INDIANA TRIAL
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Admissibility of the existence of liability insurance via the defendant's expert witness

By James "Jay" Ludlow

All too often the following scenario seems to come about. One day, a good personal injury case comes in your front door. You prepare the case for settlement, but the insurance company reminds you that it is in the business of making money, and not paying it out.

Accordingly, you prepare the case for trial. A month or so before the trial date, you receive a motion in the mail from the defendant which requests the court pursuant to Indiana Trial Rule 35 to order your client to appear for an "independent" medical examination. The court grants the defendant's motion, and your client is ordered to appear at the office of a physician who you have never heard of.

As ordered, your client shows up at the office of Dr. X at the appointed date. Thereafter, your client tells you that the doctor spent only a brief period of time actually talking with them and that in fact the whole examination lasted approximately 15 minutes. You then receive a copy of this gentleman's report in the mail which concludes that nothing is wrong with your client, that he or she is a hypochondriac, that all of your client's treating physicians are mistaken in their diagnosis, and that even if there was some slight injury involved, it has long since healed with no residual problems whatsoever.

Being a diligent attorney, you take the deposition of the defendant's doctor after first being required to pay a hefty fee for an hour or so of this gentleman's time. Having properly subpoenaed the doctor to have his complete file with him at the time of your examination, you discover a photocopy of a check from the defendant's insurance company to the doctor for his fee in examining your client. In this deposition, you also learn that this gentleman no longer treats patients. Rather, his livelihood is derived almost totally from doing independent medical examinations at the request of automobile insurance companies. Entirely coincidentally, of course, this physician has a habit of consistently finding that there is nothing wrong with the people he examines.

In formulating your trial strategy, you plan on impeaching the doctor's testimony by bringing out the fact that he is being paid by the defendant's insurance company and in fact derives his livelihood almost entirely from performing "independent" medical examinations for insurance companies. However, several days before trial, you receive a Motion in Limine from the defendant which seeks to preclude you from mentioning anything having to do with the fact that the defendant may have had liability insurance at the trial of this cause. The trial court grants this motion. No matter though, you think, because you will ask the court for relief from it's Order in Limine to introduce what you rightfully believe is evidence of bias on behalf of the defense doctor.

Unfortunately, at trial the judge tells you that "we are not going to get into any insurance matters here" and refuses to allow you to introduce evidence of who has paid the physician for his examination and the fact that this gentleman depends upon the goodwill of the insurance industry for his livelihood. Rather, you are limited to introducing evidence that the doctor was hired by the defendant.

Certainly, the foregoing frustrating scenario is one which many trial lawyers have experienced. Many trial judges and attorneys believe that evidence of insurance is never admissible under any circumstances, unless of course the defendant blurts out that he was insured. Even then, you get the feeling that the judge would probably declare a mistrial.

Fortunately, if you can persuade the judge to simply follow the law as it exists in this state, one should be successful in introducing the fact that the defendant's insurer is actually the entity which is compensating the defendant's expert witnesses, along with the expert's other financial ties with the insurance industry.

Generally speaking, evidence of liability insurance is not admissible at trial. As to the historical rationale for this rule,

"When the rule originated, insurance coverage of individuals was exceptional. In the absence of references to insurance at trial, a juror most probably would not have thought that a defendant was insured. Today, compulsory insurance laws for motorists are ubiquitous, and liability insurance for homeowners and businesses has become the norm. Most jurors therefore probably assume that defendants are insured." 1 *McCormick* § 201 at 856-857 (4th Edition 1992).

Indeed, in the state of Indiana, proof of insurance is required to obtain a registration or a license plate for an automobile. Indiana Code § 9-18-2-11. As stated by one judge, "[a]ny juror who doesn't know there is insurance in the case by this time should probably be excused by virtue of the fact that his or she is an idiot." *Young v. Carter,* 121 Ga. App. 191, 173 S.E. 2d 259, 261 (1970) (Hall, P.J., concurring).

Rule 411 of the Indiana Rules of Evidence states the general rule that evidence of liability insurance is not admissible upon the issue of whether a person was acting negligently. However, "[t]his rule does not require the exclusion of evidence of insurance against liability when offered for *another purpose* such as proof of agency, ownership or control, or *bias or prejudice of a witness.*" Rule 411 (emphasis added). In other words, the inquiry as to whether evidence of liability insurance is admissible should begin with the question of what issue does this evidence bear upon. If this evidence is to show the existence of bias or prejudice on behalf of a witness, such as in the aforementioned scenario, insurance evidence should be admissible. Although many attorneys and judges do not seem to know this fact, this rule has been the law in this state since 1968.

In the Indiana Supreme Court case of *Pickett v. Kolb,* 250 Ind. 449, 237 N.E. 2d 105 (1968), the plaintiff was inquiring of a defense expert witness as to who had paid for an inspection which he had performed. Defense counsel objected, stating that plaintiff was merely seeking to introduce evidence of liability insurance. The trial court sustained this objection. On appeal, the appellant argued that although liability insurance was not admissible to show that the defendant was negligent or that a "deep pocket" was available, it should be admissible to show the bias or interest or a witness.

In agreeing, the Indiana Supreme Court reversed the trial court and the Court of Appeals, holding that:

"Proof of liability insurance in and of itself is not admissible, but such a principle may not be expanded to the extent that is serves as a means of excluding otherwise competent evidence which is relevant to the issues involved in the trial. We do not think that a trial court may arbitrarily exclude otherwise competent and relevant evidence merely on the ground that it will reveal an insurance carrier is involved.

"If a party sees fit to present a witness on his behalf, the opposing party has a right to cross-examine that witness with reference to all his interests in the litigation, including who is compensating him or giving him anything of value which resulted in him being a witness or participating actively in the litigation."

Pickett v. Kolb, 237 N.E. 2d 105, 108.

This case has been followed by subsequent Indiana decisions which have reversed a trial court's refusal to allow evidence that the defendant's expert was being compensated by an insurance carrier. *See,* e.g., *Benefiel v. Sullivan County REMC,* 161 Ind. App., 238, 315 N.E. 2d 395 (1974), *transfer denied* 263 Ind. 334, 331 N.E. 2d 25 (1975); *Yates v. Grider,* 145 Ind. App. 567, 251 N.E. 2d 846 (1969).

One of the purposes of trial is to present the truth. If this indeed is the goal, then a relationship between a defense expert witness and the defendant's insurer should be rightfully be exposed so that a jury can consider the expert's credibility. As stated by an ancient Slavic proverb, "Whose bread I eat, his song I sing." *Wright and Graham* § 5367, at 459 (1980).•