Tuesday, October 21
2:30 pm-4:00 pm

607 Ethics in Practice

JoAnna Brooks
Partner
Jackson Lewis LLP

Victoria Kidman
Managing Attorney
State Farm Insurance Company

Arlene Zalayet
Senior Vice President and General Attorney
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Faculty Biographies

JoAnna Brooks

JoAnna Brooks is a partner at Jackson Lewis in the firm's San Francisco office. Ms. Brooks has extensive experience specializing in the defense of employment disputes, including, harassment, discrimination, breach of contract, wage and hour and unfair business practices. She routinely works on complex multi-plaintiff and class action matters. Ms. Brooks also represents employers in matters before the California Labor Commissioner, California Unemployment Insurance Appeals Board and California Workers' Compensation Appeals Board. In addition to her litigation practice, Ms. Brooks spends considerable time counseling clients regarding preventative measures to avoid litigation. She assists employers in the formulation of personnel policies and procedures, and has conducted numerous training seminars on prevention of discrimination and harassment in the workplace, personnel management, and wage and hour compliance.

Prior to joining Jackson Lewis, Ms. Brooks worked as an associate specializing in the defense of employment matters at Wilson Sonsini Goodrich and Rosati.

Ms. Brooks received a BA from Purdue University and is a graduate of Georgetown University Law Center.

Victoria Kidman

Victoria Kidman is currently the managing attorney for State Farm Insurance Company's Utah Claim Litigation Counsel Office, Victoria K. Kidman & Associates, in Salt Lake City.

Prior to joining State Farm, Ms. Kidman served as lead counsel for Allstate Insurance Company and established Allstate's first staff counsel office in Utah. She began her legal career at the law firm of Strong & Hanni, where she practiced insurance defense and general civil litigation.

Ms. Kidman is currently the chair of the Utah State Bar's unauthorized practice of law committee and has been a member of the committee for several years. She is also co-chair of the 2008 Utah State Bar's annual convention committee. Ms. Kidman is an AV rated attorney in Martindale-Hubble and has been recognized as one of Utah's Legal Elite in the area of personal injury by Utah Business Magazine and her peers.

Ms. Kidman received a BA from the University of Utah and her JD from S.J. Quinney College of Law. While there, Ms. Kidman served as the executive editor for the Journal of Contemporary Law and the Journal of Energy Law and Policy.

Arlene Zalayet

Arlene Zalayet is senior vice president and general attorney for Liberty Mutual Group in Boston. She is responsible for operations in 62 staff counsel litigation offices in 35 states with staff of approximately 1500 people, where her oversight of staff counsel offices includes management, organizational structure, and talent development.

Prior to joining Liberty Mutual, Ms. Zalayet served as trial division-officer for Nationwide Insurance Company, and was responsible for office audits, ethics compliance, skills/advocacy training, staff development, and quality initiatives for 60 staff counsel litigation offices across the country.

Ms. Zalayet received a BA from St. John's University and is a graduate of the University of Miami School of Law.

Ethics in Practice
Paving the Ethical Path

Arlene Zalayet

Overview:

"Ethics Everyday" for Corporate Counsel

The 3 "C"s for Corporate and In-House Counsel

- Conflict of Interest
- Confidentiality
- Client Communication

Conflict of Interest

ABA Model Rules

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Conflict of Interest (cont.)

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Also see: ABA MODEL RULE 1.8 (b) regarding informed consent

Confidentiality

ABA Model Rules

Client-Lawyer Relationship
RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) 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 or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

Confidentiality (cont.)

Client-Lawyer Relationship
RULE 1.6 CONFIDENTIALITY OF INFORMATION

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Client Communication

ABA Model Rules

Client-Lawyer Relationship
RULE 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

Client Communications (cont.)

ABA Model Rules
RULE 1.4 COMMUNICATION

4) promptly comply with reasonable requests for information; and

5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Golden Rules of In-House Counsel

Duty to supervise ABA Model Rules

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGER, AND SUPERVISORY LAWYERS

a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct

b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

The Golden Rules of In-House Counsel (cont.)

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGER, AND SUPERVISORY LAWYERS

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Law Firms And Associations

ABA Model Rules

Rule 5.2 RESPONSIBILITIES OFA SUBORDIANTE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Law Firms And Associations

ABA Model Rules

Rule 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

Law Firms And Associations (cont.)

Rule 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Law Firms And Associations (cont.)

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Law Firms And Associations

ABA Model Rules

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

Law Firms And Associations (cont.)

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

Law Firms And Associations (cont.)

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Paving the Ethical Path

Five steps along the path

Step One

- Educating the "client"
- Explanation, information provided on continual basis to internal Corporate leadership
  - Updates - Virtual jurisdictions
  - eRooms - Legislation / Regulation
- "Buy-in" support from the highest level of the Corporation
- In the insurance context – discussions with claims leadership on need for complete compliance
  - Consequences for the individual attorney and the enterprise

Paving the Ethical Path (cont.)

Step 2

- Educating the employees
  - Attorneys and paralegals
- "Ethics Everyday" type initiatives - uniformly execute throughout the Department / Program
  - Web site - Monthly Meetings
  - "Topic of the Month - "Breaking Mews" tip sheet
  - Support staff confidentiality

Paving the Ethical Path (cont.)

Step 3

Emphasizing the "Duty to Supervise"

- Implement protocols and guidelines that stress the obligations of supervisory attorneys mandatory "sign-off" by systematic file review team / process

Paving the Ethical Path (cont.)

Step 4

Develop recognition and "issue spotting" techniques

- Interactive "quiz"
- Webinars with "mock" scenarios

Daily Walks Down the Ethical Path

Victoria K. Kidman, Esq.

Paving the Ethical Path (cont.)

Step 5

Appropriately / anonymously addressing questions / disagreements

- Escalation channels
- Ethics "Helpline"
- Appoint internal lawyers ethics committee

Daily Walks Down the Ethical Path

- Client Communication:
  - Insurer's Right to Control Defense
  - Importance of Undivided Fidelity
  - Disclosure of Employment Status
- Conflict of Interest
- Confidentiality

Daily Walks Down the Ethical Path

Client Communication:

- Insurer's Right to Control Defense
- Importance of Undivided Fidelity
- Disclosure of Employment Status

Insurer's Right to Control Defense

- "The insurance contract does not define the ethical responsibilities of the lawyer to his/her client."

ABA Committee on Professional Ethics, Formal Opinion 403 (1996)

Rules of Professional Conduct Govern

- "The essential point of ethics involved is that the lawyer SHALL represent the insured as his client with undivided fidelity."

ABA Committee on Professional Ethics, Formal Opinion 282 (1950)

Insurer's Right to Control Defense

- "The lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of his/her representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract."

ABA Committee on Professional Ethics, Formal Opinion 403 (1996)

Insurer's Right to Control Defense

- Under Rule 1.2 the lawyer may "limit the objectives of representation" but only if "the client consents after consultation" with the lawyer."
- Rule 1.2 "explicitly requires" the lawyer to communicate with the client and convey information "sufficient to permit the client to appreciate the significance of the matter in question."

ABA Committee on Professional Ethics, Formal Opinion 403 (1996)

Insurer's Right to Control Defense

- "A prudent lawyer hired by an insurer to defend an insured will communicate with the insured concerning the limits of the representation at the earliest practical time."

ABA Committee on Professional Ethics, Formal Opinion 403 (1996)

Insurer's Right to Control Defense

- "A short letter clearly stating that the lawyer intends to proceed at the direction of the insurer under the insurance contract and what this means to the insured satisfies Rule 1.2."
- No extended discussion or any oral communication is necessary.

ABA Committee on Professional Ethics, Formal Opinion 403 (1996)

Initial Client Letter – Sample Language

"X Insurance Company has appointed this office to defend you at X Company's expense in the lawsuit filed against you under the terms of the insurance policy that provides you with coverage. Your policy provides that X Company retains the right to investigate, negotiate and settle any claim or suit. "

Initial Client Letter – Sample Language

"Because I have been appointed to represent you in defending the claims made against you in this lawsuit, I cannot represent you in any claim of your own. If you wish to make a claim, you should consult an attorney of your choice, promptly, at your expense. "

Importance of Undivided Fidelity

Rule 5.4 (c) states:

"A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Importance of Undivided Fidelity

– "In defending insureds, insurance staff counsel must be vigilant of Rule 5.4(c) which requires a lawyer to exercise independent professional judgment in advising or otherwise representing clients, regardless of who may be paying for the lawyer's services."

ABA Committee on Professional Ethics, Formal Opinion 430 (2003)

Initial Client Letter – Sample Language

"Pursuant to the terms of your insurance policy, I will also be consulting with X Insurance Company's Claim Department concerning the facts and progress of the case. However, my primary obligation is to you, and I cannot and will not take any action contrary to your interest. "

Corporate Code of Conduct

"X Insurance Company recognizes that those employees holding positions as Claim Litigation Counsel owe an ethical duty of undivided loyalty to their individual clients. If the good faith discharge of these duties and responsibilities by Claim Litigation Counsel conflicts with their duty of undivided loyalty to X Insurance Company as an employee, the duty to their individual clients is preeminent."

Initial Client Letter – Sample Language

"I am an employee of the Corporate Law Department of X Insurance Company, as are other members of this office. I have been assigned responsibility for this file and will represent you and exercise my independent legal judgment on your behalf."

Disclosure of Employment Status

- "Rule 1.8(f) requires insurance staff counsel to disclose their employment status and affiliation with the insurance company to all insureds-clients."
- "Such disclosure should occur at the earliest opportunity practicable."

  ABA Committee on Professional Ethics, Formal Opinion 403 (1996)

Conflict of Interest

- One of a lawyer's foremost professional responsibilities is preservation of the client's confidence with respect to "information related to representation."

  Model Rule 1.6
- A lawyer is required to provide information to a client "to the extent reasonably necessary to permit the client to make informed decisions regarding representation."

  Model Rule 1.4

Conflict of Interest

– Common hypothetical –

- Lawyer retained by insurance company to defend both the insured employer and an employee of the insured whose conduct is at issue and for which the employer may be vicariously liable.

Initial Client Letter – Sample Language

"Based on the information that I have reviewed to date, I am not aware of any conflict between your position and that of X Insurance Company in this case. If you are aware of any conflict, please notify me immediately. If, in the course of representing you, I discover facts that raise a conflict, I will promptly advise you of the conflict and I will not disclose these facts to X Insurance Company. If a conflict arises that cannot be resolved, I will withdraw entirely from the matter and a new lawyer will be selected at X Insurance Company's expense."

Conflict of Interest

– "Counsel retained by an insurer should ensure that the client(s) are fully informed at the inception of the relationship, preferably in writing, of any limitation inherent in the representation and any area of potential conflict ."

ABA Committee on Professional Ethics, Formal Opinion 450 (2008)

Conflict of Interest

– "The lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company when the revelation might result in denial of insurance protection to the employee ."

ABA Committee on Professional Ethics, Formal Opinion 450 (2008)

Conflict of Interest

– "In the event the lawyer is prohibited from revealing the information, and withholding the information from the other client would cause the lawyer to violate Rule 1.4(b), the lawyer MUST withdraw from representing the client under Rule 1.16(a)(1)."

ABA Committee on Professional Ethics, Formal Opinion 450 (2008)

Confidentiality

– Rule 1.9 prohibits any attorney from using information relating to his prior representation of a client "to the disadvantage of the former client."

Model Rules 1.9(b)

Conflict of Interest

– "The lawyer has no obligation under Rule 1.4 to communicate to the insurer information contrary to the interests of the insured, but on the contrary is obliged by Rule 1.6 not to do so."

ABA Committee on Professional Ethics, Formal Opinion 450 (2008)

Confidentiality

– Rule 1.6 allows disclosure "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."

Model Rules 1.6(b)(3)

Confidentiality

– "The lawyers may, consistent with their duties under the Rules of Professional Conduct, disclose matters relating to their representation of State Farm in a suit against State Farm, so long as those disclosures are reasonably necessary to that claim."

Spratley v. State Farm, et. al., 78 P.3d 603 (Utah 2003)

Confidentiality

– "Both former in-house counsel and trial courts must exercise great care in disclosing confidences."

– "It remains the attorney's duty to minimize disclosures. Any disclosures not reasonably necessary to the claim may still subject that attorney to professional discipline or litigation sanctions."

Spratley v. State Farm, et. al., 78 P.3d 603 (Utah 2003)

Confidentiality

– "The public interest is better served [when] in-house counsel's resolve to comply with ethical . . . duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with those duties."

Spratley v. State Farm, et. al., 78 P.3d 603 (Utah 2003)

Corporate Code of Conduct

CONFIDENTIAL AND PROPRIETARY MATTER: Ideas, information, and data which are proprietary to X Insurance Company must be safeguarded from unauthorized disclosure or use. This information includes, but is not limited to, copyrights, trade secrets, customer lists, marketing plans, manuals, and other materials developed for business use.

Such proprietary matter belongs to X Insurance Company, and employees must not use it for their benefit or that of others. Employees must return proprietary matter to X Insurance Company upon request or when they leave X Insurance Company. The obligation not to reveal proprietary matter continues after employees leave X Insurance Company.

To protect confidentiality and to preserve applicable legal privileges, the discussion of X Insurance Company's legal matters should be restricted to those with a need to know."

Daily Walks Down the Ethical Path

- Training
  - Yearly
  - Monthly
  - Daily
- Keep an open door to facilitate discussions
- Have a presence in the office and walk the floors

Legal Oversight of Internal Investigations of Executive Misconduct

- Sarbanes-Oxley
- Discrimination/Harassment Complaints
- Wage and Hour Compliance

Ethical Rules Implicated in Handling of Internal Investigations

JoAnna Brooks, Esq.

- **ABA Model Rules of Professional Conduct**
  Client-Lawyer Relationship
  Rule 1.13 Organization as Client

a. A lawyer employed or retained by an organization **represents the organization** acting through its duly authorized constituents.

b. **If a lawyer** for an organization **knows** that an officer, employee or other person associated with the organization **is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization**. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Except as provided in paragraph (d), if,

despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon, or fails to address in a timely and appropriate manner, an action, or a refusal to act, that is clearly a violation of law, and

the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation, whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

- CRPC 3-600 organization as client:

  If attorney learns agent of organization intends to act or refuses to act in a manner which violates law which is imputable to organization

  The attorney may report the matter to the highest internal authority

  If highest internal authority refuses to prevent violation of law, attorney's only recourse is resignation

Contrary to Model Rules, cannot disclose in CA

What Should You Do To Protect the Organization and Avoid Ethical Violations?

- Develop Complaint Procedures
- Referral to External Investigator
- Combination of Internal and External Resources
- Review D&O insurance policies in terms of coverage and claim reporting requirements

Scenario #1

John Doe, a claims handler with your company, We Care Insurance, calls you and informs you that he has a new law suit to assign to your office. He is particularly interested in this case as the damage to the vehicles is very minor, but the alleged injuries are very serious and the insured driver is a wealthy business person with a high profile in the local community. You accept the case referral and assure Adjuster Doe that the case will be handled well.

You assign the file to a senior litigation team in your office. The team consists of a senior attorney, a newly admitted attorney, a paralegal and a legal secretary. The senior attorney is about to start a long complex trial. She hands over the file to the new attorney and suggests he "run with it". She also advises the new attorney to ask the paralegal for help if he has any questions and to let her know if there are any problems. The newly admitted attorney asked the paralegal to prepare the pleadings and discovery demands. He also instructs the secretary to call the client to discuss the details of the accident. Because this was the first lawsuit handled by the new attorney, his secretary did not send an initial letter of representation to the client. You see the senior attorney in the office working late one evening during her trial and she assures you the file is under control.

The next morning Adjuster Doe calls you to say he received an irate phone call from the defendant because "the lawyer who called him could not answer his questions about his financial exposure on the case." He said the new lawyer "promised" him that the case would never go to trial. Adjuster Doe is also upset because the insurance company planned to take this "bogus mill firm minor impact case" trial.

What issues do you see so far? What would have been the better practice at the initial file referral stage?

Scenario #2

The client comes in for a meeting with you after his phone call with Adjuster Doe. He begins to immediately discuss the facts of the accident and tells you that he was not actually driving the car at the time of the accident. His best friend who is unlicensed was driving and they did not want the police or the insurance company to know this.

You tell him that your firm may not be able to continue to handle this case because you are employees of We Care Insurance. You don't explain why you may not be able to handle the case and simply tell him that his assigned lawyer will call him to discuss this as soon as she has completed her big trial. The client is "outraged" to learn about your firm's employment relationship with We Care Insurance. He says wouldn't have told you about this fact if he knew you were "one of them."

You note the potential conflict in the file and ask the secretary to set up a meeting with the senior attorney as soon as she gets out of trial. The next day Adjuster Doe calls your office to see how the meeting with the client went. The paralegal grabs the file and reads him the entry you made regarding the best friend having been the driver. Adjuster Doe then leaves you a message indicating he now has "doubts" about the coverage for the accident. What issues do you see? What steps, if any, can be taken at this point to rectify the situation?

Appendix of Supporting Opinions
For
Ethics in Practice: A Panel Discussion

Contents:

ABA 96-406 re: Policy Limits

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 96-403

OBLIGATIONS OF A LAWYER REPRESENTING AN INSURED WHO OBJECTS TO A PROPOSED SETTLEMENT WITHIN POLICY LIMITS

August 2, 1996

A lawyer hired by an insurer to represent an insured may represent the insured alone or, with appropriate disclosure and consultation, he may represent both the insurer and the insured with respect to all or some aspects of the matter. So long as the insured is a client, however, the Rules of Professional Conduct--and not the insurance contract--govern the lawyer's obligations to the insured. A lawyer hired to defend an insured pursuant to an insurance policy that authorizes the insurer to control the defense and to settle within policy limits in its sole discretion must communicate the limitations on his representation of the insured to the insured, preferably early in the representation. After the lawyer has communicated the necessary information to the insured, the lawyer may settle at the direction of the insurer. If a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense.

Introduction

In this opinion we consider several issues that may arise when a lawyer is hired by an insurance company to defend an insured with respect to a claim pursuant to an insurance contract that authorizes the insurer to control the defense and settlement of the claim in its sole discretion without consultation with the insured. First, whether the lawyer has any obligations to the insured under the Model Rules of Professional Conduct (1983, as amended) in these circumstances. Second, what disclosures must the lawyer make to the insured if the lawyer intends to proceed with the representation of the insured at the direction of the insurer. Third, what can the lawyer do when the insured objects to a settlement acceptable to both the insurer and the plaintiff.

For purposes of discussion, we assume an insurance policy that requires an insurer to defend its insured with respect to specified categories of claims. The policy authorizes the insurer to direct the defense of any claims against the insured, including settlement within the policy limits,

in its sole discretion without the consent of the insured. A claim covered by the policy is asserted against the insured, and the insurer hires counsel to defend the claim. n1 A settlement within the policy limits and acceptable to both the insurer and the plaintiff is proposed.

n1 *See generally* D. R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics,* 9 GEO. J. LEG. ETHICS 475, 477-81 (1996) (describing an insurer's duty to defend).

The Model Rules of Professional Conduct offer virtually no guidance as to whether a lawyer retained and paid by an insurer to defend its insured represents the insured, the insurer, or both. *See* American Bar Association ("ABA"), Model Rules of Professional Conduct, Scope [15] (1994) ("for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists"). The Model Rules assume a client-lawyer relationship established in accordance with state law, and prescribe the ethical obligations of the lawyer that flow from that relationship.

The insurer, the insured, and the lawyer may agree on the identity of the client or clients the lawyer is to represent at the outset. For example, the parties might agree that the lawyer will represent (1) the insured alone, (2) the insured and the insurer, or (3) the insured and the insurer for all purposes except settlement, and with respect to settlement the lawyer will represent the insurer alone. Provided there is appropriate disclosure, consultation, and consent, any of these arrangements would be permissible. Absent an express agreement specifying the identity of the lawyer's client or clients, however, a lawyer hired by an insurer to defend its insured may be held to have a client-lawyer relationship with the insured alone or with both the insured and the insurer. n2

n2 *Id.* at 482, note 26 (1996) (collecting cases). At one time, at least some courts concluded there was no client-lawyer relationship between the insured and the lawyer hired by the insurer to defend the insured pursuant to an insurance policy. *See* C. Silver, *Does Insurance Defense Counsel Represent the Company or the Insured,* 72 TEX. L. REV. 1583, 1590 note 33 (1994); C. WOLFRAM, MODERN LEGAL ETHICS 430-32 (1986). Today, absent a contrary agreement as to the identity of the client, the prevailing view appears to be that the lawyer represents both the insured and the insurer, at least for some purposes. *See, e.g.,* K. Bowdre, *Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel,* 17 AMER. J. TRIAL ADVOC. 101, 109 (1993). In any event, if the insured is not the lawyer's client, the lawyer's obligations to him are generally governed by some source of law other than the Rules of Professional Conduct. Beyond noting the requirements of Rule 4.3, we do not address the lawyer's duties to the insured if the insured is not a client.

We have no reason to enter the debate as to whom the lawyer represents in this context absent an express agreement as to the identity of the client. For purposes of this opinion, nothing fundamental turns on whether the lawyer represents the insured alone or both the insurer and the insured. If a lawyer hired and paid by an insurer to defend a claim against an insured represents the insured--whether alone or jointly with the insurer, whether by virtue of a provision in an engagement letter or otherwise--the Rules of Professional Conduct govern the lawyer's obligations to the insured, and "the essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity . . ." ABA Committee on Professional Ethics, Formal Opinion 282 (1950) (construing the 1908 Canons of Professional Ethics). Whatever the rights and duties of the insurer and the insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to his client. n3

n3 *See* Rogers v. Robson, Masters, Ryan, Brumund and Belom, 407 N.E.2d 47, 49 (Ill. 1980), *aff'g* 392 N.E.2d 1365 (Ill. App. 1979) (defendant lawyers' duty "stemmed from their attorney-client relationship with plaintiff and was not affected by the extent of the insurer's authority to settle without plaintiff's consent").

If the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of his representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract. Generally a lawyer must abide his client's decisions as to the objectives of the litigation and specifically as to whether to accept a settlement. Rule 1.2(a) states:

> A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to [subparagraph (c)] . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

Rule 1.2(c) provides that a "lawyer may limit the objectives of the representation," but only if "the client consents after consultation" with the lawyer. "Consultation" "denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Model Rules of Professional Conduct, Terminology. *See also* Rule 1.2, Comment [4]; Rule 1.4(b); Rule 1.7(b); Rule 4.3.

We presume that in the vast majority of cases the insured will have no objection to proceeding in accordance with the terms of his insurance contract. Nonetheless, communication between the lawyer and the insured is required. Rule 1.2 explicitly requires the lawyer to communicate with the client, and convey information "sufficient to permit the client to appreciate the significance of the matter in question." We cannot assume that the insured understands or remembers, if he ever read, the insurance policy, or that the insured understands that his lawyer will be acting on his behalf, but at the direction of the insurer without further consultation with the insured.

A short letter clearly stating that the lawyer intends to proceed at the direction of the insurer in accordance with the terms of the insurance contract and what this means to the insured is sufficient to satisfy the requirements of Rule 1.2 in this context. We do not believe extended discussion is required or, indeed, that any oral communication is necessary. As long as the insured is clearly apprised of the limitations on the representation being offered by the insurer and that the lawyer intends to proceed in accordance with the directions of the insurer, the insured has sufficient information to decide whether to accept the defense offered by the insurer or to assume responsibility for his own defense at his own expense. No formal acceptance or written consent is necessary. The insured manifests consent to the limited representation by accepting the defense offered by the insurer after being advised of the terms of the representation being offered. n4

n4 *Cf.* Moritz v. Medical Protective Co., 428 F.Supp. 865, 871 (W.D. Wis. 1977) (construing the insurance policy at issue to provide that "when the insured elects to tender to the insurer the defense of a claim against him or her, he or she consents to having the insurer choose the lawyer who is to defend the claim; and that the insurer is entitled then to

control the defense by taking charge of the incidents of the defense including the supervising of the litigation").

Once the lawyer has apprised the insured of the limited nature of his representation and that he intends to proceed in accordance with the directions of the insurer, he has satisfied the requirements of Rule 1.2(c). A prudent lawyer hired by an insurer to defend an insured will communicate with the insured concerning the limits of the representation at the earliest practicable time. For example, basic information concerning the nature of the representation and the insurer's right to control the defense and settlement under the insurance contract reasonably could be incorporated as part of any routine notice to the insured from the lawyer advising the insured that the lawyer has been retained by the insurer to represent him. Alternatively, so long as it is early in the representation, the lawyer may wait until there is some other reason for communicating with the insured in connection with the claim such as developing relevant facts, answering a complaint, responding to interrogatories, or scheduling a deposition. Failure to make the appropriate disclosures near the outset of the representation may generate wholly unnecessary, but difficult, problems for the insured, the insurer, and the lawyer. Thus, if the lawyer fails to advise the insured of the limited nature of the representation and his intention to proceed in accordance with the directions of the insurer early in the representation, the lawyer may find himself trying to advise the insured of a proposed settlement at the last minute under short time constraints, when the insured will have little practical opportunity to reject the defense offered by the insurer and assume responsibility for his own defense.

If after accepting the limited representation offered under the insurance contract, the insured and the insurer disagree as to whether a proposed settlement is acceptable and, moreover, who has the right to decide that question under the insurance contract, the lawyer may consult with his client or clients as to the likely consequences of a proposed course of conduct or advise the parties to seek independent counsel, and indeed in some circumstances he may be required to do so. Rule 1.7(a). Thus, for example, the lawyer might remind the insured that the policy gives the insurer the right to control the defense and settle the claim without the consent of the insured or that rejecting the proposed settlement might result in a forfeiture of his rights under the policy. Ultimately, however, although the insurer hires the lawyer and pays his fee, the insured retains the power to reject the defense offered by the insurer under the policy and to assume the risk and expense of his own defense. Rule 1.16. n5

n5 Rule 1.16(a)(3) provides that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client, if ... the lawyer is discharged." *See generally* Silver, *supra* note 2, at 1614; ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1397 (1977); *see also* Model Rule 1.2, Comment [5]. Of course, if the lawyer has entered an appearance in judicial proceedings, he may need the approval of the court to withdraw.

If the dispute between the insurer and the insured as to the desirability of settlement results in the insured's rejection of the defense offered under the policy and hence termination of the lawyer's representation of the insured, Rule 1.9 would preclude the lawyer from participating in the settlement on behalf of the insurer alone without the consent of the insured, his former client. *See* Rule 1.9, Comment [1] ("The principles of Rule 1.7 determine whether the interests of the present and former client are adverse.").

As a practical matter, however, if the insurer has the right to settle a claim without the consent of the insured, the insured may be powerless to prevent a settlement within the policy limits. A claims agent for the insurer or another lawyer who represented only the insurer certainly could negotiate a settlement with the plaintiff and secure a release of all claims against the insured, without ever entering an appearance on behalf of the insured. Furthermore, without a plaintiff interested in pursuing the matter, the insured would be hard pressed to continue the litigation even with new counsel. Absent bad faith on the part of the insurer, the insured is not likely to suffer any cognizable injury resulting from the insurer's exercise of its rights under the contract. n6

n6 *See* Caplan v. Fellheimer, 68 F.3d 828, 838-40(3d Cir. 1995); *see also* Gardner v. Aetna Casualty & Surety Co., 841 F.2d 82 (4th Cir. 1988); Nationwide Mutual Ins. Co. v. Public Service Co. of North Carolina, 435 S.E.2d 561 (N.C. App. 1993).

In any matter pending before a court, a lawyer may advise the court of the status of settlement negotiations--specifically, that the insured objects to a settlement acceptable to both the insurer and the plaintiff. In these circumstances, a court reasonably might conclude that the insurer's rights under the insurance contract warrant settlement over the insured's objection. The lawyer, however, may not make that determination on behalf of either the insured or the insurer.

As described at the outset of this opinion, in the vast majority of cases, an insured doubtless will be delighted at the prospect of resolving litigation against him, provided only that the amount of the proposed settlement is within the insurance policy limits. So long as the lawyer has apprised the insured of the limitations on the representation offered under the insurance policy and the insurer's right to settle the matter, as described above, whether at the outset of the representation or later, and the lawyer does not know that the insured objects to the proposed settlement within policy limits, the lawyer may follow the directions of the insurer to settle, without further communication with the insured. In the unusual case addressed in this opinion, however, where the lawyer knows that the insured objects to a settlement within policy limits, the lawyer must give the insured an opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense.

Conclusion

Whether a lawyer hired by an insurer to defend an insured represents the insured alone or the insured and the insurer, the Rules of Professional Conduct govern the lawyer's obligations to his client or clients. After appropriate disclosure to the insured as to the limited nature of the representation being offered under the insurance contract, a lawyer may proceed with the representation of an insured at the direction of the insurer in accordance with the terms of the insurance contract. If the lawyer knows that the insured objects to a settlement, however, he may not proceed without giving the insured an opportunity to assume responsibility for his own defense at his own expense. The lawyer also may apprise an appropriate court of the dispute between the insured and the insurer, and proceed in accordance with the court's instructions.

ABA 30-430 re: Staff Counsel

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 03-430

PROPRIETY OF INSURANCE STAFF COUNSEL REPRESENTING THE INSURANCE COMPANY AND ITS INSUREDS; PERMISSIBLE NAMES FOR AN ASSOCIATION OF INSURANCE STAFF COUNSEL

July 9, 2003

This opinion addresses two ethical issues arising under the Model Rules of Professional Conduct. n1 First, may insurance staff counsel n2 represent both their employer and their employer's insureds in a civil lawsuit resulting from an event defined in the insurance policy? Second, under what name may an association of insurance staff counsel practice?

For the reasons set forth below, the Committee reaffirms its prior opinions and concludes that insurance staff counsel ethically may undertake such representations so long as the lawyers (1) inform all insureds whom they represent that the lawyers are employees of the insurance company, and (2) exercise independent professional judgment in advising or otherwise representing the insureds.

The Committee also concludes that insurance staff counsel may practice under a trade name or under the names of one or more of the practicing lawyers, provided the lawyers function as a law firm and disclose their affiliation with the insurance company to all insureds whom they represent.

n1 This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

n2 "Insurance staff counsel" are insurance company employees. Alternatively, they are called "house," "in-house," "salaried," or, less precisely, "captive" counsel.

Background

A liability insurance policy, subject to stated policy limits, promises to pay on behalf of the insured any amount for which the insured is liable on claims falling within the policy's coverage. In addition to this duty to indemnify, the insurance company assumes the duty to defend the insured against any such claims. The insured, in turn, by entering into a liability insurance contract with an insurance company, consents to give the company considerable control over the direction of the defense and any settlement of the matter. n3

n3 *See* JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4681 (1979).

If the insured asks the insurance company to defend a lawsuit, and the suit falls within the insurance company's duty to defend, the insurance company is contractually bound to retain a lawyer to represent the insured. Absent a conflict, the lawyer commonly represents the insurance company as well. n4 The determination of when and to whom the client-lawyer relationship attaches is a matter of state law and not governed by the rules of professional responsibility. However, once the client-lawyer relationship attaches, the rules of professional responsibility, not the insurance contract or the lawyer's employer, govern the lawyer's ethical obligations to clients. n5 These obligations, the Committee's prior opinions have found, largely are unaffected by the determination of whether or not the insurance company is a co-client. n6 In any event, the insurance company provides direction to defense counsel in accordance with the terms of the insurance policy, and often as a co-client as well.

n4 Many jurisdictions have adopted this "dual client" rule. For a collection of cases and authorities, *see* ABA Comm. on Ethics and Professional Responsibility Formal Op. 01-421 (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) n. 6 (Feb. 16, 2001), and RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 29.3 at 213 (5th ed. 2000).

Other jurisdictions have adopted a "single client" rule, in which the lawyer's sole client is the insured. For a collection of cases and authorities, *see* ABA Formal Op. 01-421 n.7. The ABA Ethics Committee's analysis and conclusions in this opinion are equally applicable in both "dual client" and "single client" jurisdictions.

n5 ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-403 (Obligations of a Lawyer Representing an Insured Who Objects to a Proposed Settlement Within Policy Limits) (Aug. 2, 1996), *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 405 (ABA 2000).

n6 ABA Formal Ops. 01-421 and 96-403, *supra* notes 4 and 5.

Historically, most insurance defense lawyers practiced in private law firms. Today, however, many are employees of insurance companies. n7 Whether insurance companies may use employee-lawyers to defend insureds, therefore, has been the subject of numerous opinions by courts and state bar association committees. n8 The focus of these opinions customarily has been twofold. First, as a matter of the state's substantive law, does an insurance company that employs insurance staff counsel to represent the company's insureds engage in the unauthorized practice of law? n9 And second, as an ethical consideration, does the defense of insureds by employee-lawyers of the insurance company create an inherent and impermissible conflict of interest for the lawyer? n10 Because issues of substantive state law are beyond the purview of this Committee, we do not address the issue of the unauthorized practice of law. Rather, we focus exclusively on the second question, namely, the ethical considerations associated with the use of insurance staff counsel.

n7 Insurance companies reportedly have employed insurance staff counsel to defend insureds since the 1890's. It is estimated that there are several thousand insurance staff counsel presently representing hundreds of thousands of insureds. *See* Charles M. Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 237-40 (1997-98).

n8 Many of these court decisions and bar association opinions are collected in Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 155 (Ind. 1999).

n9 A substantial majority of jurisdictions that have addressed the issue have concluded the use of insurance staff counsel does not constitute the unauthorized practice of law. *See, e.g.*, Gafcon, Inc. v. Ponsor & Assoc., 98 Cal.App.4th 1388, 1396-97, 120 Cal.Rptr.2d 392, 397 (Cal. Ct. App. 2002). Illinois and Maryland have enacted statutes permitting insurance companies to employ staff counsel to defend insureds. 705 ILL. REV. STAT. ch. 220, para. 5 (2001); MD. CODE ANN. BUS. OCC. & PROF. § 10-206 (2001). Kentucky and North Carolina, however, have interpreted their unauthorized practice of law statutes to prohibit staff counsel operations. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996); Gardner v. N.C. State Bar, 341 S.E.2d 517, 521 (N.C. 1986).

n10 *See* Robert J. Johnson, *Comment: In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibility*, 57 OHIO ST. L.J. 945, 965 (1996).

Issue one: May insurance staff counsel represent both their employer and their employer's insureds in a lawsuit seeking damages resulting from an event for which the insurance policy imposes a duty to defend?

The Committee first considered the ethical implications of lawyers serving as insurance staff counsel in Formal Opinion 282 (1950). n11 Applying the provisions of the Canons of Professional Ethics, we stated that "[a] lawyer, employed and compensated by an ... insurance company, which holds a standard contract of insurance with an insured, may with propriety ... defend the insured in an action brought by a third party...." n12 We noted that "a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest." n13

n11 ABA Comm. on Ethics and Professional Responsibility Formal Op. 282 (May 27, 1950), *in* OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 621 (ABA 1967).

n12 *Id.*

n13 *Id.* at 622.

We revisited the question in Informal Opinion 1370, n14 concluding that the then-applicable Code of Professional Responsibility suggested "no different results." n15 A year later, in Informal Opinion 1402, n16 we reaffirmed an observation made in Formal Opinion 282 that "the essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity...." n17

n14 ABA Comm. on Ethics and Professional Responsibility Informal Op. 1370 (Representation of Policy Holder by Insurance Company House Counsel) (July 16, 1976), *in* FORMAL AND INFORMAL ETHICS OPINIONS 252 (ABA 1985).

n15 *Id.*

n16 ABA Comm. on Ethics and Professional Responsibility Informal Op. 1402 (Insured's Contractual Obligation to Reimburse Liability Insurer for Legal Expenses up to Deductible Amount in Defending Claim When Insurer's House Counsel Acts in Behalf of Insured) (November 3, 1977), *in* FORMAL AND INFORMAL ETHICS OPINIONS 290 (ABA 1985).

n17 *Id.* at 292.

We acknowledge that insurance staff counsel operations, perhaps due to their evolution and growth, continue to spawn ethical challenges. n18 Therefore, we revisit the issue in the context of today's Model Rules.

n18 *See* Silver, *supra* note 7 at 237-58.

Insurance Staff Counsel and the Model Rules of Professional Conduct

The defense of an insured under an insurance contract gives rise to interrelated duties between the insurance company, the insured, and the lawyer retained by the insurance company. The Model Rules provide considerable guidance to insurance defense lawyers who must address the potentially divergent interests of insureds and their insurance companies on a daily basis. Fortunately, in the great majority of liability cases, the interests of insureds and their insurance companies do not collide. n19

n19 *See* Kent D. Syverud, *What Professional Responsibility Scholars Should Know About Insurance*, 4 CONN. INS. L.J. 17, 22 (1997-98) ("Intractable conflicts between insured and company have rarely developed, even though the insurance company largely calls the shots in the defense of claims.").

This is particularly true in the "full coverage case" in which the probable monetary exposure of the insured is within the limits of the insurance policy and there is no dispute regarding coverage for the incident. The interests of the company and the insured in these situations are financially aligned. n20

n20 *See* In re Allstate Ins. Co., 722 S.W.2d 947, 952 (Mo. 1987) ("When coverage is admitted and adequate the interests of the insurer and the insured are congruent. Both are interested in disposing of the case on the best possible terms. Only the insurer's money is involved. Even though the insured may be interested in minimizing liability and damages, perhaps because of apprehension about insurance coverage and rates, this concern introduces no conflict and there is no reason why the same lawyer may not represent both interests.").

We do not view the employment status of insurance staff counsel as itself creating a conflict between the insurance company and the insured when they are both represented by insurance staff counsel in a lawsuit. n21 In fact, the Model Rules dealing with conflicts of interest between co-clients specifically contemplate lawyers representing multiple clients. Of course, if a conflict of interest between the insurance company and the insured does arise in the course of the representation, the lawyer immediately must resolve it by either obtaining the insured's informed consent or terminating his representation of the insured. n22

n21 *See* In re Youngblood, 895 S.W.2d 322, 330 (Tenn. 1995) (employment relationship does not, in and of itself, constitute a violation of the professional duties of lawyers).

n22 In re Allstate Ins. Co. 722 S.W.2d at 953; Cincinnati Ins. Co. v. Wills, 717 N.E.2d at 163 ("if [a conflict] arises retention of new counsel to represent the policyholder may be either preferred or necessary").

Some courts and commentators have argued that, when the insurance company uses insurance staff counsel to defend its insureds, the opportunity for undue influence by the insurance company is too great. n23 However, even if it were assumed that the insurance company has more control over its employees than it does over retained lawyers in private practice, that circumstance is of no significance in the full coverage case "in which there is no temptation to favor the insurer's interests over that of the insured." n24

n23 *See, e.g.*, American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d at 571, as well as Michael D. Morrison and James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 401-02 (2001).

n24 In re Allstate Ins. Co., 722 S.W.2d at 952. *See also* Cincinnati Ins. Co. v. Wills, 717 N.E.2d at 163 ("the potential for conflict is inherent in the insurer-insured relationship regardless of whether the attorney is house counsel or outside counsel, and the employment relationship is not qualitatively different in this respect"). Some authorities even assert that there is less opportunity for undue influence in an insurance staff counsel office than in a private law firm. *See* MALLEN & SMITH, *supra*, note 4, § 29.10 at 272 ("In a properly structured corporate environment, salaried counsel does not face many of the economic pressures that can tempt outside counsel to favor the insurance company. Employed counsel has no bills to send out, justify or collect. There is no concern about receiving future assignments, and there is no economic benefit in seeking to increase the volume of the business."). For a description of the pressures placed upon outside insurance defense lawyers, *see* Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J., 27, 46 (1997-98).

We do note, however, that in defending insureds, insurance staff counsel must be vigilant of Rule 5.4(c), n25 which requires a lawyer to exercise independent professional judgment in advising or otherwise representing clients, regardless of who may be paying for the lawyer's services. n26 This rule underscores the importance of undivided fidelity to the insured-client. n27 Nothing in the status of insurance staff counsel as employees diminishes their obligation or ability to comply with Rule 5.4(c) or any of the other Model Rules. n28

n25 Rule 5.4(c) states "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

n26 Although a lawyer has the duty to advise, the Model Rules leave to the client or the client's representative the decision whether to implement legal advice. As Rule 1.4(b) states, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

n27 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 12.13, at 12-31-12 to 32 (3d ed. 2002).

n28 *See, e.g.*, California State Bar Standing Comm. on Professional Responsibility and Conduct Formal Op. 1987-91, 1987 WL 109707 * 3 (1987) ("the mere fact that the lawyers are employees of Insurance Company does not necessarily compromise the attorney's independent professional judgment").

Disclosure of Employment Status

In Formal Opinion 96-403, n29 we discussed certain disclosures that an insurance defense lawyer must make to the insured-client. We noted that the Model Rules require the lawyer "to communicate with the client, and convey information 'sufficient to permit the client to appreciate the significance of the matter in question.'" n30 We advised that a prudent lawyer would inform the client of "basic information concerning the nature of the representation and the insurer's right to control the defense and settlement under the insurance contract...." n31 We suggested that this information could be routinely included in the retainer letter, or otherwise provided near the outset of the representation.

n29 ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-403, *supra* note 5.

n30 *Id.* at 406.

n31 *Id.*

Here we interpret Rule 1.8(f) to require insurance staff counsel to disclose their employment status and affiliation with the insurance company to all insureds-clients. n32 Such disclosure should occur at the earliest opportunity practicable, such as during the initial meeting with the client or through appropriate language in the initial letter to the client. n33

n32 Model Rule 1.8(f) provides: "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6." It typically applies when the insurance company pays the fees of the defense lawyer to represent the policyholder, whether or not the insurance company also is a client. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16, cmt. e (2000). ("A lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client.").

n33 These are not the exclusive means of informing insureds-clients. The disclosure of employment status to clients can be accomplished in a variety of ways, including a personal meeting with the insured or clear language in the engagement letter. As one bar association ethics committee has stated: "In this situation lawyers should exercise their own sound judgment as to how best to inform insureds whom they are designated to represent that they are paid by the insurers, whether as employees or independent contractors...." Nassau County Bar Ass'n Comm. on Professional Ethics Op. 95-5 (1995).

In contrast, the Model Rules do not place a similar duty of affirmative disclosure on insurance staff counsel in respect to communications with the courts or persons other than insureds-clients. As an ethical consideration, whether a lawyer is a member of an outside law firm or an employee of an insurance company is rarely material to persons other than insureds-clients. Therefore, although local law or court rule may require affirmative disclosure to persons other than insureds-clients, the Model Rules do not.

Issue two: How may an association of insurance staff counsel identify itself?

We next turn to the matter of names by which an insurance staff counsel office may identify itself. This subject has been of some concern to courts and state bar associations. n34 As the New Jersey Supreme Court stated: "We recognize the genuine interest of the petitioners in being permitted to practice under a name that they believe reflects the nature of their association." n35

n34 *See* MALLEN & SMITH, *supra* note 4, § 29.10 at 261 (setting out the various jurisdictional approaches).

n35 In re Weiss, Healy & Rea, 536 A.2d 266, 269-70 (N.J. 1988).

The inquiry must begin, as the New Jersey Supreme Court correctly assessed, with a determination of the "nature of the association." Stated directly: does an association of insurance staff counsel constitute a "firm" or "law firm" within the meaning of the Model Rules?

Whether an association of lawyers constitutes a "law firm" turns upon (1) the manner in which the association functions, and (2) the association's compliance with the responsibilities of a law firm, including those imposed by the Model Rules. n36 We thus examine the structure and function of insurance staff counsel operations.

n36 *See* Florida Bar Ass'n Report of the Special Comm'n on Ins. Practices II at 16 (Mar. 1, 2002), *adopted by* Florida Bar Bd. of Governors (Mar. 15, 2002) ("It is recognized that what constitutes a law firm for purposes of the rules is to be determined by a functional analysis of particular relationships and the purposes of the relevant ethical strictures in protecting the public interest."). *See also* Amendment to Rules Regulating The Florida Bar Re: Rules of Professional Conduct, 838 So.2d 1140 (Fla. 2003) (court formally adopted amendments to rules of professional conduct recommended in Special Commission report).

Although there is substantial variation in approaches taken by different insurance companies, insurance staff counsel operations are most commonly unincorporated divisions of the insurance company's corporate law department. Typically, the offices of insurance staff counsel are physically and organizationally separate from the insurance company's business operations. A senior lawyer, often called a managing or supervising lawyer, oversees business and professional responsibilities in the office. n37 The supervising lawyer must make reasonable efforts to ensure the office's compliance with the ethical rules of the jurisdiction, including conflict of interest provisions. In this regard, the supervising lawyer functions much like a managing partner in a private firm.

n37 Report and Recommendations of the House Counsel Task Force of the Ohio State Bar Ass'n 10 (2002) ("Staff counsel organizations should be designed as law firms that are controlled by senior attorneys.").

The lawyers work collectively, usually in teams with other lawyers, paralegals, and support personnel. Those lawyers in a single location commonly share confidences and consult with each other on assignments and strategies. n38 In addition to functioning as a law firm, insurance staff counsel frequently are part of the insurance company's legal organizational structure, thereby falling within Model Rule 1.0's definition of "firm" or "law firm." n39

n38 If lawyers residing in separate offices function as insurance staff counsel for the same insurance company, the lawyers may share the confidences of clients among the offices. However, if they do so, or otherwise hold themselves out as associated with lawyers in other offices, the lawyers in all locations will be subject to the imputation of conflicts of interest under Rule 1.10. Whether various offices of insurance staff counsel constitute one law firm or multiple law firms for purposes other than maintaining client confidences and conflict avoidance has received scant attention from courts or scholars. Furthermore, it would seem to have few, if any, practical implications. Ultimately, as Comment [1] to Rule 1.10 suggests, the determination of whether offices operate as separate law firms comes down to "specific facts."

For example, in ABA Comm. on Ethics and Professional Responsibility Informal Op. 1309 (Legal Services Offices Representing Opposing Sides) (January 13, 1975), *in* FORMAL AND INFORMAL ETHICS OPINIONS 181 (ABA 1985), the ABA Ethics Committee addressed whether lawyers of the Neighborhood Law Office ("N.L.O.") and those of the state bar association's Legal Services Project, could represent opposing sides. The N.L.O. was an unincorporated legal services project that received indirect funding through the Legal Services Project. The Committee reviewed how the N.L.O. and Legal Services Project functioned, and concluded the lawyers could represent opposing sides because the offices "operated as separate law firms." *Id.* at 182.

n39 Rule 1.0(c) defines "firm" or "law firm" to include "lawyers employed in a legal services organization or the legal department of a corporation or other organization." Comment [1] to Rule 1.10 states, "for purposes of the Rules of Professional Conduct, the term 'firm' includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization."

Having shouldered the responsibilities associated with law firm status, are insurance staff counsel permitted to refer to themselves as a "firm," "law firm," or an "association" of lawyers? We conclude they may do so provided that the names satisfy Rule 7.5(a), which cautions that, "[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." Rule 7.1, in turn, reads:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

We believe the use of traditional law firm names, without more, might mislead insureds-clients who do not know the firm's affiliation with the insurance company. Such potential for misleading, however, is eliminated when insurance staff counsel disclose their employment status to their insureds-clients in the manner described above. n40

n40 *See supra* note 33 and accompanying text.

As it happens, insurance staff counsel commonly include explanatory language on their letterhead, business cards, office entry signs, and court pleadings. The language identifies the lawyers in the firm as employees of the insurance company, *e.g.*, "Employees of the Corporate Law Department of ABC Insurance Company." Although permissible, the Model Rules do not require such explanatory language, provided that all insureds-clients are informed of the employment status of the lawyer. n41

n41 We note that insurance staff counsel do not solicit clients. They obtain clients solely through their affiliation with their employer. Because the employment status of insurance staff counsel is seldom material to anyone other than insureds-clients, Rule 7.1's threshold of a "material misrepresentation" rarely will be met in this context.

So long as disclosure is made to all insureds-clients, an insurance staff counsel office may refer to itself as an association of lawyers practicing under the name of the supervising lawyer, *e.g.*, "John Smith and Associates," or "Law Offices of John Smith." In addition, it is permissible for the lawyers to practice under the names of a former member of the firm who is totally retired from the practice of law, so long as the retired lawyer is designated as "retired" on firm letterhead and other firm listings. n42

n42 *See* ABA Comm. on Ethics and Professional Responsibility Informal Op. 85-1511 (Use of Firm Name "The X Partnership" Where X is Retired) (March 26, 1995), *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 547 (ABA 2000), finding it permissible for a firm to practice under the name of the "X Partnership" when founding partner X retired.

Insurance staff counsel offices may also practice under the name of two or more of the lawyers in the office, *e.g.*, "Smith and Jones." Care must be taken in the latter approach, however, to comply with the dictate of Rule 7.5(d) that "lawyers may state or imply that they

practice in a partnership or other organization only when that is the fact." Specific and prominent disclosure of the employee status of the lawyers may be used to dispel any potential implication that the firm is a partnership. n43

n43 *Accord* New York State Bar Ass'n Comm. on Professional Ethics Op. 726, 2000 WL 567960 *3 (2000). Another means of preventing misunderstanding would be to incorporate the legend "an association of lawyers not in partnership" or similar language whenever the firm's name appears on letterhead, business cards, and signage.

Insurance staff counsel offices also may use a trade name, subject to the limitations of Rule 7.5(a). For example, insurance staff counsel may include the name of the insurance company in the law firm's name, *e.g.*, "Law Offices of ABC Insurance Company." n44 The Model Rules allow for the use of trade names (including the name of a deceased member of the firm) so long as the name is not misleading or deceptive. n45

n44 *But see* Virginia Legal Ethics Op. 775 (1986) (impermissible to use on letterhead designation "Law Offices of the ABC Insurance Company," followed by names of staff counsel).

n45 Comment [1] to Rule 7.5 provides an instructive example. "If a private firm uses a trade name that includes a geographic name such as 'Springfield Legal Clinic,' an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication."

ABA 08-450 re: Multiple Clients

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

CONFIDENTIALITY WHEN LAWYER REPRESENTS MULTIPLE CLIENTS IN THE SAME OR RELATED MATTERS

Formal Opinion 08-450

April 9, 2008

Lawyers frequently are engaged to represent a client by a third party, most commonly an insurer or a relative. In some circumstances, the third party also may be a client of that lawyer, either with respect to the matter in question, or with respect to a related matter. When a lawyer represents multiple clients, either in the same or related matters, Model Rule 1.6 requires that the lawyer protect the confidentiality of information relating to each of his clients. Because the scope of the "implied authority" granted in Rule 1.6(a) to reveal confidential information "to carry out a representation" applies separately and exclusively to each representation the lawyer has undertaken, a conflict of interest arises when the lawyer recognizes the necessity of revealing confidential information relating to one client in order effectively to carry out the representation of another. In such a circumstance, the lawyer would be required to withdraw from representing one or both of her clients. n1

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n1 This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 8, 2008. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling. This opinion supersedes Informal Opinions 949, "Defense of Insured-Insurer, Conflict of Interest and Confidences of Client" (Aug. 8, 1966), in INFORMAL ETHICS OPINIONS, VOL. II 867-1284 (ABA 1975) at 948, and 1476, "Duty of Lawyer to Preserve Confidences and Secrets of Client in Multiple Representation from Co-clients," in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 (ABA 1985) at 402, which are hereby withdrawn.>ENDFN>

Among a lawyer's foremost professional responsibilities are fidelity to a client and preservation of the client's confidence with respect to "information related to the representation" as addressed by Rule 1.6. n2 On the other hand, a lawyer is required by Rule 1.4(b) to provide information to a client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." n3 When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each. n4 There are a variety of common circumstances, in litigation and otherwise, where a lawyer either represents multiple clients or represents one client, but another person is compensating the lawyer for doing so. n5 Whether the latter situation involves an insurance company or a client's relative engaging the lawyer, the boundaries of Rule 1.6 and of Rule 1.8(f)(3) n6 require the lawyer to exercise care with information relating to the representation. This opinion addresses the factors the Rules bring to bear to resolve that conflict.

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n2 Rule 1.6 states:

(a) 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 or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of la crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

n3 The lawyer also is required by Rule 1.1 to provide competent representation to a client, which requires communicating information adequate to that purpose.

n4 *See* Rule 1.7, cmt. 30 ("[w]ith respect to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.") The common complication is that, in such situations as insurance, even if both carrier and insured are deemed to be clients, the scope of representation relates only as to the indemnity matter, not as to any disputes between the carrier and insured. Whether or not the lawyer has an ethical duty of confidentiality is separate from the privilege question, which turns on the scope of the lawyer's duty to each client.

n5 In some states in the insurance context, the payor also is a client; in others, it is not a situation of multiple representations. *See infra* note 6 and accompanying text.

n6 Rule 1.8(0 states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected as required by Rule 1.6.>ENDFN>

The issues may usefully be considered in the context of a hypothetical, but common, situation. A lawyer is retained by an insurance company to defend both an insured employer and an employee of the insured whose conduct is at issue and for which the employer may vicariously be liable. In the course of a conversation with the lawyer, the employee relates facts to the lawyer indicating that the employee may have acted outside the scope of his employment and that, under the terms of the insurance contract, the employee may not be entitled to the protection of the employer's insurance. The employee made the disclosures in the reasonable belief that he was doing so in a lawyer-client relationship, and without understanding the implications of the facts. The lawyer learned similar information when interviewing another witness. The lawyer believes that the insurance company may have a contractual right to deny protection to the employee based on these facts. It also is possible that the employer could invoke scope-of-employment principles to defend against its own liability to the plaintiff.

There are two points in time at which the potential problem of confidential information involving multiple clients must be addressed. The first point in time is when the joint representation is undertaken, when both the scope of the representation and the clients' intentions concerning the lawyer's duty with respect to confidentiality can best be clarified for each client. In certain jurisdictions, a lawyer engaged by an insurance carrier to defend an insured is deemed to represent both the insured and the insurer, and in other jurisdictions such a lawyer is deemed to represent only the insured. n7 Although the identity of the client may be relevant to questions of conflict of interest, resolving that issue under a given jurisdiction's principles is not necessary to determine the lawyer's duty with respect to the confidential information of the employee or employer in the situation described above. The same analysis applies whenever the lawyer is placed in the position of representing multiple clients, or of having duties under contracts such as an insurance policy to an indemnitor with rights affecting the lawyer's provision of a defense to a litigation client.

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n7 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421, "Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions" (Feb. 16, 2001), at 3 & nn. 6 & 7 (noting the split between "one client" [lawyer only represents insured] and "two client" [lawyer represents both insurer and insured] states). Although a lawyer might limit the scope of representation by contract (*e.g.,* by providing in the engagement letter that only the insured is represented), we have no evidence that this is being done.>ENDFN>

In the situation of insurer-engaged counsel, the scope of the representation normally is understood by the insurer to be limited to defending the action under the policy, and not to include representing the carrier or the insured in any coverage or other dispute between the two. n8 Insureds may not fully understand those limitations, n9 so counsel retained by an insurer or other third party should ensure that the client(s) are fully informed at the inception of the relationship, preferably in writing, of any limitation inherent in the representation and any area of potential conflict. To the extent the clients' informed consent to any conflicts of interest may be required under Rules 1.7 through 1.9, both clients' expectations related to confidentiality need to be addressed in order for the waiver to be valid. An advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate. n10

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n8 Whether the lawyer may or must advise the insured of possible claims against the insurer turns on the scope of the representation, on the lawyer's duties to the insurer under substantive law, and on the extent to which a conflict of interest precludes such advice. To the greatest extent possible, ambiguity about such issues should be clarified by the lawyer at the onset of the representation.

n9 Many lay persons may think of a lawyer engaged to represent them as "their lawyer," without qualification. *Cf.* Rule 1.2(c), cmt. 6 (when a lawyer has been retained by an insurer to represent an insured "the representation may be limited to matters related to the insurance coverage.") Rule 1.2(c) requires "informed consent" by the insured to such a limitation.

n10 *See* ABA Comm. on Ethics and Profl Responsibility, Formal Op. 05-436 (May 11, 2005) (discussing advance waivers in the context of conflicts of interest). As discussed in that opinion, waiver of future conflicts is generally more feasible when dealing with experienced users of legal services, a principle that would apply equally to a waiver of the duty of communication under Rule 1.4.>ENDFN>

The second point in time at which the lawyer's duty concerning confidential information must be addressed is when the lawyer comes to understand that disclosure to one client will be harmful to the other client's interest. In our example, the insured may not understand the reasons the information may defeat coverage, but the lawyer knows. Resolving what the lawyer should do requires balancing the lawyer's obligations under Rules 1.6 and 1.4(b). n11

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n11 *See* A. v. B., 726 A.2d 924, 927 (N.J. 1999) (resolving tension between 1.6 and 1.4 in favor of disclosure of fraud under New Jersey version of 1.6 permitting disclosure reasonably necessary to "rectify the ... client's ... fraudulent act in furtherance of which the lawyer's services had been used," contrary to New York and Florida opinions that would prohibit disclosure). Since 1999, Rule 1.6 has been amended substantially to include the New Jersey language.>ENDFN>

Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, n12 the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6. Whether any agreement made before the lawyer understands the facts giving rise to the conflict may satisfy "informed consent" (which presumes appreciation of "adequate information" about those facts) is highly doubtful. In the event the lawyer is prohibited from revealing the information, and withholding the information from the other client would cause the lawyer to violate Rule 1.4(b), the lawyer must withdraw from representing the other client under Rule 1.16(a)(1).

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n12 The extent to which harm is relevant relates to when the lawyer is impliedly authorized to disclose. In practice, lawyers routinely disclose information that would otherwise be confidential without obtaining express prior waivers from every client on every piece of information related to a matter, because the information at issue must be disclosed in order to represent the client. This circumstance, addressed in the provision of Rule 1.6(a) on implied authority, does not usually apply when "adverse" to the client. *See* Rule 1.6(b), Comments [6]-[15].>ENDFN>

The confidentiality issues are governed by Rule 1.6, which provides three circumstances under which "information related to the representation" may be revealed: informed consent, implied authority, or an applicable exception. Under the circumstances detailed above, both the information given to the lawyer by the client and the information gleaned from the witness constitutes "information related to the representation." n13 Rule 1.6 applies not only to information protected by the attorney-client or work product privileges, but to non-privileged information as well. n14

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n13 The term "information related to the representation" is not defined in the Rules, although Comment [3] makes clear that it is intentionally broad, encompassing not only information protected by the attorney-client and work product privileges, but "all information relating to the representation, whatever its source."

n14 Whether the communication to the lawyer by the insured's employee is privileged is a question of law, which the Committee ordinarily does not consider. The Committee notes, however, that where a lawyer represents multiple clients in a matter (such as the insured employer, its employee, and the insurance company), communications by any client to the lawyer may not be privileged as to the other clients. *See, e.g.,* Moritz v. Medical Protective Co., 428 F. Supp. 865 (W.D. Wis. 1977); Henke v. Iowa Home Mutual Casualty Co., 249 Iowa 614, 87 N.W.2d 920 (1958). The privilege question, however, does not resolve the question of the lawyer's duty under Rule 1.6.>ENDFN>

The lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, n15 when the revelation might result in denial of insurance protection to the employee. n16 Under the circumstances described in the hypothetical, there has been no "informed consent" and it would be difficult to envision either that a lawyer could recommend or that the client would freely authorize disclosure once given an "explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." None of the exceptions of Rule 1.6(b) apply. The only question, therefore, is whether anything about the multiple representation warrants a conclusion that the lawyer has impliedly been authorized to make the disclosure.

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n15 *See* Rule 1.8(b) (lawyer may not use information related to the representation "to the disadvantage of the client" absent informed consent or a specific Rule exception).

n16 *See* Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265-66 (Tex. App. 1991) (scope of ethical duty may exceed attorney-client privilege in multiple client situations; where confidentiality is expressly assured in multiple representations, lawyer has fiduciary duty of confidentiality). The confidentiality duty assumes the employee-client has not made false or fraudulent statements, and is not engaging in a crime that the lawyer may have a duty to reveal to the affected person. *See* Rules 1.6(b)(1), 3.3(b).>ENDFN>

Implied authority applies only when the lawyer reasonably perceives that disclosure is necessary to the representation of the client whose information is protected by Rule 1.6. Comment [5] to Rule 1.6 provides that "a lawyer may be impliedly authorized ... to make a disclosure that facilitates a satisfactory conclusion to a matter." n17 Disclosures adverse to the client are carefully detailed in the exceptions under Rule 1.6(b), and no client may be presumed impliedly to have authorized such disclosures. In our hypothetical, therefore, there is no basis upon which the lawyer could conclude that disclosure of information that would deprive the employee of coverage is necessary to the representation of the employee, so there is no implied authority justifying disclosure of the information to the insurance company, to the employer, or to any other person.

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n17 *Cf.* Parler & Wobber v. Miles & Stockbridge, 756 A.2d 526, 541, 545-46 (Md. 2000), citing Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wa. 1975) (test for implied waiver of attorney-client privilege is affirmative act by asserting party to put information at issue in a lawsuit that would be vital to the adversary's position in the matter).>ENDFN>

Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise.

The question generally will be whether withholding the information from the other client would violate the lawyer's duty under Rule 1.4(b) to "explain a matter to the extent reasonably necessary to permit the [other] client to make informed decisions regarding the representation." If so, the interests of the two clients would be directly adverse, requiring the lawyer's withdrawal under Rule 1.16(a)(1) because the lawyer's continued representation of both would result in a violation of Rule 1.7. The answer depends on whether the scope of the lawyer's representation requires disclosure to the other client. n18 Ordinarily, when a lawyer is engaged by an insurer to represent the insured, the substantive law precludes the lawyer from acting contrary to the interests of the insured. n19 In that situation, the lawyer has no obligation under Rule 1.4 to communicate to the insurer information contrary to the interests of the insured, but on the contrary, is obliged by Rule 1.6 not to do so.

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n18 Although the problem commonly involves potential disclosures to an insurer that could impair the insured's interests, it could involve potential disclosures to an insured impairing the insurer's interests, particularly in "two client" states. *Cf.* Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 600-01 (Ariz. 2001) (insurer-engaged counsel may owe duty of care to insurer even absent attorney-client relationship).

n19 In "one client" states this rule flows from the notion that the lawyer represents only the insured, and in "two client" states the rule may be articulated in terms of a "primary" duty to the insured. *See, e.g.,* Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Court, 152 P.3d 737, 741 (Nev. 2007) ("primary client" remains insured in "majority" of jurisdictions); American Home Assur. Co. v. Unauthorized Practice of Law Comm., 121 S.W.3d 831, 838 (Tex. App. 2003), judgment affirmed and modified, 2008 WL 821034 (Mar. 28, 2008) (ethical choices must be resolved in favor of insured as "primary client"). Particularly in a jurisdiction where the insured is considered the "primary" client in the "tripartite" relationship, an advance understanding could be routine that, if conflict arises, the lawyer may continue representing the insured. In some "two client" states, on the other hand, the insurer may be required by law when a conflict arises to provide independent counsel to the insured at the insurer's expense. *See, e.g.,* San Diego Fed. Credit Union v. Cumis Ins. Soc'y, 162 Cal. App. 3d 358, 369-74, 208 Cal. Rptr. 494, 501-05 (Cal. App. 1984); *see also* CAL. CIV. CODE § 2860 (West Stipp. 1992) (codifying, with modifications, the *Cumis* rule).>ENDFN>

We are mindful that a typical liability insurance policy does not give the insured the right to choose the lawyer retained and compensated by the insurance company. Moreover, the insured is required, as a condition of the insurance protection, to cooperate and assist in the defense and, implicitly, to reveal to the lawyer all pertinent information known to the insured. None of that, however, undermines the insured's right to expect that the lawyer will abide by Rule 1.6 and withhold from the carrier information relating to the representation that is damaging to the insured's interests under the policy.

The employer in our hypothetical is also the lawyer's client, and the employer's liability to the plaintiff may be affected by scope-of-employment circumstances. The lawyer would be unable under Rule 1.7 to pursue the employer's interest in avoiding legal responsibility for the employee's conduct if doing so could harm the interest of the employee-client in preserving insurance protection. Possibly, the employer-client and the insurance company would be willing to forego a scope-of-employment defense and stand with the employee, in which case the interests of the lawyer's clients would not differ. The lawyer's dilemma, however, is that in seeking this consent, the lawyer might disclose information the lawyer must preserve in confidence. She may not do so without the employee's informed consent, after full advice as to possible consequences.

It also may not be possible for a lawyer to recommend disclosure without committing malpractice, but that issue is beyond the scope of this opinion. When the lawyer represents, the insurer or employer as well as the insured, and the interests of any of the three differ as to the advisability of waiver, Rule 1.16(a) will require withdrawal from representing the conflicting interest(s) that compromise the independent professional judgment to which the client is entitled under Rules 1.7 through 1.9. As noted in Comment [4] to Rule 1.7, when "a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b)" and "[w]here more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client."

Whether withdrawal from representing all the parties is required is governed by Rule 1.16(a), under which the lawyer's obligation to withdraw is evaluated separately with respect to each client. n20 If the continued representation of any client would cause the lawyer to violate a Rule, including participation in any fraud, withdrawal from that representation will be required. The lawyer may be able to continue representing the insured, the "primary" client in most jurisdictions, depending in part on whether that topic has been clarified in advance. n21 If the lawyer cannot continue to represent the insured, she should recommend to the insurance company that separate counsel be retained to represent the insured's interest only.

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n20 *See generally* Parsons v. Continental Nat'l Am. Gp., 550 P.2d 94, 98 (Ariz. 1976) (retained counsel "should have notified [the carrier] that he could no longer represent them when he obtained any information (as a result of his attorney-client relationship with [the insured]) that could possibly be detrimental to [the insured's] interests under the coverage," holding that when attorney gave such information to the carrier, the carrier was estopped to use it); *see also* Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979) (requiring lawyer who represented both clients to withdraw from representing either under pre-Model Rules "appearance of professional impropriety" principle).

n21 *See* Rule 1.7 cmt. 31 ("[t]he lawyer should, at the outset of the common representation ... , 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.") Clarifying expectations at the onset of the representation is always preferable in these situations, and may affect the ability of the lawyer to continue representing one or the other client after difficulties arise.>ENDFN>

Richard K. Spratley and Brett G. Pearce, Plaintiffs and Appellants, v. State Farm Mutual Automobile Insurance Company, Michael Arnold, Craig Kingman, Scott D. Kotter, and Harold E. Nixon, Defendants and Appellees.

Nos. 20011002, 20011003

SUPREME COURT OF UTAH

2003 UT 39*; *78 P.3d 603*; *2003 Utah LEXIS 94

September 23, 2003, Filed

SUBSEQUENT HISTORY: [*1]** Released for Publication October 21, 2003.

PRIOR HISTORY: Third District, Salt Lake. The Honorable J. Dennis Frederick. *Spratley v. State Farm Mut. Auto. Ins. Co., 2003 UT 31, 2003 Utah LEXIS 82 (2003)*

DISPOSITION: Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

COUNSEL: Richard K. Spratley, Brett G. Pearce, L. Rich Humpherys, Karra J. Porter, Salt Lake City, for plaintiffs.

Alan L. Sullivan, Scott C. Sandberg, Salt Lake City, for defendants.

JUDGES: WILKINS, Justice. Chief Justice Durham, Associate Chief Justice Durrant, Justice Parrish, and Justice Nehring concur in Justice Wilkins' opinion.

OPINION BY: WILKINS

OPINION

[605]** AMENDED OPINION

WILKINS, Justice:

[*P1] We granted this interlocutory appeal by plaintiffs Richard Spratley and Brett Pearce to review the trial court's December 7, 2001 order requiring Spratley and Pearce, attorneys who formerly represented State Farm Mutual Automobile Insurance Company ("State Farm") and its insureds, to "refrain from disclosing" certain communications and facts relating to that representation, to return to State Farm documents that Spratley and Pearce retained from the representation, and disqualifying Spratley and Pearce's chosen legal counsel, L. Rich Humpherys, and his law firm, Christensen & Jensen, from further representation of Spratley and Pearce. We **[***2]** affirm in part, reverse in part, and remand to the trial court for further proceedings.

FACTUAL BACKGROUND

[*P2] The complex relationship between the parties to this case spans a number of years. Spratley began his relationship with State Farm in 1987, working as State Farm's sole in-house lawyer in Salt Lake City before transferring temporarily to State Farm's headquarters in Illinois. Beginning in the early 1990s, Spratley and Pearce worked together as Claims Litigation Counsel (CLC) **[**606]** for State Farm in the Salt Lake City CLC office. In this capacity Spratley and Pearce represented both State Farm and its insureds. During that representation, Spratley and Pearce allege that State Farm required them to violate many of their ethical duties as attorneys and punished them when they did not. Concluding that they could not meet their ethical duties as attorneys and comply with allegedly unlawful and unethical demands placed on them by State Farm, Spratley and Pearce resigned their employment with State Farm in June 2000. Upon their departure, Spratley and Pearce retained copies of many allegedly confidential documents and materials, some of which State Farm contends **[***3]** were improperly appended to the complaint.

PROCEDURAL BACKGROUND

[*P3] Spratley and Pearce ultimately sued State Farm for (1) misrepresentation and nondisclosure; (2) tortious interference with business relations; (3) retaliation and termination in violation of public policy; (4) breach of the covenant of good faith and fair dealing; (5) breach of the employment contract; (6) wrongful discharge and employment termination; and (7) intentional infliction of emotional distress. The trial court's later dismissal of the second and sixth causes of action is not challenged on appeal. As noted above, the complaint contained appendices, some of which State Farm argues were confidential documents. Pursuant to a separate trial court order, affidavits subsequently submitted by Spratley and Pearce were filed under seal, as were the briefs to this court.

[*P4] At all times during the prosecution of Spratley and Pearce's claims, they have been represented by attorney L. Rich Humpherys and his firm, Christensen & Jensen. Numerous other litigants have employed Humpherys and his firm for representation against State Farm in their separate cases.

[*P5] Fearing further disclosure **[***4]** of what it viewed as confidential communications and information, State Farm filed a motion for a preliminary injunction and protective order concurrent with a separate motion to disqualify Humpherys and his firm from representing Spratley and Pearce. The trial court's response to those motions is the subject of this appeal.

[*P6] After briefing and oral argument by the parties, the trial court entered an order [1] requiring Spratley and Pearce to:

(1) Refrain from disclosing (in this litigation or otherwise) confidential communications and information exchanged between Spratley or Pearce on one hand, and State Farm and/or its insureds on the other hand, relating to the provision of legal services by Spratley, Pearce or other lawyers for State Farm, or made for the purpose **[***5]** of facilitating such legal services;

(2) Refrain from disclosing any facts relating to Spratley or Pearce's representation of State Farm's insureds, absent express consent to disclosure by the insureds; and

(3) Return to State Farm all confidential documents[,] materials, and information that Spratley and Pearce created, maintained, or acquired as part of their employment with State Farm, and that are currently in their possession.

[*P7] Finding that Spratley and Pearce had divulged confidential information to Humpherys and his firm and that the disclosure would taint further proceedings in the case, the court also granted State Farm's motion to disqualify. Spratley, Pearce, and Humpherys all filed petitions for interlocutory review, which were ultimately granted by this court along with a stay of certain portions of the trial court's order.

STANDARD OF REVIEW

[*P8] Both the trial court's grant of a protective order under Rule 26 of the Utah Rules of Civil Procedure and the order of disqualification are reviewed for an abuse of discretion. *In re Discipline of Pendleton, 2000 UT 77, P 38, 11 P.3d 284* (protective order); *Houghton v. Dep't of Health, 962 P.2d 58, 61* **[**607]** *(Utah 1998)* **[***6]** (disqualification). This court, however, has a special interest in the administration of the Rules of Professional Conduct and the discretion granted to the trial

1 The trial court's order does not appear to comply with the requirements of Rule 65A(d) and (e) of the Utah Rules of Civil Procedure for orders granting preliminary injunctions. Accordingly, we will treat the order as a protective order.

court in matters of disqualification is quite limited when there are no factual disputes. *Houghton, 962 P.2d at 61*.

ANALYSIS

[*P9] Our treatment of the trial court's order hinges, in large measure, on the nature of Spratley and Pearce's duties to their former clients, State Farm and its insureds. If the order merely restates Spratley and Pearce's existing duties toward those clients, it is readily sustainable. If, on the other hand, the order prohibits disclosures by Spratley and Pearce that would not otherwise violate their ethical duties as attorneys, it represents an abuse of the trial court's discretion. Accordingly, the exposition of Spratley and Pearce's ethical duties is an appropriate starting point for our analysis.

I. SPRATLEY AND PEARCE'S DUTIES OF CONFIDENTIALITY

A. Existence of Attorney-Client Relationship

[*P10] The duties of confidentiality that control our resolution of the instant case depend upon an attorney-client relationship between Spratley **[***7]** and Pearce and State Farm. Of additional concern to this court are the duties that Spratley and Pearce may have toward State Farm's insureds, whom Spratley and Pearce were hired to defend. Our holding today recognizes that attorneys like Spratley and Pearce primarily represent the insureds they are hired to defend, but may also have an attorney-client relationship giving rise to duties of confidentiality with the insurance company which hires them.

[*P11] In *Paradigm Insurance Co. v. Langerman Law Offices, 200 Ariz. 146, 24 P.3d 593 (Ariz. 2001)*, the Arizona Supreme Court discussed the tripartite relationship between counsel, insureds, and insurers and followed the majority rule, concluding that in cases where "no question arises regarding the existence and adequacy of coverage, . . . we see no reason why the lawyer cannot represent both insurer and insured." *Id. at 598*. This position merely recognizes the fact that the insurer has an interest in the litigation and a sufficiently strong relationship with the attorney to give rise to the duties that accompany that relationship. Recognizing the relationship is in the best interests of the insurer. This is neatly **[***8]** illustrated by the *Paradigm* case in which Paradigm was sued for non-payment of fees by a lawyer it hired to represent one of its insureds. Paradigm, arguing that the lawyer was negligent in representing its interests, counterclaimed for damages it incurred when it was forced to pay a claim with its own funds when another payment source existed of which the attorney should have been aware. *Id. at 594-95*. Paradigm, which had a significant stake in the litigation, rightly sought recompense for the failure of counsel to protect its interests. Recognizing an attorney-client relationship gives the insurer recourse against a negligent attorney who has caused the insurer to pay more than it otherwise might have on a claim. We follow Arizona in adopting the "dual-client" paradigm because it best protects all parties involved. Notwithstanding the propriety of this test, we recognize the potential for conflict that exists in this and any system for handling the tripartite relationship in insurance defense cases.

[*P12] We find the Arizona court's resolution of the potential conflicts of interest appropriate to address the problem. "In the unique situation in which the lawyer actually **[***9]** represents two clients, he must give primary allegiance to one (the insured) to whom the other (the insurer) owes a duty of providing not only protection, but of doing so fairly and in good faith." *Id.* (citing *Zilisch v. State Farm Mut. Auto. Ins. Co., 196 Ariz. 234, 995 P.2d 276, 279-80 (Ariz. 2000))*. Thus, where no actual conflict exists or is foreseeable, an attorney will ordinarily represent both the interests of the insured and the insurer. However, where actual conflict exists or is likely to arise, the attorney's allegiance is to the insured because of an insurer's duty to provide a defense in good faith.

[*P13] Spratley and Pearce represented State Farm's insureds for many years. They undoubtedly participated in many cases **[**608]** where State Farm was a dual client. Likewise, as Spratley and Pearce acknowledge in their complaint, they provided legal services for both State Farm directly and for its insureds. Thus, they owe an attorney's duties of confidentiality to State Farm and its insureds in connection with that long history of representation.

B. Duty of Confidentiality to Former Client

[*P14] Rule 1.9 of the Utah Rules of Professional **[***10]** Conduct prohibits an attorney from using information relating to his prior representation of a client "to the disadvantage of the former client." Utah R. Prof'l Conduct 1.9(b). Exceptions exist to this rule for circumstances allowed in Rule 1.6 or when the information becomes "generally known." *Id.* Because the information at issue in this case is not generally known, [2] the exceptions in Rule 1.6 determine whether the disclosures were violations of Spratley and Pearce's duties of confidentiality toward State Farm and its insureds.

> 2 Spratley and Pearce argue that State Farm waived its privilege for the communications at issue in this case. Part of that argument is that the information became known at the trial court's December 3, 2001 open hearing where some of those communications were discussed. A review of the transcript of that hearing reveals that the discussion of those communications was general in nature and insufficient to render the information either "generally known" or to waive privilege. Utah R. Evid. 507(a) (noting waiver occurs when disclosing a "significant part of the matter"). Additionally, the duties of confidentiality found in the Rules of Professional Conduct are not coextensive with the rules of privilege found in the Rules of Evidence. Utah R. Prof'l Conduct 1.6, cmt (noting that confidentiality is protected by privilege in the law of evidence, but by "the rule of confidentiality . . . in professional ethics"). Thus, privilege might be waived allowing compelled disclosure by an attorney while the duty of confidentiality is still in full force.

[*11]** **[*P15]** Of the exceptions found in Rule 1.6, only one has any potential application to the facts of this case. The applicable exception allows disclosure "to the extent the lawyer reasonably believes necessary . . . [such as] . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." Utah R. Prof'l Conduct 1.6(b)(3). Thus, if Spratley and Pearce's suit represents a "claim" within the meaning of Rule 1.6, they may make disclosures if they are reasonably necessary to that claim.

[*P16] The question of what matters qualify as claims under Rule 1.6 has not been answered by this court and has been only lightly treated by other authorities. The ABA Model Rules of Professional Conduct's comparable rule, now found therein at Rule 1.6(b)(3), is explained as follows:

> With regard to paragraph (b)[(3)], [the old rule] provided that a lawyer may reveal "confidences or secrets necessary to establish or collect his fee . . . ." Paragraph (b)[(3)] *enlarges* the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee; for example, recovery of property from the client.

[*12]** ABA Annotated Model Rules of Prof'l Conduct 68 (5th ed. 2003) (emphasis added). This language clearly indicates that the rule was designed as an expansion beyond the fee disputes and defensive matters that traditionally allowed disclosure of client confidences. The ABA confirmed this intention in a Formal Ethics Opinion, which found the Model Rules did not prohibit the use of confidential information in a suit brought by former in-house counsel. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424. A few other authorities have approved of an expansion of the scope of the "claim or defense" exception in cases involving wrongful discharge claims by former in-house counsel.

[*P17] In a formal ethics opinion of its own, the Oregon State Bar ruled that the "claim or defense" exception to Rule 1.6 *plainly* permits "disclosure to establish a wrongful discharge claim." Oregon State Bar Legal Ethics Comm., Formal Op. 1994-136 at 3. The plain language of our rule also supports such an interpretation, and representative cases from other jurisdictions illustrate that the policy embodied in Rule 1.6 is in harmony with that interpretation. *Burkhart v. Semitool, Inc., 2000 MT 201, 5 P.3d 1031, 300 Mont. 480 (Mont. 2000)*; **[***13]** **[**609]** *Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002)*.

[*P18] In both *Crews* and *Burkhart*, the respective courts relied, at least in part, on the "claim or defense" exception to Rule 1.6 to justify the disclosure of confidential client information in wrongful discharge suits. *5 P.3d at 1040-42*; *78 S.W.3d at 863-64*. In *Crews*, the court noted that "the very purpose of recognizing an employee's action for retaliatory discharge in violation of public policy is to encourage the employee to protect the public interest," *78 S.W.3d at 860*, and concluded that "the 'public interest is better served [when] in-house counsel's resolve to comply with ethical . . . duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with those duties.'" *Id. at 862* (quoting *GTE Prods. Corp. v. Stewart, 421 Mass. 22, 653 N.E.2d 161, 166 (Mass. 1995))*. *Burkhart* relied on language from a related federal case in reaching the same conclusion as the *Crews* case: "'[a] lawyer . . . does not forfeit his rights simply because **[***14]** to prove them he must utilize confidential information. Nor does the client gain the right to cheat the lawyer by imparting confidences to him.'" *5 P.3d at 1041* (quoting *Doe v. A Corp., 709 F.2d 1043, 1050 (5th Cir. 1983))*.

[*P19] Other courts have prevented suits by former in-house counsel where no rule comparable to our Rule 1.6 existed. The case which best embodies the line of reasoning that would prevent such suits is *Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (Ill. 1991)*. In that case, the defendant sold dialysis machines. It received a shipment of machines that failed to meet FDA requirements, which in-house counsel advised the company not to sell. The attorney later learned of the machines' impending sale and renewed his objections, threatening to disclose the sale to the FDA. After being terminated for his threatened disclosure, counsel notified the FDA and sued Gambro for retaliatory discharge.

[*P20] Refusing to allow suit, the court spent much of its opinion discussing the need for trust and candid discussion in the attorney-client relationship. *584 N.E.2d at 108-11*. The **[***15]** court opined that allowing former in-house counsel to sue an employer for employment related claims would cause the employer- client to be hesitant to turn to counsel for advice. *Id. at 109*. However, the dissent argued, inter alia, that the refusal to allow such suits inappropriately placed the cost of an employer's wrongful conduct on the attorney who has chosen to obey strong ethical rules governing his conduct. *Id. at 113-15*. Thus, the dissent's argument echoes the concerns raised in *Crews* and *Burkhart* that forbidding suit, as a practical matter, encourages unethical conduct. Despite the countervailing considerations outlined in the opinion of the court in *Balla*, the plain language of Rule 1.6 and the policy considerations outlined in other cases weigh in favor of allowing disclosure, in a limited fashion, of confidential client information in a suit by former in-house counsel for wrongful discharge. [3]

> 3 While we are not called upon to decide the application of the privilege rules to specific communications, we note that our interpretation of Rule 1.6(b)(3) is in harmony with Rule 504(d)(3) of the Utah Rules of Evidence, which exempts from privilege "communications relevant to an issue of breach of duty . . . by the client to the lawyer." *See* Utah R. Evid. 504 advisory committee's note (Rule 504 "is intended to be consistent with the ethical obligations of confidentiality set forth in Rule 1.6 of the Utah Rules of Professional Conduct."). Likewise, the determination of privilege for discovery purposes under Utah Rules of Civil Procedure 26(b)(1) should be made in harmony with Rule 504 of the Utah Rules of Evidence, which governs the attorney-client privilege. Neither Rule 504(d)(3), which supersedes the privilege rule found at *Utah Code Ann. Section 78-24-8(2)*, nor Rule 1.6(b)(3) contains language limiting its application merely to defensive matters and fee collection, as State Farm urges, and we remain unpersuaded of the wisdom of such a construction.

[*16]** **[*P21]** While adopting a literal interpretation of Rule 1.6 that permits revelations of confidential client information, we are careful to note that both former in-house counsel and trial courts must exercise great care in disclosing confidences. *See e.g.*, *Burkhart, 5 P.3d at 1041-42* (suggesting lawyer make all practicable efforts to limit disclosure, including protective orders); *Crews, 78 S.W.3d at* **[**610]** *864* (noting limited scope of disclosure and suggesting efforts to limit the disclosure, such as protective orders). The professional judgment of the former in-house attorney and the stringent limitations available to trial courts are of paramount importance in restricting disclosures within the bounds of Rule 1.6.

[*P22] The trial court has numerous tools it must employ to prevent unwarranted disclosure of the confidential information, including "'the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings.'" *Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal.Rptr.2d 906, 921, 89 Cal. App. 4th 294 (2001)* **[***17]** (quoting *Gen. Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487, 504 (Cal. 1994))*. The liberal use of these tools, and others inherent in a trial court's authority to govern the conduct of proceedings, is a prudent and sufficient safeguard against overbroad disclosure. We note, however, that it remains the attorney's duty to minimize disclosures. While trial courts possess broad protective powers, any disclosures made by the attorney that are not reasonably necessary to the claim may still subject that attorney to professional discipline or litigation sanctions; a trial court's failure to prevent improper disclosure will not be a safe harbor for former in-house counsel who carelessly disclose more than is reasonably necessary to the claim.

II. THE TRIAL COURT'S ORDER

[*P23] Having determined that Rule 1.9, by reference to Rule 1.6, allows limited disclosure of confidential material, we now examine the trial court's order in this case. It is evident that portions of the trial court's order cannot be sustained consonant with the provisions of Rules 1.6 and 1.9.

A. Trial Court's Prohibition on Disclosures

[*P24] The **[***18]** first part of the trial court's order, prohibiting Spratley and Pearce "from disclosing (in this litigation or otherwise) confidential communications and information exchanged between Spratley or Pearce on one hand, and State Farm and/or its insureds on the other hand" cannot stand in its current form. Because we hold that Spratley and Pearce may disclose information reasonably necessary to establish their claim against State Farm, the trial court's order must be reversed, requiring, as it does, that Spratley and Pearce refrain from any disclosures, even within the litigation.

[*P25] As noted in our discussion above, Spratley and Pearce may, consistent with their duties under the Rules of Professional Conduct, disclose matters relating to their representation of State Farm in a suit against State Farm, so long as those disclosures are reasonably necessary to that claim. Utah R. Prof'l Conduct 1.6(b)(3). Thus, within this litigation, Spratley and Pearce may disclose some material that would be precluded under the trial court's order. Disclosure, however, should proceed carefully and under the close supervision of the

trial court. The trial court's utilization of the many tools **[***19]** at its disposal must carefully protect and limit disclosures so as to minimize the impact on the parties and the attorney-client relationship while still affording Spratley and Pearce the appropriate measure of justice.

[*P26] Spratley and Pearce have made no claim against the insureds they represented during their employment in the CLC office and are not called upon to defend themselves against claims by those insureds. Accordingly, our pronouncements regarding the ability of Spratley and Pearce to disclose information reasonably necessary to their claim do not apply. However, information which neither discloses, nor from which is ascertainable the identities of former clients may be appropriate. Thus, statistical information or generic summaries of the alleged actions of State Farm in cases where Spratley and Pearce represented its insureds might be permissible. We affirm the portion of the trial court's order that prohibited disclosures of the insured clients' confidential information without the consent of those clients.

[611]** *B. Trial Court's Order to Return Documents*

[*P27] We must limit the trial court's order to Spratley and Pearce to return confidential **[***20]** documents and materials to State Farm to apply only to original documents and materials. Upon the termination of an attorney-client relationship, the client is entitled to possession of its original client file, but the attorney is permitted to retain copies at its own expense. Utah R. Prof'l Conduct 1.16(d). There is no indication in the record whether the documents retained by Spratley and Pearce are the originals from the client file, or whether Spratley and Pearce retained copies in accordance with Rule 1.16. We remand to the trial court for correct application of the order as modified.

C. Trial Court's Disqualification Order

[*P28] The trial court, in making its determination on the disqualification issue, employed a standard utilized by our court of appeals in past cases. That standard, explained by the case of *Cade v. Zions First National Bank, 956 P.2d 1073, 1081 (Utah Ct. App. 1998)*, would lead to disqualification if Spratley and Pearce had privileged information involving State Farm's trial strategy that was disclosed to Humpherys, and that disclosure threatened to taint the remaining proceedings in the case. Clearly the *Cade* test was not **[***21]** fashioned to apply to a factual situation like the one now before us and we must reverse the trial court's order of disqualification. We do not disapprove of the test outlined in *Cade*, only its application to this case.

[*P29] Given our resolution of the trial court's order preventing disclosures in this litigation, we cannot sustain an order of disqualification against Humpherys or his firm. Spratley and Pearce must be able to seek the advice of counsel to prosecute their claim against State Farm. If chosen counsel could be disqualified because of disclosures made by the plaintiffs for the purpose of legal advice and representation, the ability to retain counsel in such matters would be illusory. Under the facts of this case we cannot sanction a result that would deprive Spratley and Pearce of the opportunity to employ counsel.

[*P30] State Farm argues that significant authority for the disqualification it seeks is found in similar cases. It cites cases such as *Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975)*, for the proposition that attorneys for former in-house counsel who receive privileged and confidential communications from their client should **[***22]** be disqualified from representing that client. However, State Farm ignores the fact that the attorneys in *Hull* and other similar cases were disqualified from representing *other* litigants, not the former in-house counsel. *See, e.g.*, *id. at 571-72*.

[*P31] Representing a former in-house attorney as a client and learning the substance of confidential communications does not disqualify an attorney from representing that client, but it may require disqualification of the attorney from representing other clients. State Farm has opposed other litigants represented by Humpherys and his firm, but those cases are not now before us. The disqualification in this case was inappropriate.

CONCLUSION

[*P32] Spratley and Pearce represented State Farm and its insureds for many years and owe lawyers' duties of confidentiality to those former clients. Nevertheless, they may disclose State Farm's client confidences as reasonably necessary to make a claim against State Farm. We reverse the trial court's order insofar as it prohibits disclosures that would be reasonably necessary to Spratley and Pearce's claims against State Farm. We affirm the portion **[***23]** of the trial court's order that requires Spratley and Pearce to obtain the permission of any clients other than State Farm if Spratley and Pearce wish to use those clients' confidences in their suit against State Farm. Because Utah Rule of Professional Conduct 1.16(d) provides that lawyers may retain copies of a former client's file at their own expense after returning the original file to the client, we revise the trial court's order requiring return of confidential documents to State Farm to apply to original documents. We reverse the **[**612]** trial court's order disqualifying Humpherys and Christensen & Jensen from representing Spratley and Pearce in this case because, although Humpherys may have become privy to State Farm's confidential communications with Spratley and Pearce, the remedy of disqualification is inappropriate. Former in-house counsel must be free to employ legal counsel in cases against their former employers and an order of disqualification in this case would prevent Spratley and Pearce from receiving effective legal counsel because any attorney they hired who received enough information to prosecute the suit would be similarly disqualified. Thus, we affirm in part and reverse **[***24]** in part, remanding for proceedings consistent with this opinion.

[*P33] Chief Justice Durham, Associate Chief Justice Durrant, Justice Parrish, and Justice Nehring concur in Justice Wilkins' opinion.