

EXCESS EXPOSURE FROM DAY 1

Managing excess exposure with the client, carrier, and all the other players involved.

COMMUNICATION WITH THE INSURED

- Who is your client?
- Conflicts?
- Early and often
- Scope of representation?
- Information gathering and preserving
- Early conversation about insurance policies
- Early conversation about assets
- Worst day; high stress



COMMUNICATION WITH THE CARRIER

The Tripartite Relationship

- Duty of Independent Judgment
- Duty of Confidentiality
- Early evaluations
- Early expert retention
- Excess carriers?
- Time Limited Demands?



BENEFITS OF PERSONAL COUNSEL

- Advising on Bashor Agreement
- Advising on asset protection, bankruptcy
- Another opinion on value to communicate with plaintiff's counsel to resolve the case



CONCURRENT CRIMINAL MATTERS – STAY

- Consider stay of civil case “to prevent either party from taking advantage of broader civil discovery rights or to prevent the exposure of the criminal defense strategy to the prosecution.” *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080-81 (10th Cir. 2009).
- Fifth Amendment Rights – are they implicated? *Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97–98 (2d Cir. 2012)
- Shifrin Factors - *People v. Shifrin*, 342 P.3d 506, 513 (Colo. App. 2014)

CONCURRENT CRIMINAL MATTERS – MONITOR

- Obtain assistance from insurer on issues which align with civil defense
- Monitor discovery
- Attend hearings and trial
- Allocution?

CONCURRENT CRIMINAL MATTERS – WHAT IS ADMISISBLE LATER?

- Citations or convictions? C.R.S. § 42-4-1713; *Ripple v. Brack*, 132 Colo. 125 (1955); *Wark v. McClellan*, 68 P.3d 574, 579 (Colo. App. 2003)
- Other conduct? *Wark v. McClellan*
- Understand and explain the effect of a plea in civil case
 - Felonious killing?
- Statements of the defendant insured? CRE 613

WORKING WITH CRIMINAL COUNSEL

- Consent to communicate with criminal counsel
- Access to criminal file and witnesses
- Access to your client if incarcerated



BASHOR & NUNN AGREEMENTS

- Bashor & Nunn
- What can you do for your client?
- What can you do for the carrier?
- Can the carrier intervene?



DOCUMENTING YOUR FILE

- Advising your client of excess potential
- Advising your client to retain personal and/or criminal counsel
- Evaluations of and responses to time limited demands
- What is admissible later in a bad faith trial?



COVERAGE ISSUES

- No advice to carrier
- No advice to insured
- MSJ – covered versus uncovered claims?

CREATIVE RESOLUTIONS

- Comfort letters
- Loans and payment plans
- Nonmonetary conditions
- Bankruptcy
- Consultants to assist with complex agreements



QUESTIONS AND DISCUSSION

