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Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Schaefer v. Elder*
3d Civ. No. C068229
Supreme Court No. S212053
Request for Depublication (Rule 8.1125)

Dear Chief Justice and Associate Justices:

We write on behalf of amicus curiae Association of Southern California Defense Counsel ("ASCDC"), requesting that the Court order the Court of Appeal's opinion, published at 217 Cal.App.4th 1, be withdrawn from publication in the official reports.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. Its members include approximately 2,000 of California's leading civil defense bar lawyers. ASCDC is dedicated to promoting the administration of justice, providing education to the public about the legal system, and enhancing the standards of civil litigation practice in California. ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared numerous times as amicus curiae addressing such issues in this Court and in the Courts of Appeal.

ASCDC's member lawyers are regularly appointed by insurers to defend policyholders, thereby becoming part of the tripartite relationship. The ethical quandaries created by the tripartite relationship have been satisfactorily addressed by California law for more than two decades, enabling the defense bar to understand its ethical obligations. The interpretation of an attorney's ethical obligations arising from the tripartite relationship as stated in the Court of Appeal's opinion in *Schaefer v. Elder* represents a departure from this established precedent. ASCDC is acutely concerned with the Schaefer court's mischaracterization of the ethical duties encompassed by the tripartite relationship and the uncertainty the opinion creates in what has otherwise been a consistent and uniform interpretation of that relationship under California law.

The Court of Appeal's opinion should be ordered depublished because, if permitted to remain published, it will cause confusion in future cases and threaten to interfere with otherwise well-established principles governing the tripartite attorney-client relationship. Although recognizing the tripartite relationship, defense counsel know (1) they must avoid taking sides on coverage disputes and (2) if there is a conflict between the appointing carrier's interests and those of the insured, defense counsel is duty bound to protect the insured's interests. Schaefer ignores these established precepts in holding that appointed defense counsel owe a duty to assist carriers in defeating their insured client's coverage. Such a rule puts appointed defense counsel in an untenable position. They cannot serve two masters.

The Schaefer opinion holds that defense counsel retained by an insurer to represent its insured has an ethical duty to establish facts that will assist the insurer in defeating coverage:

“Put simply, the Koeller firm had an ethical duty to Elder to try to establish that the workers were employees and, at the same time, *had an ethical duty to CastlePoint to try to establish that the workers were independent contractors*. That conflict supported the trial court's determination that Elder has the right to independent counsel.” (Emphasis added.)

If it remains published, the *Schaefer* opinion would not only completely change the obligations of defense counsel in a tripartite relationship, it would arguably make it impossible for defense counsel to handle anything other than cases in which there could never be *any* question about coverage. Because, as shown below, the *Schaefer* opinion can neither be aligned with existing law applicable to the tripartite relationship, nor is it necessary to protect against actual conflicts of interests that may arise from such a relationship, it should be depublished.

It is well-settled that “[i]n the insured-insurer relationship, the attorney characteristically is engaged and paid by the carrier to defend the insured. The insured and the insurer have certain obligations each to the other . . . arising from the insurance contract. Both the insured and the carrier have a common interest in defeating or settling the third party's claim. If the matter reaches litigation, the attorney appears of record for the insured and at all times represents him in terms measured by the extent of his employment.” (*American Mut. Liability Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 592.) Under this tripartite relationship, “each member of the trio, attorney, client-insured, and client-insurer has corresponding rights and obligations founded largely on contract, and as to the attorney, by the Rules of Professional Conduct, as well.” (*Ibid.*)

Despite this tripartite relationship, “where an insurance carrier is called upon to defend its insured, the attorney retained by the carrier for this purpose owes the same fiduciary duty to the insured as he or she would had the insured made the selection of counsel.” (*Purdy v. Pacific Automobile Ins. Co.* (1984) 157 Cal.App.3d 59, 76.) In fact, the attorney’s “primary duty” is to “further the best interests of the insured.” (*Ibid.*, citing *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566-582, emphasis added.) Thus, while defense counsel has an attorney-client relationship with both the insured and the insurer, the attorney’s relationship with the insurer is viewed as “secondary” to the client “in the sense of priorities. . . .” (*American Mut. Liability Ins. Co.*, *supra*, 38 Cal.App.3d at p. 59; *Purdy*, *supra*, 157 Cal.App.3d at p. 76; *Dynamic Concepts, Inc. v. Truck Ins. Exch.* (1998) 61 Cal.App.4th 999.)

This principle also applies to the attorney’s duty of confidentiality. While the attorney’s obligations to the insured and the insurer are “part of a common, joint plan,” they are also independent of one another. (*American Mut. Liability Ins. Co.*, *supra*, 38 Cal.App.3d at p. 592.) This is because “it may well be that in full discharge of his obligation to his client-insurer, the attorney may communicate to the insurer objective evaluations of his client-insured, which are for the consideration only of the client-insurer in permitting it to discharge its duties to the insured under the insurance contract.” (*Ibid.*) As importantly, “there may be confidences indulged by the insured to the attorney which in turn *are not intended for the insurer.*” (*Ibid.*, emphasis added.)

“As between defense counsel’s two clients, there is no privilege concerning communications intended to affect the common goal of the defensive effort. *There are other communications, however, that the attorney should not reveal to the other client. Confidentiality is essential, if the communication can adversely affect the insured’s coverage . . .*” (4 *Mallen & Smith, Legal Malpractice* (2013 ed.) § 30:8, pp. 190-191, emphasis added.)

Relying on language from the American Bar Association’s Guiding Principles relating to liability insurers, one well-respected treatise has explained defense counsel’s obligation of confidentiality to the insured, stating that “the attorney must assure that the disclosures of one client that may affect the coverage issue are not revealed to the other.” (*Id.* at p. 192.) Quoting from those Guiding Principles, the treatise explains:

“Where the attorney selected by the company to defend a claim or suit becomes aware of facts or information, imparted to him by the insured under circumstances indicating the insured’s belief that such disclosure would not be revealed to the insurance company but would be treated as a confidential communication to the attorney, which indicated to the attorney a lack of coverage, then as to such matters, disclosure made directly to the

attorney, should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question.” (*Id.* at § 30:8, p. 192.)

Therefore, quite contrary to the *Schaefer* court’s conclusion, the law does not place on defense counsel in the tripartite relationship an ethical obligation to try to establish facts negating coverage for the benefit of the insurer. Rather, the opposite is true. The attorney’s primary duty—which ASCDC entirely endorses—is to *the insured* to provide a full and complete defense. And to the extent the attorney learns of confidential information from the insured that may adversely affect the insured’s coverage, that information is not intended for, and must not be communicated to, the insurer. It is defense counsel’s ethical obligation to the insured *not* to disclose those communications. The *Schaefer* court’s conclusion otherwise cannot be reconciled with this established law and directly conflicts with it.

This is not to say there can never be a circumstance under which a conflict between the insured and the insurer develops that requires defense counsel to make full disclosure to the insured and the insurer and possibly withdraw from representation. Existing law has in place safeguards in the event of such a conflict. Civil Code section 2860(b) defines when an actual conflict is created during the defense of an insured such that independent (*Cumis*) counsel is required. It provides:

“[A] conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist.”

“If the communication [between attorney-insurer or attorney-insured] creates a conflict of interests, then counsel may be required to make appropriate disclosures or withdraw.” (*Ibid*; see also 4 Mallen & Smith, *Legal Malpractice* (2013 ed.) § 30:80, p. 191.)

Importantly, however, the potential for this conflict does not equate with the conclusion that defense counsel in the tripartite relationship has an *affirmative duty* to establish facts to defeat coverage. This is where the *Schaefer* opinion parts ways with existing law. In other words, in its conclusion that there was information provided to defense counsel that created a conflict requiring disclosure or withdrawal, the *Schaefer* court erroneously held that this conflict necessarily existed because it was defense counsel’s affirmative duty to establish facts to defeat coverage. This, as shown above, is not the law. While defense counsel may have an obligation to disclose a conflict and

possibly withdraw (if the conflict falls within the scope of section 2860), this is not the equivalent of an affirmative duty to try to find facts to defeat coverage. The *Schaefer* court's conclusion that it is the legal equivalent of such an affirmative duty is incorrect and conflicts with settled law, which imposes on defense counsel a primary duty to the insured, not the insurer.

Interpreting the obligations of defense counsel in a tripartite relationship to include the affirmative duty to negate coverage is also inconsistent with the separate role defense counsel plays in that relationship. Although the insurer may control the defense of the matter in certain respects, the defense attorney cannot allow an insurer's guidance to interfere with his or her own professional judgment about how best to represent the insured. With regard to coverage issues, defense counsel in the tripartite relationship is not permitted to make coverage decisions or to participate in declaratory relief actions. Defense counsel should also not depose or take a statement from the insured to develop evidence for the insurer's use concerning a coverage issue. As explained, doing so may be an abuse of the attorney's obligation not to reveal confidential communications that can prejudice the insured's coverage. Where the insurer issues a reservation of rights, the lawyer's duties to the client are enhanced. (4 *Mallen & Smith, Legal Malpractice* (2013 ed.) § 30:20, pp. 330-331; see also *Dynamic Concepts, Inc. v. Truck Ins. Exch.* (1998) 61 Cal.App.4th 999, 1009, fn. 8 [Reserving insurers owe 'enhanced' obligations of fairness "to retain competent defense counsel who fully inform[] and loyally represent[] the insured and who refrain[] from any action that demonstrates a greater concern for the insurer's financial interests than for the insured's potential exposure."].)

Nor is there any reason to believe that defense counsel are disregarding the ethical duties they owe to insureds in favor of the interests of insurers. To the contrary, the balance struck by the Legislature in section 2860 has remained unchanged for more than twenty years -- a testament to its effectiveness and to the ethical advocacy of insurer-retained defense counsel. The following sentiment expressed by one Indiana court when an insured presented unfounded allegations of favoritism by defense counsel is fitting:

"We consider the argument impertinent, if not scandalous. Without considering the respected reputation of the attorney involved, we point out that on a daily basis defense attorneys employed by insurance carriers for policyholders are called upon to deal with matters in litigation where the interests of the policyholder and the carrier do not fully coincide. Under such circumstances the attorney's duty is, of course, to the insured whom he has been employed to represent. In response the defense bar has exhibited no inability to fully comply with both the letter and spirit of Canon 5 of the Code of Professional Responsibility. If it were otherwise

we suspect the desirability of requiring a carrier to supply defense counsel would have long since disappeared as a term of the policy.” (*Siebert Oxidermo, Inc. v. Shields* (Ind.App. 1982) 430 N.E.2d 401, 403.)

Section 2860 strikes a balance between the right of the insured to a full, complete, and zealous defense, and the right of the insurer to control the defense of claims for which it may have a duty to indemnify. The *Schaefer* opinion disrupts this balance by holding that defense counsel has an affirmative duty to try to establish facts to negate coverage. The law does not impose on defense counsel any such duty; it stands in stark contrast to it. Nor would such a duty be consistent with defense counsel’s primary obligation to fully and zealously represent the interests of the insured. As such, the *Schaefer* opinion should be removed from publication in the official reports.

Respectfully submitted,

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By:


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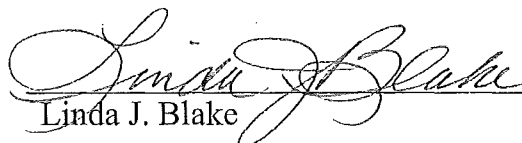
I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 500 South Grand Avenue, Suite 1500, Los Angeles, California 90071.

On August 9, 2013, I served the foregoing document on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 9, 2013, at Los Angeles, California.


Linda J. Blake

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