Insurance Defense Counsel Must Be Cautious in Sharing Information with the Insurer

By William T. Barker[1]

While insurance defense counsel are permitted to share most information about the cases they defend with the insurance carriers that have retained them to provide that defense, that permission is not unlimited.[2] Attention was drawn to these limits by a decision in *Cosgrove v. National Fire & Marine Insurance Co.*[3] A motion to reconsider was filed, the case settled, and the opinion withdrawn and sealed.[4] Thus, whatever precedential value the opinion might have had has been erased. But the fact pattern and the court's analysis are still worthy of attention for the lessons that may be drawn from them.

I. The Case

Cosgrove arose from a construction defect suit that Karen Cosgrove brought against WTM Construction Co. for its work in remodeling her house. National Fire & Marine Insurance Co ("National") provided a defense, by Richard Righi, but reserved its right to deny coverage under a subcontractor exclusion. Pursuant to that exclusion coverage was excluded "'[t]o the extent that the damage[s] alleged … arose out of operations performed for you by independent

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[2] WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL, §§ 10.01-.03. Some of the analysis in this article is adapted from that book.

[3] Cosgrove v. Nat'l Fire & Mar. Ins. Co., No. 2:14-cv-229-HRH (D. Ariz. April 10, 2017).

[4] *See* Cosgrove v. Nat'l Fire & Mar. Ins. Co., 2017 U.S. Dist. LEXIS 54479 (D. Ariz. April 10, 2017) (reporting the sealing and removal from the Lexis database).

contractors or subcontractors and such independent contractors or subcontractors did not agree in writing to defend, indemnify, and hold WTM harmless.'"[5]

In his initial evaluation, Righi told National that he had learned that "all construction work was done by subcontractors except for the framing" and that "we have been unable to locate any sub-contract agreements."[6] Righi testified that he had learned this information both from WTM and from review of the job file (a file later produced to all parties in the defect litigation). Righi later informed National that even the framing had been done by a subcontractor and that "'[w]e have been unable to locate written contracts between WTM and th[e] subcontractors who performed work on the project. At this point, we are doubtful that any such contracts exist.'"[7]

When challenged on reporting these facts, Righi responded that it was all in the public record and not confidential, and that he would never report anything privileged. Righi later filed common-law indemnity complaints against the subcontractors. Such complaints are routine to transfer risk as far as possible, and the failure to allege express indemnity claims clearly implied that there were no indemnity agreements.[8]

Based on the facts reported by Righi and the opinions of coverage counsel, National estimated that it had an 80% chance of defeating indemnity coverage. When Righi recommended settling for $110,000, the adjuster recommended $23,000, based on the coverage analysis. National rejected a $109,000 offer of judgment. On the eve of trial, WTM settled with Cosgrove stipulating to a $443,690 judgment with an assignment of insurance rights and a covenant not to execute. After a reasonableness hearing, in which National participated, the state court found that

[5] *Cosgrove*, Slip Op. at 2.
[6] Slip Op., at 4.
[7] Slip Op., at 5.
[8] Slip Op., at 6-7.

a reasonable settlement amount would be $304,373, from which it deducted $25,000 paid to settle noncovered fraud claims and $25,000 agreed to as a guarantee against failure to collect the full $443,690 stipulated judgment, leaving a net, reasonable settlement of $254,373.[9]

Cosgrove then sued National, asserting both contractual and bad faith claims. Among National's defenses was lack of coverage, based on the Subcontractor Exclusion. Citing *Parsons v. Continental National American Group,*[10] Cosgrove responded that National was estopped to assert that exclusion, because Righi had breached his duties to WTM by reporting on the lack of subcontracts.[11]

The court summarized National's argument as follows:

> [National] argues that the information Mr Righi learned about the subcontractors was not confidential information. Rather, [National] contends that all Mr. Righi learned was the identity of who had performed the work on the project and that WTM had no written contracts with its subcontractors. Defendant argues that there is no evidence that suggests that WTM intended to keep this information confidential or that [it] relayed this information to Mr. Righi in confidence. In short, [National] argues that the information about the contractors was simply routine information and that this information in a construction defect case is almost always a known fact based on the insured's job file…. [National] suggests that it could have learned this information if it had, as [Cosgrove] suggests it should have done, completed its own investigation rather than relying on the information received from Mr. Righi. If it could have learned this information on its own, then defendant argues that this information cannot possibly be considered confidential information.[12]

The court disagreed, quoting *Parsons* as holding that

> "[w]hen an attorney who is an insurance company's agent uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy in the garnishment proceeding we hold that such conduct constitutes a waiver of any policy defense, and is so contrary to public policy

[9] Slip Op., at 8-10
[10] Parsons v. Cont'l Nat'l Am. Group, 550 P.2d 94 (Ariz. 1976).
[11] Slip Op., at 10-12.
[12] Slip Op., at 16-17.

> that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy."[13]

Here, Mr. Righi knew or had reason to know that the information he disclosed was coverage sensitive and undertook to gather further sensitive information, which the court took to mean that his loyalty to WTM "'was diluted by his allegience to'" National.[14]

The court found no requirement that the information disclosed be independently confidential. "*Parsons* only requires that the information have been obtained via the attorney-client relationship and that the disclosure of the information be detrimental to the insured."[15] While that information became public with the filing of WTM's third-party complaint, by then the *Parsons* violation had already occurred. While estopping National on this basis might seem a harsh result, the court found that *Parsons* called for that result.[16]

II. Analysis

Insofar as National's arguments were directed at defeating the estoppel by showing a lack of any harm to WTM resulting from Righi's disclosures, they seem well taken. But the underlying question is whether Righi violated his duties to WTM by making those disclosures. That analysis is more complex than either National or the court recognized.

A. National might have been a co-client with WTM.

There is significant disagreement among jurisdictions on whether or when a carrier is a co-client with its insureds of the counsel it retains to defend them.[17] Under the Restatement of the Law Governing Lawyers, this is a question of fact, but the usual facts regarding such

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[13] Slip Op., at 17, *quoting Parsons,* 550 P.2d at 99.
[14] Slip Op., at 18, *quoting* Lake Havasu Community Hosp. Inc. v. Ariz. Title Ins. & Trust Co., 687 P.2d 371, 384 (Ariz. Ct. App. 1987).
[15] Slip Op., at 18.
[16] Slip Op., at 19-20.
[17] WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL, § 4.04[4] (surveying jurisdicational rules on this point).

retentions lead to the conclusion that the carrier is a co-client unless there would be some conflict of interest between carrier and policyholder[18] regarding conduct of the defense.[19] Arizona follows the Restatement rule.[20]

The Subcontractor Exclusion would not seem to create any conflict regarding conduct of the defense. Regardless of whether particular work was done by a subcontractor, WTM would be responsible to the Cosgroves for defects in that work. And it would be in the interest of both National and WTM to seek indemnification from subcontractors for as much of that liability as possible. Doing so would reveal which subcontractors did which work and, at least implicitly, whether there were any written agreements and, if so, the terms of those agreements. But, as National argued, that information would be provided by the job file which would surely be produced to all parties to the litigation, making it available to National as well. Thus, neither by controlling the defense nor by access to defense information would National be in a position to gain any advantage over WTM.

But the opinion does not reveal whether some other coverage issue or fact might have created a conflict. Nor does it indicate whether the facts regarding Righi's retention support the conclusion that National was a co-client with WTM. So, the disclosure question must be analyzed both ways

[18] While the insured being defended is not necessarily an actual policyholder, it is clarifying for the purposes here to refer to such an insured as a policyholder. And WTM actually was a policyholder.

[19] WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL, § 4.04[1]-[2].

[20] Paradigm Ins. Co v. Langerman Law Offices, P.A., 200 Ariz. 146, ¶¶ 10-21 (Ariz. 2001) (also relying on Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured,* 72 TEX. L. REV. 1583, 1594-95 (1994)).

B. The facts about work by subcontractors and written agreements with subcotractors were information relating to Righi's representation of WTM, which should not have been disclosed except as permitted by Arizona Rule of Professional Conduct 1.6.

Arizona Rule of Professional Conduct 1.6 is substantively parallel to Model Rule 1.6, providing in relevant part that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation"[21] or pursuant to exceptions not material here. Arizona Rule 1.8(b) supplements this prohibition on disclosure of information by prohibiting its use "to the disadvantage of the client unless the client gives informed consent, [with exceptions not relevant here]."[22]

The scope of that rule is very broad:

> The confidentiality rule … applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.[23]

Thus, at this level, the *Cosgrove* court was correct in regarding facts about work by subcontractors and written agreements with subcotractors as protected by the duty of confidentiality.

C. Unless National was a co-client, disclosure of such facts was not impliedly authorized at the time Righi made it.

Implied authority to disclose generally arises when utility to the representation combines with lack of any apparent risk to the interests of the client.[24] "Except to the extent that the

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[21] ARIZ. R. PROF'L CONDUCT , R.1.6(a).
[22] ARIZ. R. PROF'L CONDUCT , R.1.8(B).
[23] ARIZ. R. PROF'L CONDUCT , R.1.6, cmt. [3].
[24] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000). The test stated there has been approved by the ABA as the equivalent of the standard under Model Rule 1.6. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 n.25 (2001).

client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation."[25] This standard is taken from the law of agency, under which implied authority is inferred from the nature of the representation, the "general usages" of similar relationships, and those acts which "usually accompany" or are "reasonably necessary" to the representation.[9] For example, attorneys do not ask client consent in sharing their confidential information with non-attorneys within a law firm such as secretaries, copy clerks, and accountants, because such disclosure is a necessary and usual part of any representation. The same is true of potential expert witnesses. ABA Opinion 95-398 extended this reasoning to outside copy services and data processing services used to produce billing statements from firm time records.

The authorization for disclosures "impliedly authorized in order to carry out the representation" most obviously permits disclosure "when the lawyer reasonably believes doing so will advance the interests of the client in the representation."[10] The policyholder has contractually committed management of the defense to the carrier, a commitment confirmed when the policyholder acquiesces in counsel's explanation of the way in which the representation is to be conducted.[26] Moreover, the carrier needs full information about the progress and prospects for the case to perform its duties to the policyholder regarding settlement. On this basis, disclosure to the claim representative of most information regarding the defense is impliedly authorized, whether or not the carrier is a co-client.

Implied authorization (by the policyholder) for such disclosure normally would not exist, however, if counsel knows of a reasonable prospect that disclosure could be injurious to the

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[25] ARIZ. R. PROF'L CONDUCT, R. 1.6 cmt.[5].
[9] RESTATEMENT (SECOND) OF AGENCY §§ 34–35 (1958).
[10] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000).
[26] *See* WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL, § 9.02[8].

policyholder or if the policyholder requested that the information not be disclosed. The *Cosgrove* court found as a fact that "[a]t the point Mr. Righi disclosed the subontractor information to [National] he knew or had reason to know, that WTM's policy contained the Subcontractor Exclusion and that [National] may attempt to deny coverage based on this exclusion."[27] Actual knowledge is supported by the fact that focus on work by subcontractors and the existence of written agreements was prominent in Righi's first substantive communication with National about the case. Righi probably regularly handled construction defect cases for National; if so, he would almost surely have learned that this was an important coverage limitation under its policies. Such knowledge would preclude any implied authority to disclose.

Of course, production of the job file would soon be called for in discovery. Disclosure in discovery and the implicit disclosure in the indemnity claim still would have posed the same risks to WTM, so Righi would have needed to consult WTM before making that disclosure. If that were produced in discovery, it would no longer have been confidential. Righi still could not call attention to the information potentially detrimental to WTM's coverage interest, but he could provide a copy to National on request.

While consultation with WTM would have been required before production, there would have been little practical alternative to producing (unless indemnity claims were simply to be abandoned, something that would have effectively told National of the problem and likely violated National's subrogation rights, endangering any coverage that might have existed). Even abandonment of the indemnity claims would likely not have avoided the need to produce the job file, because Cosgrove would likely have demanded such production to pursue her own claims against subcontractors or for other purposes.

[27] *Cosgrove,* Slip Op., at 18.

Moreover, National was already focused on the Subcontractor Exclusion and would surely have demanded information from WTM (in coverage litigation, if necessary), if it had not received that information from Righi. Finally, affirmative concealment of that information would seem to attempt a fraud, something that Righi could not assist.[28] Thus, there would have been no real prospect of keeping National from learning this information. On the other hand, that information seemingly destroyed any possibility of indemnity coverage and might have led to withdrawal of the defense, so WTM might have resisted disclosure.

All of the foregoing needed to be discussed with WTM in deciding what disclosures should be made. Pending production of the job file (or consent by WTM to disclosure), inquiries from National about subcontractors should have been deferred on the ground that this was coverage sensitive information, which could be sought directly from WTM or obtained from the job file, when produced, as Righi and National could be relatively confident it would be.

D. Even if National was a co-client, disclosure was still not impliedly authorized.

1. In no event should information not related to matters not within the scope of the defense representation be shared with the carrier.

Even if the carrier is a co-client any disclosure based on implied authorization or on the joint representation rule discussed below depends on the information disclosed being pertinent to the subject matter of the representation. There is no duty to communicate information not pertinent to that subject matter and no implied authority to do so.[29] Because counsel is concerned

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[28] ARIZ. R. PROF'L CONDUCT , R.1.2(d).

[29] *See also* ACTEC COMMENTARIES, at 84-85 ("Absent an advance agreement that adequately addresses the handling of confidential information shared by only one joint client, a lawyer who receives information from one joint client (the 'communicating client') that the client does not wish to be shared with the other joint client (the 'other client') is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, *inter alia*, (1) *taking no action with respect to communications regarding irrelevant (or trivial) matters*; (2) encouraging the communicating

only with defending the suit against the policyholder(s), information not relevant to the defense should never (without client consent) be disclosed and especially should not be disclosed if there is any reasonable possibility it could adversely affect a policyholder. In particular, information bearing on coverage but not relevant to liability or damages in the underlying action should not be disclosed to the claim representative.

In *Cosgrove,* the subcontractor information had no relation to the defense, narrowly viewed. Thus, it is arguable that such information might have been beyond any implied authority to disclose, even apart from the possible adverse effect. But that information was related to shifting risk back to subcontractors. It was not an unrelated affirmative claim (which National would have had no right or duty to prosecute,[30] because it depended upon WTM's liability to Cosgrove and could never produce any net recovery to WTM. Also, to the extent that there would have been coverage for any such liability, National would have been subrogated to any indemnity claim. Realistically, shifting liability by indemnity would probably fall within the presumed scope of of a defense representation, so (but for the potential adverse effect) disclosure to the carrier would have been impliedly authorized.

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client to provide the information to the other client or to allow the lawyer to do so; and (3) withdrawing from the representation if the communication reflects serious adversity between the parties. *For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse.* On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., 'After she signs the trust agreement, I intend to leave her …' or 'All of the insurance policies on my life that name her as beneficiary have lapsed'). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.") (emphasis added).

[30] WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, SECOND EDITION, § 3.02[2][c].

2. The default rule for joint representations is that there will be no secrets between the joint clients.

Every client has a right to full information about the representation.[31] Where there are two clients represented jointly, this right is inconsistent with a duty to one client to refrain from disclosures to the other. Thus, the normal rule is that (unless the clients agree otherwise) all information may be shared with both clients.[32] This corresponds with the rule that communications of either client with the attorney are not privileged against the other in any subsequent dispute between the two.[33]

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[31] MODEL RULES OF PROF'L CONDUCT, R. 1.4 (2011). *See* MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. [31] ("As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and *each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit*." (emphasis added)).

[32] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. *l* ("[T]he common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter … . The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from the lawyer's own investigation or learned in confidence from that co-client."); GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, & PETER R. JARVIS, THE LAW OF LAWYERING, § 9.12 (as between co-clients, "[t]he default rule … is that there is no confidentiality, because b[y] definition all clients are confiding in the same lawyer or lawyers"). *Accord* AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT, Commentary on MPRC 1.6 ("ACTEC COMMENTARIES"), at 84 (5th ed. 2016) ("[E]xcept in special circumstances, joint clients should be advised at the outset of the representation that information from either client may be required to be shared with the other if the lawyer considers such sharing of information necessary or beneficial to the representation."), *available at* http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf *But see In re* H Children, 160 Misc. 2d 298, 300–01 (N.Y. Family Ct. 1994) (where there was reasonable probability that law guardian for two minor children received confidential information from one that would be useful to the other after guardian's withdrawal from relationship with the communicating child, law guardian must withdraw from relationship with noncommunicating child, because improper to use that information for her benefit; obviously children could not have consented to no-secrets rule, but appointing court arguably charged with notice of that rule).
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[33] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(2). *See* RESTATEMENT § 75 cmt. *d* ("Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness

This limitation on confidentiality is something that the policyholder must be told near the outset of the representation.[34] Indeed, a lawyer has been reprimanded for failure to so inform his clients.[35] A lawyer who fails to so inform the policyholder might permit a situation to arise in which the lawyer has both a duty to the policyholder to keep a secret and a duty to the carrier to disclose, making the lawyer liable to one or the other, no matter what the lawyer does.[36] Where, as in *Cosgrove,* the lawyer knows that sharing of information might be deterimental to the

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and candor between the co-clients and with the lawyer generally preclude the lawyer from keeping information secret from any one of them, unless they have agreed otherwise."; "Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients … . In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients.").

[34] *See* MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. [31] ("The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, *advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other*." (emphasis added)). *Accord* ACTEC COMMENTARIES, 84 ("[E]xcept in special circumstances, joint clients should be advised at the outset of the representation that information from either client may be required to be shared with the other if the lawyer considers such sharing of information necessary or beneficial to the representation. This advice should be confirmed in writing, and the lawyer should consider asking the clients to acknowledge that understanding in writing."); D.C. BAR, ETHICS OP. 327 (2005) (considering withdrawal from representation of some jointly represented several clients while continuing to represent other clients: "This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients."); D.C. BAR, ETHICS OP. 296 (2000) ("A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences."; concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement.") N.Y. STATE BAR ASS'N, OP. 778 (Aug. 30, 2004) ("In seeking consent to a joint representation the lawyer should explain to both clients … potential consequences, including (1) the lawyer's obligation, absent each client's agreement to other arrangements, to disclose to one client any confidences and secrets communicated by the lawyer to the other client … .").

[35] An Unnamed Atty. v. Ky. Bar Ass'n, 186 S.W.3d 741 (Ky. 2006) (lawyer represented husband and wife to develop evidence that they were not involved in a fatal shooting of the wife's former husband; lawyer discovered evidence implicating husband, but did not disclose to wife).

[36] 186 S.W.3d at 743 (in the absence of disclosure of the lack of confidentiality, clients could not provide informed consent).

policyholder, that concern would need to be addressed in obtaining the policyholder's informed consent to a joint representation in which information will be shared.[37]

In general, the default rule of sharing information permits disclosure to the claim representative of anything received from the plaintiff or other third parties and anything disclosed to them, in discovery, pleadings or otherwise. Such information is no longer truly confidential, and it necessarily affects the carrier's decisions on handling of the claim.

This is so even though, in unusual circumstances, disclosure of such information to the claim representative might adversely affect the policyholder. For example, the policyholder's deposition testimony about prior accidents might disclose a misrepresentation of loss history that could be a ground for seeking rescission. The lawyer would usually have no reason to know the contents of the application, so there would be no reason to withhold this information in reporting on the deposition.

But, if (as in *Cosgrove*) the lawyer knew of the potential adverse impact on the policyholder, consultation with the policyholder should precede any report (other than provision of a copy of material already provided to the policyholder's adversaries in the litigation). If the policyholder provides confidential information (directly or by providing consent for a third party, such as a doctor, to disclose it) and disclosure to the claim representative of that information could adversely affect the policyholder (or the policyholder requests secrecy), that is a matter of even greater delicacy than when such information comes from a third party or has been rendered nonconfidential by disclosure to the plaintiff or others.[38]

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[37] *See* WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL, § 9.02 (discussing initial communications at the outset of an insurance defense representation).

[38] The discussion here relates to information defense counsel received from the policyholder. Where the carrier is a co-client, a more complicated analysis might apply to information received from a third party. *See* WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL, § 10.04.

III. Conclusion

Insurance defense lawyers must be alert to their confidentiality duties and not confuse the scope of those duties with the scope of the attorney-client privilege. While much disclosure to the insurance carrier is impliedly authorized, counsel must always consider whether disclosure would potentially have adverse effects on the policyholder. If so, consultation is necessary before disclosure. (This article does not address counsel's duties if consent is refused and the issue cannot be avoided by deferral, as it might have been in *Cosgrove*.)