*

In *Pasco v. State Auto Mut. Ins. Co.*, Franklin App. No. 99AP-430, 1999 Ohio App. LEXIS 6492, the policyholder, citing *Belcher*, argued prejudice to him should be presumed because there is an inherent conflict of interest whenever an insurance company fails to provide coverage for all claims but nonetheless assigns defense counsel. Without accepting or rejecting *Belcher/Pildner*, the Tenth District Court of Appeals held that there was no actual adversity.

Similarly, in *Henke v. Badowki*, Montgomery App. No. CA 10223, 1987 Ohio App. LEXIS 8292, the Second District Court of Appeals acknowledged O'Neill's approach in *Pildner*, but held that separate and independent counsel was unnecessary merely because punitive damages were sought. The defense attorney "represented parallel interests" of the insurer and the policyholder in vigorously defending the case. The court said to conclude otherwise would, in effect, require independent counsel whenever punitive damages are sought, and the court found "no justification for this position under the circumstances of this case."

Finally, in *Glavac v. Guarantee Mut. Ins. Co.*, Cuyahoga App. No. 36575, 1977 Ohio App. LEXIS 8358, the insurer defended its policyholder on an assault claim at an arbitration while reserving its right to disclaim coverage based on the intentional conduct of the policyholder. Following an arbitration award against the policyholder, the insurer instructed its counsel to file an appeal *de novo* but then instructed counsel to withdraw from the case. The insurer thereafter declined to defend the policyholder. The Eighth District Court of Appeals reversed a summary judgment in favor of the insurer, finding a genuine issue of material fact as to whether the insurer willfully and wrongfully failed to defend the policyholder. The court cited *Pildner* in footnote 2 and said, "Interwoven in this disposition of this case is the question of conflict of interest."

The concurring opinion of Chief Justice O'Neill in *Pildner*, later embraced by Chief Justice Celebrezze, has not been adopted by a majority of the Supreme Court. Moreover, with the exception of the Second Appellate District, the lower courts have chosen not to follow it.

Where coverage issues exist, the insurer will decide whether to assign defense counsel to the policyholder. Clearly, however, the lawyer who enters into a tripartite relationship has an independent duty to ensure compliance with Canon 5.

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