

June 1959

The Relation of Trial Counsel to the Public

John Alan Appleman

International Academy of Trial Lawyers

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Insurance Law Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

John A. Appleman, *The Relation of Trial Counsel to the Public*, 61 W. Va. L. Rev. (1959).

Available at: <https://researchrepository.wvu.edu/wvlr/vol61/iss4/4>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

THE RELATION OF TRIAL COUNSEL TO THE PUBLIC

JOHN ALAN APPLEMAN*

I HAVE often felt a tug of sympathy for the poor layman who becomes involved in a legal controversy. As a rule, his sole contacts with attorneys are social, if indeed he has any contact with them at all—and a sparkling social personality is not necessarily correlated with great legal abilities. In addition, the lawyer who has examined his abstract seldom would be the man to defend his interests in court.

The individual who falls ill can look in the classified section of the telephone directory under the heading of “physicians” and get a pretty fair idea of the fields of competence of those particular individuals. But, when one requiring the services of a lawyer looks under the heading “attorneys”, he encounters no assistance whatever. Whether he needs assistance upon a copyright, a tax matter, the drafting of a will, or the trial of a personal injury case he encounters only a mass of names and no information whatever concerning the competence of these individuals.

It is true that about half of the actively practicing attorneys are sufficiently cognizant of their own shortcomings that they will call in a specialist to assist them in a field where they find themselves deficient. The other half—no; they prefer to struggle along and make their mistakes at the expense of the client, who is rarely even aware of the fact that a mistake has been made. Time and again I have seen tens of thousands of dollars lost to clients through bungling estate planning, inadequate handling of relationships between a corporation and its key stockholder, or other legal situations. A few good malpractice suits with resounding verdicts might help greatly to increase the ethical standards of such lawyers.

When it comes to personal injury cases, the shortcomings of attorneys appear in even sharper light. An attorney who would immediately call in a tax expert or patent lawyer in a specialized situation deems himself sufficiently competent to appraise the value of a case and to attempt its negotiation, with the idea of calling in a trial specialist only if it appears that he cannot settle the case. Again

*A.B., M.A., J.D., University of Illinois; member of the bars of Illinois, Massachusetts, District of Columbia, Kentucky, Supreme Court. Dean, International Academy of Trial Lawyers; past president, Federation of Insurance Counsel; life member, American and Illinois State Bar Associations. Author, *Successful Jury Trials*, *Insurance Law and Practice*, *Approved Appellate Briefs*, and other works.

because of his ineptness in appraising the case and evaluating its manifold possibilities, cases worth \$6,000 are settled for \$1,500; \$25,000 cases are settled for perhaps \$10,000. The more ethical attorney whose prime work is in general practice has a higher regard for the interests of his clients. He tends to call in the trial specialist immediately and the client fares much better.

In many situations, I have found it necessary to extricate attorneys from predicaments where they had permitted the statute of limitations to run, or had given an inadequate notice to a city, or whose pleadings failed to state "a" proper or "the" proper basis for a judicial remedy. Occasionally such counsel is sought only after a case has been tried and lost, in seeking a reversal upon appeal where a record has been inadequately preserved. There is much to be said for the English system of limiting the handling of litigation to barristers. At least, in these times, when there is already criticism of the handling of matters in court, it seems that a greater responsibility should be placed upon the bar to find some method of informing the lay public of those persons of ethical standards properly qualified to handle their contested matters. This could also, it might be pointed out, help greatly to reduce the incidence of ambulance chasing, since the layman so approached could easily check the telephone directory to see if those persons had received the required rating. And, since the really competent trial men do not have to chase ambulances, and the rating in question would not be conferred upon an unethical practitioner, ambulance chasing could quickly be halted.

What are some methods by which such ratings could be conferred? In the first place, the state legislature could provide by statute that no attorney should be permitted to handle a damage case in a court of record involving a net damage in excess of \$1,500 unless qualified, under standards to be set up by the supreme court, as a trial counsel. Such standards could be set up somewhat as follows: (1) that such attorney have not less than five years of active practice at the bar; (2) that he be qualified under a point system upon the basis of investigative experience, research experience, and participation as a junior in the conduct of trials; (3) that he be approved by the vote of three-fourths of the judges before whom he has handled cases as possessing marked trial ability, good demeanor, and high ethical standards; (4) that he pass a written examination upon the substantive law of negligence and the pro-

cedural aspects of trials; (5) that he be found upon investigation to be of high moral character and to have been in no way involved in the solicitation of cases or other unethical practices.

Under those circumstances, the man could then receive the designation of "trial counsel" or other title, with such standards and title being established upon a national basis. A provision could be made for waiver of the written examination as to those attorneys who possess all of the above qualifications, who have practiced actively for more than ten years with "av" ratings who obviously meet the other standards. Unless they are so qualified by rating and otherwise, then they should be required to take the examination and be investigated to avoid having active shysters admitted into that group.

This would correspond closely to the standards set up for physicians who desire to be recognized as board members. There is no reason why such standards cannot also be set up in the law. To this point, any such proposals presented to the American Bar Association have met uniform resistance from those general practitioners who are afraid that they will lose a few fees. But while they are worrying about their fees, the entire bar is losing the respect of laymen. Only if we maintain high standards of practice in the courts can the status of lawyers be improved. For it is by public actions and conduct that lawyers are judged, and we should be certain that those who represent the maimed and the injured, or who defend against claims, maintain those high standards which we believe are necessary for the protection of the public.

It is not only in the representation of injured persons that these problems arise. Perhaps even more problems are generated where defense matters come under consideration. Few defense attorneys stop to realize the conflict in interest which may arise while acting in a dual capacity. Let us examine these problems more closely.

Many of the ethical problems which are presented in connection with liability insurance are encountered where recoveries by plaintiffs are in excess of the applicable policy limits. Usually, but not always, this means that the policy limits are relatively small—perhaps \$10,000/\$20,000 or \$25,000/\$50,000.

The insurance company, of course, being in the business, plays the law of averages. The policyholder who is in court perhaps for the only time in his life cannot afford to concern himself with "aver-

ages". There is no averaging so far as he is concerned—this is *his* lawsuit. It may be the only time he will ever be in court and he is definitely concerned about what his risk of personal loss may be. He cannot afford to gamble, even if the company can. If his policy limits were high, then he could relax—but usually the company would then be quick to settle to avoid the risk of greater loss. This being true, the use of "averages" would tend to indicate that the insurer is, to some extent, willing to permit the risk of loss to fall upon the insured.

In such an instance the insurance company may argue that the insured saw fit to run this risk by electing to carry a small policy—that no question would have arisen had he paid a few more dollars of premium and carried adequate insurance. To some extent that is true. However, more frequently, we find that the agent of the insurance company wrote the insurance and selected the amount in which it was written. Rarely does the insured ask any questions because he doesn't know enough about it to appreciate the risk or to make a deliberate choice as to the amount of insurance to be carried. Had the agent told him that for \$4 more he could double the protection he would receive, few would hesitate. A different practical and a different legal circumstance is presented than that which is found in the ordinary situation. If the company writes business knowing that the great majority of the policies are in low limit amounts, it should realize that questions are bound to arise from time to time of a dual interest—circumstances presenting a definite conflict between its interests and those of the policy-holder.

To illustrate the inadequacy of coverage, probably half of my readers have policies which, for property damage liability, are limited to \$10,000 in amount. Look at your policies when you have a chance. Yet I have seen case after case where somebody strikes or sideswipes a gasoline truck so as to cause it to overturn, with the burning gasoline destroying the tank truck and setting fire to other property with a combined loss of from \$50,000 to \$100,000. One large tractor manufacturer now requires all of its employees to carry property damage liability in an amount of not less than \$100,000. The average individual does not even think of property damage as exposing him to any great hazard, and the limits which would ordinarily be written by an agent are certainly not adequate. And the hazards of substantial verdicts are even greater where personal injuries are involved.

There is no excuse for an attorney carrying a low limit policy, because he knows or should know better. However, for the layman who is not acquainted with litigation or with the importance of checking up upon his agent's judgment, these questions of excess coverages are going to continue to arise until such time as companies either take the limits off policies or insist upon writing them in an adequate amount for an adequate premium.

Wherever there is the possibility of an excess judgment, or of an exposed but unprotected hazard, ethical problems are created upon the part of the attorney who represents the insured of the insurance company. Any attorney who accepts such employment must be very careful in his handling of the case throughout. He must first ask himself: "Whom do I represent? Do I represent the policyholder or do I represent the insurance company? If I represent both, at what point must I stop carrying water on both shoulders?"¹

It is clear that if a plaintiff's attorney failed to communicate an offer of settlement to his client, and lost his lawsuit, not only would he be guilty of a breach of ethics but he could be faced with a possible malpractice action. What, then, of the situation where he is the defendant with a possible excess exposure, and an offer of settlement is made to the attorney employed by the insurance company, which offer is within the policy limits? The insurance company insists that it has the sole and exclusive right to control the litigation, but if the insured knew about such offer he might insist that the insurance company accept it, or take steps to negotiate for a settlement as to his excess exposure.

The statement of principles with respect to the practice of law formulated by representatives of the American Bar Association and various insurance companies, including the American Mutual Alliance, Association of Casualty and Surety Companies, International Claim Association, National Association of Independent Insurers, and others, expressly provides:

"4(b). The companies and their representatives, including attorneys, will inform the policyholder of the progress of any suit against the policyholder and its probable results. If any diversity of interest shall appear between the policyholder and the company, the policyholder shall be fully advised of the situation and invited to retain his own counsel. Without limiting

¹ See discussion in *Federation of Insurance Counsel Quarterly* for January, 1954, which deals with the ethical relationships and problems presented.

the general application of the foregoing, it is contemplated that this will be done in any case in which it appears probable that an amount in excess of the limit of the policy is involved, or in any case in which the company is defending under a reservation of rights, or in any case in which the prosecution of a counterclaim appears advantageous to the policyholder."

These are not meant to be hollow phrases. The mere sending of a formal notice to the policyholder is not sufficient, when he is informed privately by the attorney or the adjuster that "there is no real cause for concern." It means acting in the representation of the insured in the highest good faith, and nothing less can be acceptable under the standard of ethics imposed upon attorneys. They must keep the insured informed of the progress of the suit, the probable results thereof, and offers which are made, whether they are below or in excess of the policy limits, and the action of the company thereon. If the attorney feels that the insured will suffer personal loss as a result of a course of conduct which he, as an attorney, is pursuing, full and complete information must be given.

The most recent case which gives an adequate discussion of this subject is *Allstate Insurance Co. v. Keller*.² In that case, because of misstatements made by the insured, the court indicated that it felt that the insurance company probably had a complete policy defense. However, after the insured had changed his story to the insurance company, the company had its attorneys file their appearance for him in court. Subsequently they took a detailed deposition of the insured in which he related the facts relating to the accident and again reiterated the story he had last given the company. At the time of taking such deposition, the attorneys anticipated the filing of a suit for declaratory judgment but did not inform the insured of that fact. The court, after reviewing the facts which related to the conflict of interest stated:

"It is the law of this State that an attorney is required to disclose to his client all facts and circumstances within his knowledge, which, in his honest judgment, might be likely to affect the performance of his duty for that client. *Catherwood v. Morris*, 360 Ill. 473, 481 (1935). A client may presume from an attorney's failure to disclose matters material to his employment that the attorney has no interest which will interfere with his devotion to the cause confided in him, or betray his judgment. *Hunter v. Troup*, 315 Ill. 293, 302 (1925). As

² 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958).

a New York court has succinctly pointed out, an insured's attorneys are bound by the same high standards which govern all attorneys, whether or not privately retained. . . . Where an insurer's attorney has reason to believe that the discharge of his duties to his client, the insured, will conflict with his duties to his employer, the insurer, it becomes incumbent upon him to terminate his relationship with the client. *Reynolds v. Maramorosch*, 208 Misc. 626, 144 N.Y.S.2d 900 (1955); *Helm v. Inter Insurance Exchange*, 354 Mo. 935, 192 S.W.2d 417 (1946); *Hammett v. McIntyre*, 114 Cal. App. 2d 148, 249 P.2d 885 (1952). It was the duty of plaintiff's attorneys upon learning of the possible conflict of interests between plaintiff and defendant, to immediately notify defendant of this fact."³

And I think all of us who are familiar with trial practice and conscious of the ethical duties owing to clients would agree that such was a reasonable and proper result in that case. It is clear that neither the attorney nor the insurance company can be permitted to occupy a position where divided loyalties exist—at least not without a full disclosure to the insured so that he may protect himself fully. We will return to this presently. But, first let us look to the situation of excess judgments in general and try to classify some of the factors which bring them into being and which may expose the insurance company, by reason of the actions of its counsel, to a liability over and above its policy limits.

First, there is always a possibility that the verdict in a personal injury suit was the result of fraud or perjury. In that event, there is ordinarily a remedy. By careful investigation, fraud can be uncovered and a new trial can normally be secured. At least, the insurer could not be charged with the duty, nor could its counsel, to anticipate fraud or perjury.

Second, there is the possibility that the judgment rendered seems excessive, from the point of view of foresight, because of sympathy for injuries of the plaintiff. Ordinarily, such sympathy should have been anticipated when both sides are aware of the nature and extent of the injuries. There is no excuse, under modern discovery procedures, of ignorance in that regard. When the injuries are known, and the normal reactions of jurors in that area can be anticipated, it would scarcely seem a proper excuse by the insurance company or its counsel to say: "Of this we could not be aware."

³ At 52-53, 149 N.E.2d at 486.

Third, it may be argued that the excess verdict was the result of evidence which was not known to the insurance company. Again, under modern discovery techniques and with the investigative procedures and facilities available to a professional defender of lawsuits, this would not seem an argument which could be utilized very often. If the company is taken by surprise by evidence of which it could have known, such an excuse would be unavailing.

Fourth, it is possible that the excess judgment resulted from poor trial work. In such case, of course, that would afford no excuse to the company because the trial lawyer is its servant, selected by the company and paid by it. However, even though the average employer may have recourse against his servant for a payment required arising from the servant's neglect, it is doubtful that recourse could be secured by the company against its trial attorney, unless his conduct was so flagrant as to shock the conscience of ordinary men. Usually the company is aware of the degree of experience and skill possessed by the attorney at the time it engages his services—and it can expect no greater degree of skill than he is known to possess.

In order not to leave the last situation completely beclouded, let us illustrate. If, for example, by the browbeating of witnesses or arguing with opposing counsel, an attorney antagonizes a jury, that is a matter of technique upon which the opinion and procedures of attorneys may well vary, just as different physicians may have varying techniques for the treatment of migraine headaches. However, if the attorney comes to court intoxicated, such could fall into the category of personal liability.

Even as the attorney is entitled to employ his discretion in the defense of a case, so may the insurance company. One of the most critical situations which can arise is where the decision is made to admit liability and contest only the matter of damages. In many instances, the denial of liability and a contest upon the subject may serve to inflame the jury, particularly where the circumstances of the occurrence were quite aggravated. An admission of liability in such a situation may be an excellent strategic maneuver. But on a second suit, if the insured comes into court and says "they had no right to admit liability. If they had not, we might have defeated the claim," a real problem arises. The insurance company, in that situation, using excellent local counsel as a rule, has a right to make such a decision. Certainly it is not going to fritter away its

own funds, if it can possibly do otherwise. But, for its own protection, it should encourage the insured to have personal counsel and go over the proposed procedure carefully with such counsel and secure his assent thereto.

Fifth, rather than negligence in the trial, there may be tactical errors which may expose the company, if not counsel, to criticism or loss. One might be in the selection of local counsel of insufficient skill or experience, in an effort to avoid the higher rates of skilled trial counsel. This has become particularly critical in recent years, where insurance companies attempt to secure trial counsel for \$15 an hour, let us say, when the same attorneys may be averaging \$50 an hour from other business. The company may refuse to engage local counsel at the place where the case is to be tried, resulting in an unfavorable jury, or, by importing counsel from a distance, certainly at least suggest the presence of insurance. Or it may fail properly to perfect an appeal, take the case to the wrong court upon review, or be guilty of some other omission or error which exposes its insured to personal loss, including the failure properly to supersede a judgment.

Sixth and last, probably the cases which present the most argument arise from failure to settle a borderline case which could have gone either way—but, if it goes for the plaintiff, will undoubtedly exceed the policy limits. The question is then whether or not the company has a right to gamble and expose its insured to a possibility of great loss.

As is well known to the average reader, there are two rules which are followed throughout the United States. One is the rule of negligence; the other is the rule of bad faith. Actually, in the enforcement of the principles, there is not too much difference except in lip service between the two rules. One who is a professional in the defense of lawsuits is held to a substantial duty, and the failure to observe that duty may constitute bad faith. That, in substance, is also the definition of negligence. Except where courts of review are composed largely of ex-defense attorneys, this usually becomes a question for the trier of fact. And since there are more policyholders than insurance agents upon jury panels, they frown upon a gamble taken with the policyholder's funds.

There are certain situations which make more demonstrable the fact of bad faith, so as to jeopardize the position of the insurance company in an excess suit. One of them is, of course, the situation

where the company by making a ridiculous offer forecloses the possibility of settlement. Let us say that a case is likely to result in a \$15,000 jury verdict, and the case can be settled for \$7,500. An offer of \$1,500 is so patently ridiculous as to close the door to further settlement negotiations, and such would then seem to constitute bad faith rather than simply negligence.

A second situation of aggravated conduct is the failure to inform the insured that he has a right to and should engage personal counsel to protect him against excess liability. Since the policy gives the insurance company the right to conduct the defense, it has a correlative duty to inform the insured of his rights to protect himself.

A third situation is the failure to communicate to the insured, under the statement of principles, offers of settlement which the company has received, whether within or in excess of the policy limits, in order that he may take steps to protect himself. Similarly, if he does have personal counsel, the failure to keep such counsel informed as to the status of the case, or the progress of negotiations, would constitute bad faith.

A fourth situation is a demand by the company that the insured contribute to a settlement offer which is less than the policy limits. This used to be quite common, but is rather infrequent now. However, the situation is still encountered where, upon a \$10,000 policy, an offer of \$9,000 will be received. The company may state to its insured that it is willing to pay \$7,500, and that if he wants to settle he must contribute the other \$1,500. That is considered bad faith as a matter of law, under many cases.

A fifth situation is closing the door to settlement negotiations by refusal to disclose the policy limits. It is a known fact that an attorney handling a case worth \$30,000 in settlement will be willing to settle for, perhaps, \$22,500 if he knows the policy limit is only \$25,000, in order to avoid imposing a personal loss upon the insured. The company has no right to protect itself from excess liability by stating that it will not disclose its policy limits, when such effectively forecloses the possibility of receiving an offer of less than the policy limits. Such constitutes bad faith exercised in complete derogation of the rights of the policyholder. Many states now require the disclosure of policy limits; but, even in those jurisdictions which do not, the company is playing with fire when it cuts off the possibility of receiving an offer within the policy limits by its refusal to open the door to reasonable negotiation.

In each of these situations, the defense attorney is presented with the possibility of some danger of personal liability. Suppose the company should become insolvent, and the case could have been settled within the policy limits had they been disclosed—at a time when the settlement sum would have been paid from company funds. The attorney has joined in and condoned the act of the company. May he then be held liable for the resultant loss to the insured?

There have been no cases upon this as yet, but there undoubtedly will be. I would not venture to speculate what the results would be in each jurisdiction. It would seem that each case would turn on its own facts. If the conduct of the attorney was such as to constitute a breach of the ethical duties which he owed to the policyholder, as his attorney, then clearly a liability would exist. If there is no ethical breach, but a question of judgment involved, then a different result could follow. But in each situation, it must be apparent that he acted in the best interests of the insured as well as in the best interests of the company. And, under present day circumstances, it is unfortunately true that frequently the action of the defense attorney does not conform to those standards.

As an individual, not acquainted with the processes of law, there is not much that the insured can do to protect himself. However, when represented by competent counsel, looking after the interests of the insured alone, there are several things that can be done. The first of these is to ascertain whether or not a settlement can be made within the policy limits; and, if such a settlement can be secured, and it is a proposal which is reasonable in light of the circumstances regarding liability and damages, then a demand may be made upon the insurance company to so settle. In such an instance, the demand should be detailed and set out the circumstances which the attorney deems present aspects of particular danger and his own fears that the judgment in excess of the policy limits might well otherwise result.

Since the company is bound to use at least good faith in settlement, the receipt of such notice makes it aware of the dangers inherent in failing to settle, if it did not have such knowledge earlier. It must thereafter walk as on eggs. But, if it refuses to settle, there are still several things which can be done for the protection of the insured.

He has a right to negotiate a settlement of any excess liability or of any possible uninsured coverage. If, for example, he has only \$25,000 of protection, he may from his personal resources make a payment to the plaintiff in return for an agreement not to collect any excess judgment from him personally, provided, of course, such agreement is made in good faith.⁴ In the second situation described, there may be a question as to whether the accident happened before the insurance coverage went into effect or after it terminated, or whether the particular act which caused the injury was within the scope of the insuring agreements, or the insurance company may claim that a policy defense exists such as a failure to give prompt notice. In any of these situations the insured may negotiate with the third person to limit the scope of collection in the event of recovery to the proceeds of insurance policies existent upon the risk.⁵

It will readily be seen in such instances that neither a release nor a covenant not-to-sue can be executed, because of the fact that litigation must continue against the insured in order that his liability may be determined before the policy coverage can be ascertained. However, a stipulation which concisely recites the understanding of the parties may be utilized in those instances. In the *Krutsinger* case, heretofore referred to, an even more involved situation was presented. That was a dramshop case where I was representing the plaintiff. It arose out of habitual intoxication, with suit by the wife and children for loss to means of support. Upon the particular taverns, there were a total of six insurance companies covering varying periods of time. Five of the six companies wanted to work out a settlement; the sixth refused to do anything. It apparently figured it could compel the other companies to pay its share of the load in order to secure a release or a covenant.

In that case we handled it by stipulation. Since there were minors involved, we filed a petition in the county court through the legal guardian setting up the proposed settlement and asking for an order permitting the stipulation to be executed by the legal guardian which would permit him to proceed with the litigation but to look solely to the proceeds of the policies issued by the recalcitrant

⁴ *Krutsinger v. Illinois Casualty Co.*, 10 Ill. 2d 518, 141 N.E.2d 16 (1957); *Brewer v. Maryland Casualty Co.*, 245 S.W.2d 532, 535, 536 (Tex. Civ. App. 1952).

⁵ *General Accident, Fire & Life Assur. Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, 193 S.W. 1031, 1034 (1917); *McAleenan v. Massachusetts Bonding & Ins. Co.*, 190 App. Div. 657, 159 N.Y. Supp. 401, 405 (1916); *Pickett v. Fidelity & Casualty Co.*, 60 S.C. 477, 38 S.E. 160 (1901).

company as to collection, and to accept on behalf of the plaintiffs the amounts proposed by the other companies to be paid as a partial remission of collectibility to that extent. The order was entered by the county court and we proceeded to trial.

We recovered judgment several times in excess of the total offers made beforehand and then filed a suit against the insurance company. It came in and claimed that it had been released by such settlement, charging fraud, collusion, lack of cooperation, failure of the insured to render to it the exclusive right to defend or settle, and other matters. At the close of the plaintiff's case, the trial court directed a verdict in favor of the plaintiffs.

The judgment was appealed to the appellate court of Illinois which affirmed and soundly spanked the attorneys for the insurance company for the charges made of fraud and collusion, and referred to the conduct of the company in somewhat uncomplimentary terms. It perfected an appeal to the Illinois supreme court which, in turn, affirmed both the trial court and the appellate court.⁶

There is one other situation which is somewhat unique but which arises rather frequently these days where there are several very large automobile insurance companies. That is where the company finds itself on both sides of the fence.

This situation arises where both automobiles are insured with the same company. A collision occurs and the drivers of both automobiles, let us say, are injured. Each insists that the collision was the fault of the other. Many companies, in that situation, have tried to insist that they have the right to defend both the original suit and the counterclaim, to take confidential statements from their insureds and to use it to their detriments, to make investigations but to refuse to disclose the results thereof to the individuals concerned or to their personal attorneys. That is, of course, utter nonsense. It would clearly be in violation of public policy to permit the same interested party to control both sides of the litigation. There is no duty whatever to cooperate where there is a conflict in interest.⁷ And, in such a situation, each party has an absolute right to be represented by counsel whose allegiance is solely to that individual who may prosecute the action desired by that individual and defend against the proceedings brought by the other. It would be the duty

⁶ *Krutsinger v. Illinois Casualty Co.*, 10 Ill. 2d 518, 141 N.E.2d 16 (1957).

⁷ *Bernadich v. Bernadich*, 287 Mich. 137, 283 N.W. 5, 8 (1938); *Latronica v. Royal Indemnity Co.*, 8 Ill. App. 2d 337, 342, 132 N.E.2d 16 (1956).

of the insurance company to pay the judgment rendered against the loser and probably to pay a reasonable attorney's fee for the defense of each such proceeding, since that would have been its obligation under other circumstances.⁸ The insured must give notice of the occurrence and of the suit, if any, but his duty ends there. The company must immediately apprise him of the conflict of interest and of his right to have personal counsel, or it might well be held liable for the exercise of bad faith in its relationships.

It will be seen from the foregoing matters that whether trial counsel is representing the plaintiff or the defendant that his task is not an easy one. At all times he must conform to the highest ethical standards, which are governed largely by the dictates of his conscience, since the two are largely identical in right thinking men. Each person must understand that he cannot serve two masters, where a conflict in interest appears, and he must discharge the duty devolving upon him as an advocate with complete fidelity. There is sometimes a tendency upon the part of defense counsel to defer too greatly to corporate clients; but this deference should in no way be permitted to impair the discharge of the primary obligation.

As attorneys, upon whatever side of the fence we may find ourselves, we must realize that ethical standards are not hollow principles. They are vital rules which govern the manner in which we discharge our functions and by which we are judged by the public. In addition, since the public is in a position to judge the bar only by the standards of competence which it observes in the handling of litigated matters, then we must take steps to see that the public is advised—so that it may choose wisely—who are the competent advocates. We must, as the medical profession has done, impose certain standards for trial counsel to conform to in courts of record, and then see that those standards are known to and appreciated by the public. When this has been done, then much of the stigma which surrounds trial work, and particularly personal injury cases, will disappear.

⁸ *O'Morrow v. Borad*, 27 Cal. 2d 794, 167 P.2d 483 (1946).