210 States Under Siege—An Update

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Faculty Biographies

Marcus M. Baukol

Marcus Baukol is vice president of the claims litigation department for the Farmers Insurance Group of Companies in Los Angeles. His responsibilities include strategic and operational management of a national staff counsel program consisting of 700 employees, including 300 attorneys in 30 branch legal offices.

Mr. Baukol spent the first seven years of his professional career as a trial attorney in private practice. He then worked in-house as a managing attorney for AIG and Fireman's Fund, before going to work for Farmers as a divisional supervising attorney.

Mr. Baukol is a member of the California, Minnesota, and American Bar Associations. He is a member of ACCA and serves on the Executive Committee of ACCA's Insurance Staff Counsel Committee.

Mr. Baukol received a BS from the University of West Florida and a JD from the University of Minnesota Law School.

Patrick C. Gallery

Patrick C. Gallery is vice president and assistant general counsel of litigation services for Allstate Insurance Company. His responsibilities include direct management of a national staff counsel group consisting of 1600 total employees, including over 700 attorneys in over 100 locations. He also oversees the strategic management of a retained counsel panel of over 2000 firms.

Mr. Gallery began his career at Allstate 30 years ago and has held numerous positions in Pennsylvania, New Jersey, Connecticut, Massachusetts, and Illinois.

He is a member of the executive committee of the ACCA's Insurance Staff Counsel Committee and is a member of the Pennsylvania and New Jersey Bar Associations and the Defense Research Institute.

Mr. Gallery received his BA from the University of Delaware and JD from the Widener University School of Law.

Kenneth R. Slack

Kenneth R. Slack is associate general counsel-legal operations for American Family Mutual Insurance Company in Madison, Wisconsin. His responsibilities include management of the claim legal operations, which supervises all claim-related litigation involving the company and its insureds. This includes a staff counsel operation of over 250 employees.

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He has been with American Family for over 20 years, with over 15 years in his current position. Prior to that he was a trial attorney for American Family. Prior to joining American Family, Mr. Slack was involved in the private practice of law for eight years.

Mr. Slack is an active member of the Wisconsin and Iowa Bar Associations. He is also a member of ACCA and the Executive Committee of ACCA's Insurance Staff Counsel, DRI, IADC, and the Civil Trial Counsel of Wisconsin.

Mr. Slack received a BS/BA and JD from Drake University.

Arlene Zalayet

Arlene Zalayet is a regional managing attorney for Royal & Sun Alliance Insurance Company, in Mineola, New York. She is also an adjunct professor of law at Touro Law School, where she has taught courses including New York practice, pre-litigation, and trial advocacy.

Miss Zalayet is a past president of the Nassau County Bar Association and a past president of the Long Island Trial Lawyers Association. She served as associate dean of the Nassau Academy of Law for several years. Additionally, she chairs the Continuing Legal Education Committee of the New York State Bar Association Trial Lawyer Section.

Miss Zalayet is a senior editor of the *Nassau Lawyer* and writes a featured monthly column on jury trials. She has lectured extensively on behalf of the Practicing Law Institute, the ABA, the New York State Bar Association, and the Nassau Academy of Law.

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

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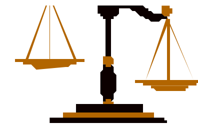

American Corporate Counsel Association
Annual Meeting: October 16, 2001
National Committee: Insurance Staff Counsel

Agenda

Introduction/Overview	**P. Gallery**
Eastern US	**A. Zalayet**
Western US	**M. Baukol**
Central US	**K. Slack**
Q&A	**Panel**

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Compendium of Staff Counsel Challenges
Compiled by the National Insurance Staff Counsel Committee
American Corporate Counsel Association
10/16/01

The long standing practice of using salaried attorneys of an insurer to defend lawsuits filed against insures has been the subject of various legal and ethical challenges through the years. There are two primary objections voiced by opponents:

1) it constitutes the unauthorized practice of law by the insurer; and
2) it involves impermissible representation of conflicting interests.

Twenty-three states plus the American Bar Association have either considered these issues or have them currently under examination. An overwhelming majority of these opinions permit insurers to use salaried counsel. A state by state chronological analysis follows.

I. Unauthorized Practice of Law

A. Use of Salaried Attorneys is not Unauthorized Practice of Law

ALASKA: Alaska Bar Ethics Committee Opinion 99-3 dated 10/22/99 approved the use of staff counsel but required disclosure of the employment relationship between the lawyer and the insurer to the insured/client and client consent to the representation was obtained after consultation with the client.

CALIFORNIA: The California Standing Committee on Professional Responsibility & Conduct, in Formal Opinion No. 1987-91 (1988) determined that salaried counsel's representation of insureds neither aids an insurer in the unauthorized practice of law nor violated Disciplinary Rules if cases involving actual conflicts of interest are referred to outside counsel. On August 23, 2000 the 2nd District Court of Appeal, in an unpublished opinion, refused to disqualify a staff lawyer on the grounds that the Plaintiff had no standing to challenge the defendant's attorney (Martino v. Kiernan, B 137746).

CONNECTICUT: In King v. Guiliani, No. CS92 0290370 S, 1993 WL 284462 (Conn. Super., July 27, 1993), a Connecticut Superior Court decided that the use of salaried counsel to represent insureds does not violate rules of professional conduct and does not constitute the unauthorized practice of law.

GEORGIA: The use of an insurer's salaried counsel to represent its insured was approved in Georgia in 1983. The Georgia Supreme Court ruled that the insurer is obligated to defend the suit by the terms of the policy, and that providing a defense to the insured is within the insurance company's own immediate affairs. Therefore, the insurer was not engaging in the unauthorized practice of law. Coscia v. Cunningham, 250 Ga. 521, 299 S.E. 2d 880 (1983).

ILLINOIS: In this state, the use of salaried counsel was approved by an appellate court which relied upon an Illinois statute allowing insurers to employ attorneys to handle

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litigation on a fee basis or by salary. Kittay v. Allstate Insurance Company, 397 N.E. 2nd 100 (1st Dist. 1979).

In 1992, the Illinois State Bar Committee on Professional Ethics agreed that salaried counsel might represent insureds so long as the insurance company does not direct counsel's decision in rendering legal services. Illinois State Bar Association, Committee on Professional Ethics, Opinion 91-15 (1992).

INDIANA: In 1999 the Indiana Supreme Court held that the use of staff counsel by an insurer was not the unauthorized practice of law. Cincinnati Ins. Co. v. Willis, 2000 Ind. LEXIS 257. The court went on to hold that staff counsel offices must indicate they are employees of the insurer.

MISSOURI: The Missouri Supreme Court determined that the use of salaried counsel to represent insureds is neither the unauthorized practice of law nor does it necessarily involve inescapable conflicts of interest. In re Allstate Ins. Co., 722 S.W. 2d 947 (Mo. 1987).

NEW JERSEY: The use of salaried counsel to defend insureds is not considered to be the unauthorized practice of law. New Jersey Supreme Court Committee on Unauthorized Practice, Opinion 23, 114 N.J.L.J. 421 (1984). In Re Weiss, Healy & Rea, 109 N.J. 246, 536 A. 2nd 266 (1988) the court held that an insurance staff counsel office could not name the office to give the effect that the law firm was that of an equity partnership.

NEW YORK: The New York State Bar Association has determined in two opinions, New York State Bar Association, Unlawful Practice of Law Committee, Opinion 13 (1970) and New York State Bar Association Professional Ethics Committee, Opinion No. 109 (1969) that it was proper for insurers to use salaried counsel to defend their insureds.

On February 2, 2000, the New York State Bar Association's Committee on Professional Ethics issued Opinion No. 726. The Opinion deals with the question of whether staff attorneys of an insurance company may hold themselves out as a law firm when they are salaried employees working exclusively on behalf of the insurer's policyholders. The Opinion concludes that a group of lawyers who are salaried employees of an insurance company and whose practice is exclusively in defense of the company's policyholders may hold themselves out as a law firm only if they do the following:

- Undertake to act consistently with the professional responsibilities of a law firm: and
- Disclose that they are employees of the insurance company.

OHIO: In 1939, an Ohio Court decided that an insurance company's use of salaried attorneys to defend lawsuits filed against its insureds was permissible and did not constitute the unauthorized practice of law by a corporation. Strother v. Ohio Casualty Insurance Company, 28 Ohio L.Abs. 550, 14 Ohio Op. 139 (Com. Pleas 1939)

Eleven years later, the Toledo Bar Association requested an opinion from the American Bar Association on the propriety of using staff counsel to defend a company's

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insureds. In 1950, the ABA approved such a practice. American Bar Association Committee Professional Ethics and Grievances, Formal Option 282 (1950).

In a strange twist, this issue resurfaced in 1994 as the Ohio Board of Commissioners on Grievances and Discipline issued an ethics opinion, holding that insurers' use of in-house attorneys to prosecute subrogation claims violated the Ohio Code of Professional Responsibility. Ohio Formal Opinion 94-9 (1994). This opinion was quickly overruled the following year. Ohio Formal Opinion 95-14 (1995)

Since 1996, there are several unreported trial court decisions that have addressed the issue of staff counsel in response to Motions to Disqualify.

Molter v. Hansell, Judge Clark, Fairfield County Common Pleas (1996) Trial judge granted motion and disqualified staff counsel based on employment.

Hinkle v. Wood, Judge Cain, Franklin County Common Pleas (1996), Motion to Disqualify overruled.

Leavelle v. McComb, Judge McGrath, Franklin County Common Pleas (1996), Motion to Disqualify denied.

Behmer v. Nguyen, Judge Sadler, Franklin County Common Pleas, (1996), Motion to Disqualify denied.

Ruffing v. Miller, Judge Connor, Franklin County Common Pleas, (1996), Motion to Disqualify overruled.

Whisner v. Slone, Judge Frost, Licking County Common Pleas (1997), Motion to Disqualify overruled.

Marsico v. Nationwide, Judge Zaleski, Lorain County Common Pleas (1998) Motion to Disqualify denied.

Griffiths v. Boyles, Judge Hogan, Franklin County Common Pleas (1998), Motion to Disqualify denied.

Heinecke v. Johnson, Judge Kroncke, Lucas County, Sylvania Municipal Court, (1999) Motion to Disqualify overruled.

On September 8, 2000 the Ohio State Bar Association's Unauthorized Practice of Law Committee voted to recommend that the Board of Governors not request a prosecution by the Ohio Unauthorized Practice of Law Commission of Allstate Insurance Company for its use of staff counsel. The UPL Committee also voted to recommend to the Bar Board of Governors that no further action be taken on the matter. The Board of Governors has yet to act on the recommendation.

TENNESSEE: In 1995, the Tennessee Supreme Court, in In Re Youngblood, 895 S.W.2nd 322, 1995 Tenn. LEXIS 46, overturned an ethics opinion that prohibited liability insurers from using salaried attorneys to defend insureds. The Court determined such arrangements did not violate the state's unauthorized practice of law statute. The Court further ruled that a staff counsel office couldn't use a name that gives the public the impression that the salaried attorneys are engaged in the general practice of law as partners or as sole practitioners. The employment relationship has to be clearly disclosed to the client and the public.

TEXAS: In 1958, the State Bar of Texas was faced with the issue of whether the use of salaried counsel to defend insureds constituted the unauthorized practice of law. The

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Committee determined that this method of defending insureds was proper, and that salaried counsel could prosecute subrogation cases too. State Bar of Texas, Committee on Canons of Ethics, Opinion No. 167 (1958).

In 1963, the Commission on Interpretation of the Canons of Ethics addressed the same issue and determined that a licensed attorney, employed by an insurer, may defend an insured in an action pending against him. State Bar of Texas, Commission on Interpretation of the Canons of Ethics, Opinion 260 (1963).

VIRGINIA: In this state, the practice of using staff counsel to defend insureds is likewise not considered to be the unauthorized practice of law. Virginia State Bar Standing Committee on Legal Ethics Opinion 598 (1985).

WEST VIRGINIA: In West Virginia Lawyer Disciplinary Board Op. 99-01, July 9, 1999, the Board concluded that the representation of insureds by employed lawyers in a "captive law firm" is permissible under the Rules of Professional Conduct subject to the criteria outlined in the opinion.

Upon referral by the Lawyer Disciplinary Board, the West Virginia State Bar's Unlawful Practice Committee reviewed the unauthorized practice of law issue and in a letter to Disciplinary Counsel concluded that it did not believe that the operation of a captive law firm is the unlawful practice of law**.**

B. Use of Salaried Attorneys is the Unauthorized Practice of Law

NORTH CAROLINA: In 1986, The North Carolina Supreme Court ruled that the state's unauthorized practice of law statute precluded the use of an insurer's salaried counsel to represent its insureds. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

KENTUCKY: In 1996, the Kentucky Supreme Court refused to overrule a 1981 Unauthorized Practice of Law Opinion which held that the use of salaried counsel constituted the unauthorized practice of law. American Insurance Association v. Kentucky Bar Association, 917 S.W. 2d 568, 1996 KY LEXIS 22 (1996).

C. States with Challenges Currently Pending

CALIFORNIA: In GAFCON v. Ponsor & Associates et. al., No. GIC 735449 (San Diego Superior Court 1999), the Plaintiff alleged that staff counsel (Ponsor) for Travelers Indemnity provided inadequate representation to forcing them to find and pay for their own lawyer. The suit further alleged that the insurer's nonlawyer ownership of Ponsor constitutes illegal fee sharing and the unauthorized practice of law. In September 2000, the trial court granted a Travelers Motion for Summary Judgment. The case is currently on appeal.

The unauthorized practice of law war continues in Ricketts v. Farmers Group, Inc., LA County Superior Court #BC165961. Judge Soussan G. Bruguera found that by using non-attorney personnel to "control the defense" of insureds, Farmers

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engaged in the unauthorized practice of law. The case is currently on appeal to the CA Court of Appeals, 2nd Appellate District, Division One.

Florida: Perhaps the most serious current challenge is also the most recent. In Gutierrez v. Orellano, No. 99-07778, Division 27, Dade County Florida Circuit Court, Judge Paul Siegel issued an "ORDER PROHIBITING ALLSTATE ATTORNEYS FROM USING LAW FIRM NAME IN DIVISION 27 PROCEEDINGS." (His caps, not mine.) On the positive side, the Order acknowledges the legitimacy of Staff Counsel as noted by In re Rules…, 220 So. 2nd 6 (Fla. 1969). However, among other issues, Judge Siegel states that staff counsel firms, practicing under names such as "Law Offices of John Doe" or "A & B", or "CD & Associates" imply the entity is an independent law firm in violation of Florida Bar Ethics Opinion 98-3 and Florida Bar Staff Opinion 22624 dated August 14, 2000. The Order also addressed evidentiary problems regarding expert testimony that Judge Siegel believes arise from the "fictitious 'independent law firm' they (Allstate) have established."

On July 20, 2001, after a hearing in response to further Orders to Show Cause, Judge Siegel issued an "ORDER PROHIBITING INSURANCE COMPANY IN-HOUSE ATTORNEYS FROM USING FIRM NAMES IND DIVISION 27 PROCEEDINGS." Delgado v. Gonzalez, et al, No.: 97-25826 CA(27), Division 27, Dade County, Florida Circuit Court, in essence reiterating –the Allstate Order absent the evidentiary issues. Delgado involved State Farm, USAA, Nationwide, Progressive and One Beacon Insurance Companies with Progressive not included in the ORDER.

As of August 1st, strategy sessions were taking place as to which avenues of appeal would be most productive.

GEORGIA: Following defendant's appeal of a verdict in a personal injury case, Stodghill v. Padgett, a Henry County trial court granted Defendant's Motion for Protective Order and denied Plaintiff's Motion to Disqualify Staff Counsel. Plaintiff applied for an interlocutory appeal to the Georgia Supreme Court. At issue was the insurer's decision to appeal from the jury verdict and whether the Plaintiff has standing to challenge the defendant's lawyer. The underlying case eventually settled rendering the issue moot.

PENNSYLVANIA: A bad faith case before the Court of Common Pleas in York County, Schoffstall v. Nationwide Insurance Co., alleges that the use of staff counsel constitutes the crime of unauthorized practice of law by a corporation, making Nationwide per se liable for bad faith. Cross-Motions for Summary Judgement has been briefed but no decision has been rendered yet.

Early in 2001, the Philadelphia Association of Defense Counsel requested input from its members on a proposed Advisory Opinion of the Pennsylvania Bar Association Ethics Committee. The proposed opinion addressed all forms of cost containment including third party audits, litigation guidelines **and** Staff Counsel:

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> “No matter how well intentioned or well designed any cost containment program might be, it is guaranteed to create real and potential conflicts of interest, the continued appearance of impropriety, and ethical dilemmas for the practicing attorney which are unnecessary.”

Staff Counsel is specifically addressed in another section:

> “We believe the ethical dilemmas mentioned above increase dramatically when applied to house counsel in light of the control an insurance company can exercise over its salaried employees. Thus, to the extent there are restrictions placed upon outside counsel in engaging in cost management programs, insurers may not be permitted to avoid those restrictions by the over utilization and proliferation of house counsel who would be likewise subject to identical if not greater conflicts of interest.”

The proposed Ethics Opinion was eventually abandoned. One addressing only litigation guidelines emerged from the Ethics Committee.

TENNESSEE: While not specific to Staff Counsel, the Board of Professional Responsibility is considering a formal opinion addressing limitations placed on attorneys. The final opinion may require client consent when any restrictions exist.

TEXAS: The issue of whether the use of staff counsel constitutes the unauthorized practice of law is being litigated in several actions. A suit was filed in 1998 by the Dallas Unauthorized Practice of Law Subcommittee in state court entitled Unauthorized Practice of Law Committee v. Collins, Allstate Insurance company, Dallas District Court. The matter remains in the discovery phase with little movement in the past year. Several insurers have intervened in this matter.

A second state court suit involving Travelers and AIG v. UPLC is pending in a Dallas state district court before Judge Gary Hall. The parties have agreed to the concept of submitting motions for summary judgment on stipulated facts. The parties are currently working on the stipulations and conducting discovery.

Nationwide Insurance Co. has filed a declaratory judgment action against the Unauthorized Practice of Law Committee in Federal Court in Dallas before Judge Buckmeyer. The Court recently granted the UPLC’s motion requesting that the federal court abstain from deciding the staff counsel issue on the ground that it involves purely state law and dismissed the case. Nationwide has filed its Notice of Appeal.

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II. Possible Conflicts of Interest Do Not Preclude the Use of Salaried Counsel

AMERICAN BAR ASSOCIATION: The ABA decided in 1950 that it was permissible under the ethical guidelines and rules of professional conduct for salaried counsel to defend insureds. ABA Committee on Professional Ethics and Grievances, Formal Opinion 282 (1950). Also, the ABA determined that salaried counsel may represent the subrogated interests of the carrier arising from settlement of claims of insureds and may represent the insured's interest in collecting the deductible. ABA standing Committee on Ethics and Professional Responsibility, Informal Opinion 1370 (1976).

ALABAMA: In 1981, the Alabama State Bar Ethics Committee ruled that salaried counsel may defend insureds in third-party litigation if extreme caution is exercised to advise the insureds when conflicts of interest or potential conflicts arise between the insurer and insured. Alabama State Bar, Ethics Opinion 81-533 (1981).

ARIZONA: In 1975, an Arizona Ethics Committee was asked whether it was proper for an insurer's salaried counsel to represent the company's insureds. In addressing the conflict of interest issue, the Committee decided that there was no difference in the ethical obligations owed to the insured between salaried attorneys and outside counsel. The Committee concluded by finding the insurer's practice of using a salaried counsel to be proper. Arizona State Bar Association Ethics Committee, Opinion 81-533 (1981).

COLORADO: The use of salaried counsel to defend insured was approved by the Colorado Bar Association Ethics Committee in Formal Opinion 91 (1993). The Committee went on the address the requirement that the employment relationship with the insurer must be clearly disclosed to the insured.

FLORIDA: In 1969, the Florida Supreme Court was asked by the State Bar to approve a new rule which would have prohibited an insurer from using salaried counsel to represent its insureds. The Bar reasoned that a conflict of interest developed when a salaried attorney was representing a policyholder in a case where the value of the claim exceeded the policy limits or a settlement demand was made that was in excess of the policy limits. The Florida Supreme Court rejected these arguments and refused to authorize the proposed rule. In re Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Florida, 220 So. 2d 5 (Fla. 1969).

IOWA: The use of an insurer's salaried counsel to represent insureds was approved in this state in 1989. Iowa State Bar Ethics Committee, Opinion 88 (1989).

MICHIGAN: In this state, salaried counsel may represent insureds so long as the attorney withdraws if prevented from exercising independent professional judgement. Michigan State Bar, Committee on Professional and Judicial Ethics, Opinion CI-1146 (1986).

OKLAHOMA: Likewise, salaried counsel received the same approval in Oklahoma. Oklahoma Opinion 1997-1 (1997).

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PENNSYLVANIA: The Philadelphia Bar Association, in Op. 86-108 (1986) ruled that salaried counsel may pursue subrogation claims and represent an insured if all foreseeable issues of conflict have been resolved or do not exist. This same result was reached by the Pennsylvania Bar Association, Committee on Legal Ethics a Professional Responsibility, Formal Opinion 96-196.

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Formal Opinion 01-421 **February 16, 2001**
Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions

A lawyer must not permit compliance with "guidelines" and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured. A lawyer may disclose the insured's confidential information, including detailed work descriptions and legal bills, to the insurer if the lawyer reasonably believes that doing so will advance the interests of the insured. A lawyer may not, however, disclose the insured's confidential information to a third-party auditor hired by the insurer without the informed consent of the insured. Moreover, if the lawyer reasonably believes that disclosure of the insured's confidential information to the insurer will affect a material interest of the insured adversely, the lawyer must not disclose such information without the informed consent of the insured.

The Committee addresses the ethical issues that arise under the Model Rules of Professional Conduct when a lawyer retained by an insurance company to defend an insured is required to work under litigation management guidelines or other restrictions imposed by the insurer. The Committee also addresses the ethical issues associated with insurance companies requiring a lawyer to submit detailed billing information to the insurer or an independent auditor so that the insurer can determine whether the lawyer's charges conform to the insurer's general requirements and guidelines.

For the reasons discussed below, we conclude that lawyers representing insured clients must not permit the client's insurance company to require compliance with litigation management guidelines the lawyer reasonably believes will compromise materially the lawyer's professional judgment or result in his inability to provide competent representation to the insured. A lawyer may not disclose the insured's confidential information[1] to a third-party auditor hired by the insurer without the informed consent[2] of the insured, but a lawyer may submit a client's detailed bills that contain confidential information to the client's insurer if the lawyer reasonably believes that disclosure: (1) impliedly is authorized and will advance the interests of the insured in the representation, and (2) will not affect a material interest of the insured adversely. If the lawyer believes that disclosure of billing statements or other confidential information to the insurer adversely will affect a material interest of the insured, the lawyer must not disclose such information without informing the client about the nature and potential consequences of both making and not making the requested disclosure and obtaining the client's informed consent to the release of the information.

I. Tripartite Relationship Among Lawyers, the Insurer and Insured

A. Background

By entering into a liability insurance contract with an insurance company, the insured gives certain contractual rights to the insurer and consents to giving the company some control over the direction of the defense and any settlement of the matter.[3] Pressured by increased litigation costs,[4] some insurance companies have implemented programs to monitor the services and fees of lawyers they retain.[5] Among the cost-saving strategies

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[1] The term "confidential information" is used to denote information relating to the representation of a client as used in Rule 1.6 and elsewhere in the Model Rules of Professional Conduct.

[2] "Informed consent" and "consent after consultation" often are used interchangeably. The term "consultation" is defined to mean "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." "Informed consent" will be used throughout the balance of this opinion. *See* MODEL RULES OF PROFESSIONAL CONDUCT Terminology (2001); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388 (Relationships Among Law Firms), *in* FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 262, 266 n. 4 (ABA 2000).

[3] *See* 7C JOHN ALAN APPLEMAN AND JEAN APPLEMAN, INSURANCE LAW AND PRACTICE, § 4681 at 203 (1979).

[4] Costs of defense can consume nearly 55 cents of every claim dollar. C. David Sullivan and Patrick T. Muldowney, *Changing Times in the Insurance Industry*, FOR THE DEFENSE (DRI Supp., February 1998).

[5] Some of the practices targeted by insurance companies include frequent and obvious billing abuses such as charging for doing extensive legal research on marginal issues and charging for "file review" unconnected to any

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employed by these companies are the imposition of guidelines and procedures, regulation of expenses, and audits of legal bills. Insurance companies have a legitimate interest in lawyer billing practices and in controlling expenses. Some litigation management guidelines, however, go beyond describing the rights and duties of the insurer, the insured, and defense counsel and give the insurance company the right to control the defense to the degree that the lawyer's professional judgment in rendering legal services may be materially impaired.

B. The Ethical Implications of the Tripartite Relationship

The tripartite relationship among defense lawyer, insured, and insurer requires a delicate balance of rights and duties. Some jurisdictions regard both the insured and insurer as clients in the absence of a conflict of interest.[6] Other jurisdictions regard only the insured as the client.[7] In ABA Formal Opinion 96-403 (1996) (Obligations Of A Lawyer Representing An Insured Who Objects To A Proposed Settlement Within Policy Limits),[8] the Committee observed, "[t]he Model Rules of Professional Conduct offer virtually no guidance as to whether a lawyer retained

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particular objective. *See generally* J. Stratton Shartel, *Tensions Between Insurers, Outside Counsel Remain Near the Boiling Point*, 10 INSIDE LITIGATION 7, 20 (October 1993).

[6] One court has held that "if there is no conflict, an attorney-client relationship can be created between an insurer hiring an attorney to represent an insured, despite the lack of an express agreement." Paradigm Ins. Co. v. Langerman Law Offices, 196 Ariz. 573, 576, 2 P.3d 663, 666 (Ariz. App. 1999) (citing Home Indem. Co. v. Lane Powell Moss and Miller, 43 F.3d 1322, 1330-31 (9th Cir.1995)). *See* MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir.1986); Unigard Ins. Group v. O'Flaherty & Belgum, 38 Cal.App.4th 1229, 1236-37, 45 Cal.Rptr.2d 565, 568-69 (Cal. Ct. App. 1995); Nandorf, Inc. v. CNA Ins. Cos., 134 Ill.App.3d 134, 136-37, 479 N.E.2d 988, 991 (1985). *See also* State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co., 86 Cal. Rptr.2d 20, 24-25, 72 Cal.App.4th 1422, 1428 (Cal. Ct. App. 1999) (lawyer represents two clients, the insured and the insurer but, "as a practical matter, the attorney may have closer ties with the insurer than with the insured"); Gray v. Commercial Union Ins. Co., 191 N.J.Super. 590, 596, 468 A.2d 721, 725 (1983) ("There is no dispute that as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured."); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994) (lawyer represents both insured and insurer if retainer agreement so provides); Scott L. Machanic, *Insurance Defense Counsel: Who Is the Client?*, 43 FED'N INS. & CORP. COUNS. Q. 45 (1992) (parties and courts typically assume the lawyer represents both insured and insurer); Richard L. Neumeier, *Serving Two Masters: Problems Facing Insurance Defense Counsel and Some Proposed Solutions* , 77 MASS. L. REV. 66, 69 (1992) ("the law firm is attorney for the insured as well as the insurer. This is the majority rule.") (quoting McCourt Co. v. FPC Properties, Inc., 386 Mass. 145, 145, 434 N.E.2d 1234, 1235 (1982)).

[7] *See, e.g.*, In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 814 (Mont. 2000); Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 519, 475 N.W.2d 294, 297 (Mich. 1991); Supreme Court of Washington v. Tank, 105 Wash.2d 381, 388, 715 P.2d 1133, 1137 (Wash. 1986). *See also* Colorado Bar Association Ethics Committee Formal Op.107 (September 18, 1999); Florida Bar Staff Op. 20591 (December 31, 1997); Maine Professional Ethics Commission of the Board of Overseers Op. 164 (December 2, 1998); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Op. No. 97-119, 1997 WL 816708 *1 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp. October 7, 1997); Washington State Bar Association Formal Op. 195 (1999). The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § (1)(a) (2000) ("the Restatement") acknowledges that a relationship arises when a "person manifests to a lawyer the person's intent that the lawyer provide legal services for the person" and "the lawyer manifests to the person consent to do so." Section 14(1)(b) states that a lawyer-client relationship can arise when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person" and "the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services." The Comment to § 134 states that whether a lawyer-client relationship exists between the lawyer and the insurer is determined under § 14. *See also* Debra A. Winiarski, *Walking the Fine Line: A Defense Counsel's Perspective*, 28 TORT & INS. L.J. 596-97 (1993); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 512 (1991); RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 28.3-5 (4th ed. 1996) (collecting authorities).

[8] FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 403.

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and paid by an insurer to defend its insured represents the insured, the insurer, or both."[9] As was the case in Formal Opinion 96-403, we take no position as to whom the lawyer represents absent an express agreement as to the identity of the client.

Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the objectives of the representation and to consult with the client concerning the means by which those objectives shall be pursued. Comment [1] states that "the lawyer should defer to the client regarding such questions as the expense to be incurred." The question whether the insurance company may be deemed a "client" who can direct the scope and extent of the representation is unsettled although a majority of the jurisdictions that have addressed the issue have concluded that in the absence of a conflict, a lawyer concurrently may represent both the insurer and the insurer. Regardless of whether the insurer is a client, Rule 5.4(c) states that a lawyer "shall not permit a person who recommends, employs or pays a lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering ... legal services."

II. The Effect of Insurer Guidelines on the Lawyer's Ethical Obligations

The interests of the insurance company and the insured may diverge if the insurance company has a paramount interest in controlling or reducing its defense costs and the insured's main interest is to receive the best possible defense. Although defense lawyers must be sensitive to the economic interests of the insurance companies that employ them and cognizant of the fact that costs of litigation ultimately are borne by insureds through premiums, they must not allow their professional judgment or the quality of their legal services to be compromised materially by the insurer.

If the lawyer is hired to defend an insured pursuant to an insurance policy that authorizes the insurer to control the defense and, in its sole discretion, to settle within policy limits, the lawyer must communicate these limitations on his representation of the insured to the insured, preferably early in the representation. The lawyer should "make appropriate disclosures 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.... 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."[10] Once this communication takes place, the lawyer is free to settle the claim at the direction of the insurer[11].

Because it is paying both the costs of defense and any resulting judgment or settlement up to the limits of the policy, the insurance company normally has the primary financial stake in the matter. Pursuant to the liability insurance contract, the insured delegates to the insurance company the right to defend the case and is required to cooperate in the insured's defense. However, the rules of professional conduct--and not the liability insurance contract--govern the lawyer's ethical obligations to his client, whether the client is the insured, the insurer, or both. To the extent that the insurance company and the insured seek an expeditious and favorable outcome to the litigation, their interests converge. Indeed, in Formal Opinion 282 (1950),[12] we stated 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. The requirement that the insurance company shall defend an action contemplates that the company, because of its contractual liability and community of interest, shall take charge of the incidents of such defense including the supervising of the litigation."[13]

In most cases, undivided loyalty to the insured thus would be fully consistent with undivided loyalty to the insurance company and its directives without regard to whether both insured and insurer are clients of the lawyer. In

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[9] *Id.* at 404.

[10] FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 406-07. In Opinion 96-403, we further stated that a lawyer could satisfy the requirements of Rule 1.2(c) by sending the insured a short letter clearly apprising the insured "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." *Id.* at 406.

[11] Some states hold that even if a settlement authority has been conferred on the insurer by the insurance policy, the lawyer's ethical obligations require the insured's informed consent before a settlement can occur. *See, e.g.,* Rogers v. Robson, Masters, Ryan, Brumund and Belom, 81 Ill. 2d 201, 205, 407 N.E. 2d 47, 49 (1980); Miller v. Byrne, 916 P.2d 566, 574 (Colo. App. 1996). This view is also consistent with Rules 1.2(a) and 1.4.

[12] OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 621 (ABA 1967).

[13] *Id.* at 622-23.

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the vast majority of cases, litigation management guidelines do not raise ethical concerns. The insured no doubt is willing to entrust the litigation against him to the insurance company, which has risk management and litigation experience in similar matters. The insurance company usually is in the best position to manage the litigation to the advantage of both the insured and itself in the most cost-effective way. There are rare situations when the lawyer believes a limitation imposed by the insurer's litigation management guidelines is compromising the lawyer's ability to provide competent representation to both the insured and insurer clients.

If the lawyer reasonably believes her representation of the insured will be impaired materially by the insurer's guidelines or if the insured objects to the defense provided by a lawyer working under insurance company guidelines, the lawyer must consult with both the insured and the insurer concerning the means by which the objectives of the representation are being pursued. "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."[14] If the insurer does not withdraw or modify the limitation on the lawyer's representation and the insured refuses to consent to the limited representation, the resulting conflict implicates Rule 1.7(b) and unless the lawyer is willing to represent the insured without compensation from the insurer, requires the lawyer to terminate the representation of both clients.[15]

In such situations, the lawyer has few alternatives available to him. The lawyer can try to persuade the insurer to withdraw the limitation. If the lawyer is unable to persuade the insurer-client to withdraw the limitation, the resulting conflict between the insurer's directives and the insured's immediate interests requires the lawyer to withdraw from representing the insurer and to protect the immediate interests of the insured in the litigation.[16] In this unlikely situation, the lawyer must, in contemplation of her immediate resignation from representation of the insured, protect the immediate interests of the insured in order to assure that her withdrawal can be accomplished without material adverse affect on the insured's interests, as contemplated by 1.16(b). Thereafter, if the lawyer is unable satisfactorily to resolve the conflict implicated by the insurer's guidelines, the lawyer may seek to withdraw pursuant to Rule 1.7 or 1.16(b).

III. Lawyer's Submission of Client Billing Records to the Insurer or to the Insurer's Third-Party Auditor

Another cost-containment measure used by the insurance industry is review of client billing information by third-party auditors. The phrase "legal bill audit" "encompasses a range of services, from an examination of the face of the legal bill for improper charges or errors to a detailed analysis of original time records, attorney work product, expenses and hourly rate benchmarks, and more.[17] In submitting a claim to the insurance company, the insured may be subject to the provisions of the contract of insurance that grant the insurance company access to confidential information. Moreover, most of the confidential information disclosed to the insurer usually will advance the interests of the insured as well as the interests of the insurer and will not affect a material interest of the insured adversely.[18]

An audit may include an examination of hourly rates and background information about the legal matters for which the bill was submitted, including examination of the lawyer's work product and opposing counsel's work product in order to gauge "quality, tactic, strategy, and performance in context."[19] A detailed bill review might include "verification of raw data, interviews of key personnel, examination of firm billing systems, checking the original time records against time entries in invoices, and reconciling receipts for expenses with the bill.[20] Most of the information supplied to insurers through billing records is of a general nature, is publicly known (*e.g.* the lawyer's court appearances), or already known as a result of the insured having forwarded it to the insurer to facilitate the

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[14] *Id. See also* Rule 1.8(f)(2); Board of Professional Responsibility of the Supreme Court of Tennessee Ethics Op. 2000-F-145, 2000 WL 1687507 (Sept. 8, 1999).

[15] Rule 1.7 Comment [2].

[16] Comment [4] to Rule 1.8(f) states that when a lawyer's services are being paid for by a third party, "[s]uch an arrangement must also conform to the requirements of Rule 1.6 . . . and Rule 1.7 . . . ."

[17] *See generally* John Toothman, *Surviving a Legal Bill Audit*, 15 COMPLEAT LAWYER 45 (Winter 1998).

[18] In Formal Opinion 95-398 (Access of Nonlawyers to a Lawyer's Data Base), we stated that law firms may give independent contractors access to the insured's confidential information to assist it in representing its clients. FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 366, 367.

[19] Toothman, *supra*, note 17 at 49.

[20] *Id.*

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defense (*e.g.* medical information). Although this information may be subject to the protections of Rule 1.6(a) as "confidential information," its disclosure to the insurer nonetheless would be authorized impliedly either to comply with the insurance contract or to carry out the representation, or both.[21] Billing records and underlying documentation may, however, reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided to the insured. This information generally is protected by the confidentiality rule or the attorney-client privilege or both.[22] In addition to the foregoing justifications for disclosure of otherwise confidential and/or privileged information to the insurer, disclosure to the insurer may be appropriate when both the insured and insurer are regarded as clients of the lawyer.[23]

Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the client has given informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and information relating to a client's representation is protected as is required by Rule 1.6. Comment [4] to the Rule states that when a lawyer's services are paid for by a third party, such an arrangement must protect the client's confidences and secrets from unauthorized disclosure as required by Rule 1.6 and that a lawyer may not represent a client under such circumstances if the representation is prohibited under Rule 1.7.[24]

Under Rule 1.6, a lawyer may not reveal information relating to representation of a client in the absence of the client's informed consent, except for disclosures that are impliedly authorized in order to carry out the representation. Informing the insurer about the litigation through periodic status reports, detailed billing statements and the submission of other information usually is required, explicitly or implicitly, by the contract between the insurer and the insured and also is appropriate in those jurisdictions where the insurer is regarded as a client and there is no conflict between the insurer and insured. The disclosure of such information usually advances the interests of both the insured and the insurer in the representation and such disclosures are, therefore, "impliedly authorized to carry out the representation."[25] In those relatively rare situations when the lawyer reasonably believes that disclosure of confidential information to the insurer will affect a material interest of the client-insured adversely, the lawyer may not disclose such confidential information without first obtaining the informed consent of the client-insured.[26]

Nor may the lawyer disclose the insured's confidential information to a third-party auditor designated by the insurer without the insured's informed consent.[27] Unlike the disclosure of the insured's confidential information to

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[21] *See* Stephen Gillers, *Ethical Issues in Monitoring Insurance Defense Fees: Confidentiality, Privilege and Billing Guidelines* 4-6 (Law Audit Services, Inc. 1998).

[22] *See* Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir.1992), *reh'g denied*, 977 F.2d 1533 (9th Cir. 1992); Licensing Corp. of America v. National Hockey League Players Ass'n, 153 Misc.2d 126, 127-28, 580 N.Y.S.2d 128, 130 (N.Y. Sup.Ct. 1992).

[23] Although the right to share confidential information between co-clients may be implied, s*ee, e.g.,* Brennan's Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 173 (5th Cir. 1979), some jurisdictions have condemned the sharing of confidential information between and among co-clients in the absence of each client's informed consent. *See, e.g.*, D.C. Bar Opinion 296 (2000); Florida Bar Ethics Opinion 95-4 May 30, 1997).

[24] *See supra* note 16.

[25] Rule 1.6(a); *see* RESTATEMENT § 61 cmt. b, which contains the functional equivalent of the "implied authorization" exception in Rule 1.6(a).

[26] *Id.* §§ 61 and 60(1)(a).

[27] A majority of jurisdictions have concluded that it is not ethically proper for a lawyer to disclose billing information to a third-party billing review company at the request of an insurance company unless he has obtained the client's consent. *See, e.g.*, Office of the General Counsel of the Alabama State Bar Op. RO-98-02 (November 9, 1998); Alaska State Bar Ass'n Ethics Committee Op. No. 99-1 1999, 1999 WL 1494993 (October 22, 1999); Arizona State Bar Formal Op. 99-08 (September 1999); Cincinnati, Ohio Bar Association Op. 98-99-02 (February 1999): Colorado Bar Association Ethics Committee Formal Op.107 (September 18, 1999); Connecticut Bar Association Committee on Professional Ethics Informal Op. 00-20 (Sept. 26, 2000); District of Columbia Legal Ethics Committee Op. No. 290 (April 20, 1999); Florida Bar Professional Ethics Committee Proposed Advisory Op. 99-2 (March 31, 1999); Florida Bar Staff Op. 20762 (March 9, 1998); Florida Bar Staff Op. 20591 (December 31, 1997); Georgia State Bar Proposed Advisory Op. No. 99-R2 (January 2000); Hawaii Bar Office of Disciplinary Conduct Op. 36 (March 25, 1999); Idaho State Bar Association Formal Op. 136 (January 2000); Indiana State Bar Association Op. 98-4 (1998); Iowa Supreme Court Board of Professional Ethics and Conduct Op. 99-01 (September 8, 1999); Kentucky Bar Association Op.E-404 (June 1998); Louisiana State Bar Association Ethics Advisory

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secretaries and interpreters, the disclosure of such information to a third-party auditor, a vendor with whom the lawyer has no employment or direct contractual relationship,[28] may not be deemed essential to the representation and may, therefore, result in a waiver—albeit unintended—of the privilege.[29] Therefore, since such disclosures always involve the *risk* of loss of privilege, the lawyer must obtain the insured's informed consent before sending bills with such information to a third party hired by the insurer to audit the bills.[30]

In order to obtain the insured's informed consent to such disclosures, the lawyer should at least discuss the nature of the information sought as well as the relevant legal and non-legal consequences of the client's decision. This would include giving advice concerning the extent of the client's obligation under the insurance contract to authorize such disclosures. The lawyer must evaluate the reasonably foreseeable adverse consequences of disclosure and inform the client of the adverse effects that may result, including communicating with the client about the consequences of not consenting to disclosure where the insurance contract requires the insured to cooperate in the defense of the claim and where failure to agree to disclosure could risk loss of insurance coverage. The client also should be informed that the insurance company may interpret the "duty to cooperate" clause in its contract with the insured as meaning that it has the right to give an independent contractor access to the client's confidential information to aid it in representing clients.

Service Committee Op. 45, *as reported in* LOUISIANA BAR JOURNAL 438 (February, 1998); Maine Professional Ethics Commission of the Board of Overseers Op. 164 (December 2, 1998); Maryland State Bar Association Committee on Ethics Op. No. 99-7 (January 1999); Massachusetts Bar Association Committee on Professional Ethics Op. 2000-4 (September 13, 2000); Mississippi State Bar Association Ethics Op. 246 (April 8, 1999); Chief Disciplinary Counsel of the Supreme Court of Missouri Informal Advisory Op. 980188 (September 9, 1998); New Mexico State Bar Formal Advisory Op. 2000-02 (June 20, 2000); New York State Bar Association Committee on Professional Ethics Op. 716 (March 3, 1999); North Carolina State Bar Proposed Formal Ethics Op.10, 1998 WL 609887 (October 16, 1998); Oklahoma Bar Association Board of Governors Legal Ethics Advisory Op. No. 309 (March 27, 1998) (representation of insureds by lawyers who are employees of a liability insurer); Oregon State Bar Association Ethics Op. 1999-157, 1999 WL 521543 (June 1999); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Op. No. 97-119, 1997 WL 816708 (October 7, 1997); Rhode Island Ethics Advisory Panel Op. 99-17 (October 27, 1999); South Carolina Bar Ethics Advisory Committee Op. 97-22; 1997 WL 861963 (December 1997); State Bar of South Dakota Ethics Op. 99-2 (April 16, 1998); Board of Professional Responsibility of the Supreme Court of Tennessee Ethics Op. 99-F-143, 1999 WL 406886 (June 14, 1999); Utah State Bar Ethics Advisory Op. No. 98-03 (April 17, 1998); Vermont Bar Association Ethics Op. 98-7 (October 1998); Virginia Bar Legal Ethics Op. 1723 (November 23, 1998); Washington State Bar Association Formal Op. 195 (1999); West Virginia Lawyer Disciplinary Board Op. LEI 99-02 (April 30, 1999); Wisconsin State Bar Ethics Op. E-99-1 (October 1999).

[28] In ABA Formal Opinion 95-398, this Committee recognized that "in this era of rapidly developing technology," lawyers frequently use outside agencies for numerous functions such as accounting, data processing, photocopying, computer servicing, storage and paper disposal and that lawyers retaining such outside service providers are required to make reasonable efforts to prevent unauthorized disclosures of client information. FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 367. The present inquiry is clearly distinguishable because the lawyer has neither a contract with nor any right to control the conduct of the third-party auditor retained by the insurer.

[29] In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d at 817-22; United States v. Massachusetts Institute of Technology, 129 F.3d 681, 684-687 (1st Cir. 1997) ("an intent to maintain confidentiality is ordinarily necessary to continued protection, but it is not sufficient").

[30] In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d at 818-19 (The relationship between the insured and third-party auditor does not involve the kind of common interest in which information can be exchanged without loss of privilege. Disclosure to persons needed in the representation or appropriate to a consultation also does not justify disclosure to a potential adversary.) (citing U.S. v. M.I.T., *supra* note 29 and accompanying text); *In re* Columbia/HCA Healthcare Corporation, 192 F.R.D. 575, 576, 579 (M.D. Tenn. 2000) ("[T]he privilege is narrowly construed because it reduces the amount of information discoverable during the course of a lawsuit . . . .[C]lients who wish to selectively disclose privilege documents and the entity to whom they wish to disclose the documents cannot negate a waiver simply by agreeing to do so.") (internal citation omitted). Other cases rejecting selective waiver include *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424-26 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir.), *cert. denied*, 490 U.S. 1011, 109 S. Ct. 1655 (1989); Permean Corp. v. United States, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981).

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The lawyer should inform the client of the risk that the information to be disclosed to the auditor could be obtained by others directly or indirectly as a result of the disclosure, the risk that a disclosure could involve a waiver of the lawyer-client privilege, and that the disclosure could be used to the client's disadvantage.

"Consent" may be influenced heavily by the client's desire to take advantage of the insurance company's duty to defend. Where the client's interests would be placed at risk by disclosing information to the auditor, the lawyer reasonably must believe that the client's consent is uncoerced even after consultation, and the lawyer then must respond to the auditor's requests in a manner that safeguards the client's interests. This would include minimizing the extent to which information relating to the representation is disclosed to the auditor and avoiding, if at all possible, disclosures that could result in a waiver of the attorney-client privilege or otherwise adversely affect a material interest of the client-insured.

Although Rule 1.6 expresses the broad principle that all information relating to representation of a client is confidential, there is an exception when the disclosure is impliedly authorized in order to carry out the representation, *see* Rule 1.6(a), or in the specific and limited circumstances set forth in Rule 1.6(b). Comment [7] explains: "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority." In the context of the tripartite relationship involving the lawyer, the insurer and the insured, the routine transmission of confidential information to the insurer from the lawyer retained by the insurer to represent the insured usually is necessary to advance the interests of both the insurer and the insured and is, therefore, impliedly authorized in order to carry out the representation without regard to whether only the insured or both the insured and insurer are clients. Moreover, we construed Comment [7] similarly in our Opinion 98-411 when we recognized that in the context of lawyer-to-lawyer consultations, the disclosure of confidential information is permitted to lawyers outside the consulting lawyer's firm "when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."[31]

As noted above, there may be occasions when the lawyer reasonably believes that disclosure of confidential information to the insurer may affect a material interest of the client-insured adversely.[32] Such occasions may arise when the information to be disclosed jeopardizes the insured's coverage under the insurance policy; reveals extremely sensitive or personal, irrelevant information about the insured; or otherwise implicates a conflict between the insurer and insured. In these relatively infrequent situations, it is essential that the lawyer obtain the informed consent of the client-insured before disclosing the confidential information in question.[33]

The disclosure to the client-insured in order to obtain informed consent within the meaning of Rule 1.6 must adequately and fairly identify the effects of disclosure and non-disclosure on the client's interests. Although the Model Rules do not specify the nature of the information that must be told to the client to obtain "consent after consultation," we stated in Formal Opinion 98-411 that in lawyer-to-lawyer consultations, the lawyer seeking his client's permission to consult another lawyer should inform his client of the possibility that privileges may be waived under applicable law and of the potential adverse effect of disclosure on the client's interest in the matter.[34]

The rules of professional conduct are, of course, inapplicable to insurance companies but they are applicable to lawyers who represent insurance companies, both in-house and in private practice. When representing an insured client, a lawyer should identify with the insurance company and any potentially involved third-party auditor the type of information that would be requested during the representation. The lawyer also should discuss with both the insured and insurer clients the legal effects of disclosing or not disclosing such information. In assessing these legal effects, the lawyer should evaluate any agreement between the insurance company and the auditor regarding procedures for protecting confidential materials. Before disclosing client information to an insurance company, the insured's lawyer should satisfy herself that the insurance company will not release confidential client information and should designate all such information clearly. Identifying each party's interests and providing full disclosure to both the insured and insurer clients from the outset of the representation should result in a relationship that meets the needs of both the insurance company and the insured as well as one that satisfies the ethical obligations of the lawyer. If there is reason to believe that the insurer will disregard this

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[31] ABA Formal Opinion 98-411 (Ethical Issues in Lawyer-to-Lawyer Consultation) in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 491, 493.

[32] The Restatement precludes the disclosure of confidential information if there is a reasonable prospect that disclosure will adversely affect a material interest of the client. *See* § 60(1)(a).

[33] *Id.*

[34] FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 494.

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instruction, then the lawyer should so advise the insured, prior to disclosure, explaining any additional risks that would result from disclosure by the insurance company to a third party.

Conclusion

In representing an insured, a lawyer must not permit compliance with "guidelines" or other insurer directives relating to the lawyer's services to impair materially the lawyer's independent professional judgment. There may be rare instances when the lawyer reasonably believes a limitation imposed by the insurer's directives is materially compromising the lawyer's ability to provide competent representation to both the insured and insurer. In such situations, if the lawyer is unable to persuade the insurer to withdraw the limitation, the resulting conflict between the insurer's directives and the insured's interests requires the lawyer to protect the immediate interests of the insured while preparing to withdraw from representing both the insured and the insurer.

A lawyer may disclose the insured's confidential information, including detailed work descriptions and legal bills, to the insurer if the lawyer reasonably believes that doing so will advance the interests of the insured. However, the lawyer may not disclose the insured's confidential information to a third-party auditor without the informed consent of the insured. It is also the opinion of the Committee that unless the lawyer reasonably believes that disclosure of the insured's confidential information to the insurer will not affect a material interest of the insured adversely, the lawyer must not disclose such information without the informed consent of the insured.

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Unlicensed Practice of Law Information

PUBLIC HEARING ON INSURANCE COMPANY PRACTICES

Pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar, the Standing Committee on the Unlicensed Practice of Law voted to hold a public hearing on the following request for a formal advisory opinion: Whether control by the insurance company over how a lawsuit against an insured is defended constitutes the unlicensed practice of law?

The public hearing was held June 22, 2001. The Standing Committee did not take final action.

Formal Advisory Opinions

Pamphlet: Filing An Unlicensed Practice of Law Complaint

Unlicensed Practice of Law Complaint Form

Branch Office Locations

Rules Regulating The Florida Bar: Chapter 10. Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law
(Help with PDF files.)

List of Supreme Court Opinions on Proposed Formal Advisory Opinions

Unlicensed Practice of Law Committee

Unlicensed Practice of Law Circuit Committee (PDF format)

Florida Supreme Court Opinions

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 99-07778 CA (27)

JUDGE PAUL SIEGEL

GERMAN A. GUTIERREZ,

Plaintiff,

vs.

CARLOS ANTONIO ORELLANO,

Defendant.

_______________________________/

ORDER PROHIBITING ALLSTATE ATTORNEYS FROM USING LAW FIRM NAME IN DIVISION 27 PROCEEDINGS

This cause is before the court for hearing on the court's "ORDER TO SHOW CAUSE WHETHER DEFENSE COUNSEL SHOULD BE PROHIBITED FROM FURTHER PRACTICE AS A LAW FIRM IN DIVISION 27 OF THE CIRCUIT COURT." The court conducted a hearing on the issue on June 15, 2001 with the participation of Allstate Insurance Company and its attorneys and Staff Counsel of the Florida Bar. The court's actions are taken pursuant to its inherent power to conduct its business in a proper manner, *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994), and the court's Disciplinary Responsibilities under Canon 3D(2) of the Code of Judicial Conduct: "A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating the Florida Bar shall take appropriate action." In issuing this order, the court's overriding concern is that only truthful testimony be given in the trials over which this jurist presides. As a result of this proceeding, it is hereby FOUND AND ORDERED as follows:

1. Florida Bar Ethics Opinion 98-3, which was affirmed by the Board of Governors of the Florida Bar, holds that: "It is impermissible for in-house attorneys who are employed to represent insureds to state or imply that they practice in a separate independent law firm. The relationship between the attorney and the insurer should be disclosed to the client and appear on the letterhead and business card of the attorney." (A copy of the opinion is attached to this order as Exhibit "A"). The opinion may not directly address whether correspondence like defense counsel's letter in this case directed to plaintiff's attorney which is attached as Exhibit "B" violates the Rules Regulating the Florida Bar. A careful reading of Opinion 98-3 and *In re*

Youngblood, 895 S.W. 2d 322 (Tenn. 1995), which it cites, demonstrates that Exhibit "B" does violate Bar rules. The Florida Bar has agreed in Florida Bar Staff Opinion 22624 dated August 14, 2000:

> "Under this rule [4-7.2(b)(1)(A), rules of Professional Conduct], an attorney may not state that he or she is practicing in a law firm unless that is the case. Additionally, Rule 4-7.10(f) prohibits an attorney from misrepresenting that he or she practices in a particular partnership or organization when that is not the case. It appears from the inquirer's facts that [Name of Attorney] & Associates, P.A. is not an independent law firm, but rather an "in-house" law department for Insurance Company in which the attorneys are salaried employees of [Insurance Company]. Therefore the nature of the relationship should be disclosed on the letterhead and [Name of Attorney] & Associates, P.A. which implies that the lawyers practice in a private law firm, should not be used or appear on the letterhead. See Florida Ethics Opinion 98-3 (copy enclosed)."

2. Exhibit "B" is a letter from Yamel Haber Siesel to Michael Libman, plaintiff's attorney, relating to the captioned case. The letter signed by Ms. Siesel is on a letterhead with the following information: "Law Office Timothy W. Harrington, Museum Tower, 150 West Flagler Street Suite 1600, Miami, Florida 33130-1506, Staff Counsel Allstate Insurance Company, Encompass Insurance." The letterhead contains the names of eight attorneys: Timothy W. Harrington, Stephen K. Katz, Randal S. West, Lisa J. Baligian, Nancy J Saint-Pierre, Yamel Haber Siesel, Eric A. Arrington, and Dawn Marie Cortese. All eight are full-time employees of Allstate Insurance Company (or a corporate affiliate). None of the eight is employed by the "Law Office Timothy W. Harrington." The "law office" does not lease office space (Allstate does), it has no employees, does not file tax returns, has no occupational license, no bank account, does not buy computers, copiers, telephones or office supplies. At the hearing, Allstate's lawyer stated that there is no entity known as the Law Office of Timothy W. Harrington; "it's a designation of office space." The letterhead violates Bar rules by suggesting that there is an independent law firm by the name "Law Office Timothy W. Harrington" with a principal attorney (Mr. Harrington) and seven associate attorneys when there is no such entity. The letterhead clearly implies that Ms. Siesel works for Mr. Harrington, when she does not; she is an Allstate employee.

3. The Allstate attorneys will violate Bar rules if they continue to use this letterhead for their correspondence. None of the attorneys works for "Law Office Timothy W. Harrington." As the Tennessee Supreme Court put it in *In re Petition of Youngblood*, 895 S.W.2d 322, 331-32 (Tenn. 1995):

> Even though, as discussed above, the relationship between an insurer-employer and an attorney-employee does not necessarily prevent the attorney from devoting to the insured-client the loyalty and independent judgment required by the Code, an attorney-employee is not "a separate and independent law firm." The

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> representation that the attorney-employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.
>
> The petitioners admit that the practice they advocate gives the public the impression that they are engaged in the general practice of law as partners or as sole practitioners. However, they would justify the misrepresentation on the ground that general identification of the attorney-employee with the insurer-employer must be avoided and, public disclosure of the real relationship between the insurer and the attorney would serve no useful purpose. The prohibition contained in the Code is not limited to false, misleading, fraudulent, and deceptive representations *which are demonstrated to be harmful*, nor will the Code be construed so narrowly on this important principle. And further, false, misleading, fraudulent, and deceptive representations are by their very nature harmful to the profession, whose credibility is dependent upon its integrity.

The Allstate attorneys are therefore prohibited from using the letterhead shown in Exhibit "B" in any litigation in Division 27 of the Circuit Court for the Eleventh Judicial Circuit over which the undersigned presides. Whether other trial judges or the Florida Bar wish to address this problem is up to them. The problem is one that is statewide and nationwide, since Allstate and probably other insurers use full-time employees to defend their insureds all over Florida and the United States. This judge can only address how litigation is conducted in his very small bailiwick.

4. For similar reasons, the pleading in this case attached as Exhibit "C" violates Bar rules. It does not even contain the disclosure of Ms. Siesel's association with Allstate that is found on the letterhead. The Allstate attorneys are hereafter prohibited from signing pleadings in Division 27 litigation in the manner set forth in Exhibit "C". A permissible, although not the only, way to sign pleadings would be:

> "Yamel Haber Siesel
> Museum Tower, Suite 1600
> 150 W. Flagler Street
> Miami, Florida 33130-1506
> Telephone: 305-536-6212
> Florida Bar No. 0085340
> Attorney for Defendant*
>
> ______________________________
>
> *Ms Siesel is one of the full-time Allstate Insurance staff attorneys assigned to represent the Defendant."

Counsel for Allstate and its attorneys pointed out that altering the way pleadings are signed, which is necessary, can present some untoward logistical problems in other cases pending in this

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division. Florida Rule of Judicial Administration 2.060(d) requires that every pleading shall be signed by at least 1 attorney of record in that attorney's individual name. Subsection (k) of the rule permits additional attorneys to appear without securing permission of the court by filing and serving a notice of appearance. It is acceptable to the court , until some other solution is worked out with the Florida Bar, that any notice of appearance or other pleading properly signed by one of the Allstate attorneys shall be considered to be a notice of appearance by all eight attorneys and any new attorneys on Allstate's staff; the attorneys may sign pleadings interchangeably for one another. The court remains open to consideration of any other solution proposed by Allstate's counsel.

Associated with the problems being discussed are potentially difficult problems of unauthorized practice of law by Allstate and other insurers which the court does not address. It is understood that these will be discussed with the Florida Bar.

5. A more difficult question, which this court is not presently prepared to answer due to lack of knowledge of the detailed facts, is whether Allstate or Allstate and its employed attorneys have generated or contributed to any false or intentionally misleading testimony during trials because of the fictitious "independent law firm" they have established.

In a typical personal injury trial, the cross-examination of the defense IME doctor often includes questions and answers like the following:

Q: "Doctor, who hired you to examine my client and testify here today?"
A: "Your law firm" or "the law office of Timothy W. Harrington."

Q: "And who paid the bill for your initial examination of the plaintiff?"
A: "Your law firm" or "the law office of Timothy W. Harrington."

With respect to the first question, if "the law office of Timothy W. Harrington" is a fiction, is that answer false or has the doctor been misled with intent to cause him to testify untruthfully? Sometimes, the first question is answered "the defendant;" this answer, although probably not true since it is rare in personal injury litigation for a party himself or herself to hire an expert, may not have been given with an intent to falsify or mislead. Evidently, the true answer to the first question would be Allstate Insurance through its staff attorney. Whether all of that information needs to be presented in front of the jury is a problem for the presiding judge in the context of the case being tried. For the second question, if the check to pay the doctor's bill was issued by Allstate Insurance Company, as it was in this case, the above answer would be false. If the second answer is given knowing that Allstate paid the bill, it is more serious than the answer to the first question since it is intentionally designed to conceal from the jury the identity of the payer. The court does not know what preparation with the IME doctors, if any, is done by Allstate's attorneys in order to meet questions like these.

At the trial of the captioned case on June 6 - 11, the court raised the issue whether the

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"Law Offices of Timothy W. Harrington" is really a law firm or simply a fictitious entity, and the subject was discussed at great length before the defense IME doctor testified. The court insisted that the doctor testify truthfully on cross examination. The jury heard that Allstate Insurance Co. paid for the IME doctor's examination. The jury was instructed not to consider the fact that the defendant has insurance, and it returned a defense verdict. The court suspects that only its forceful intervention prevented possible false or misleading testimony on the subjects discussed.

6. False testimony intentionally given during a civil trial or deposition is addressed by several different statutes. Florida's perjury statute, Fla. Stat. §837.02, makes it a felony to make a false statement, not believed to be true, under oath in an official proceeding in regard to any material matter. It applies to trials and depositions. Under the witness tampering statute, Fla. Stat. §914.22, it is a felony to knowingly engage in misleading conduct toward another person with intent to cause or induce any person to testify untruthfully in an official proceeding, including a trial. "Misleading conduct" includes knowingly making a false statement or intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact and thereby creating a false impression by such statement. See *The Florida Bar v. Carswell,* 624 So. 2d 259 (1993). Both perjury and witness tampering are included in the definition of "racketeering activity" under Florida's Racketeering Influenced and Corrupt Organizations Act (RICO), Chapter 895 of the Florida Statutes. That statute, among other things, penalizes participation in an "enterprise" through a pattern of racketeering activity. There are similar federal statutes.

7. An issue in any discussion of potential false cross-examination answers by an IME doctor is the materiality of the answers, since the subject of insurance generally should not be mentioned during a trial under *Beta Eta House v. Gregory,* 237 So. 2d 163 (Fla. 1970) and its progeny. A response to a *Beta Eta* argument is that the answers are material because they demonstrate witness bias and because Allstate intentionally waived any objection to the revelation of insurance by sending house counsel to try the case and paying the doctor's bill with a company check. A similar situation was analyzed by Judge Learned Hand in *Mideastern Contracting Corp. v. O'Toole,* 55 F.2d 909, 912 (2d Cir. 1932). When an insurance investigator took a statement from plaintiff's witness whose authenticity had to be established, plaintiff should be permitted to show that the statement was taken by defendant's liability carrier in order to show bias and interest. "The defendant need not have put in the statement at all; when it chooses to do so, it laid open to inquiry its authenticity, and that inevitably involved the relation of the person who took it. If he was in the employ of some one who stood to pay the judgment, it would certainly be unjust to suppress that connection; it makes no difference that this let in the fact that the real defendant was an insurance company." Allstate does not have to defend cases at trial using house counsel and directly pay IME doctors; in choosing to do so, arguably it accepts all the consequences.

8. The court has already stated that it does not have sufficient facts to know whether Allstate and its lawyers have generated or contributed to any false or intentionally misleading testimony during trials because of the fictitious "independent law firm" they have established.

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There are hundreds or thousands of trial transcripts in existence which can shed light on that issue. There are also thousands of deposition transcripts in which Allstate-employed IME doctors have answered cross-examination questions similar to those in paragraph 5 above. The attorneys who tried cases defended by Mr. Harrington's "law firm" or handled the appeals, should they choose to do so, can examine those transcripts to find the answers and appropriately deal with the information. In some cases there may be grounds to move for new trial or relief from the judgment.

9. For future trials, the court understands that many orthopedic physicians and other experts, unless they inform themselves, do not know while testifying who paid their bill. That can be addressed during discovery. This judge would be disinclined to permit testimony from an expert who comes to court without this information in an effort to defeat cross examination.

ORDERED at Miami-Dade County, Florida this fifteenth day June, 2001.

PAUL SIEGEL
Circuit Judge

Copies furnished to:

Timothy W. Harrington, Esq.
Michael Libman, Esq., attorney for Plaintiff
Miles McGrane, Esq., attorney for Allstate
Arlene Shankel, Esq., Staff Counsel, The Florida Bar
Dade County Trial Lawyers Association
Dade County Defense Lawyers Association

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From: http://www.flabar.org/newflabar/memberservices/Ethics/98-3.html

OPINION 98-3
(June 18, 1998)

[Affirmed by the Board of Governors on February 12,1999]

It is impermissible for in-house attorneys who are employed to represent insureds to state or imply that they practice in a separate independent law firm. The relationship between the attorney and the insurer should be disclosed to the client and appear on the letterhead and business card of the attorney.

RPC: 4-7.1, 47.7(f), 4-8.4(c)

Opinions: 93-6; 93-7; 94-6; California Ethics Opinion 1987-91; Tennessee Ethics Opinion 93-F-132 and Ohio Opinion 95-14; Virginia Opinion 775; Pennsylvania Formal Opinion 96-196

Cases: The Florida Bar v. Hastings, 523 So.2d 571 (Fla. 1988); In re Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995)

Recently the Professional Ethics Committee has been asked several questions concerning the relationship between insurers, insureds and attorneys representing insureds who are paid by the insurer. In connection with those inquiries, the committee has become concerned with the question whether salaried staff attorneys who are employed by an insurance company to participate in an "in-house law firm" may use a "firm name" that appears to be that of a separate and independent law firm.

The ethics rules clearly indicate that attorneys may not hold themselves out as practicing in a law firm unless the firm itself, and the relationships implied by the name, are bona fide. Rule 4-7.1 of the Rules Regulating The Florida Bar prohibits an attorney from making false, misleading, or deceptive statements about the lawyer or the lawyer's services. Additionally, Rule 4-7.7(f) prohibits attorneys from stating or implying that they practice in a partnership or other organization unless it is a fact. Finally, Rule 4-8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

An attorney has been disciplined for practicing under a partnership name without actually having a partnership. The Florida Bar v. Hastings, 523 So.2d 571 (Fla. 1988). This committee itself has expressed disapproval of the use of firm names which mislead the public as to the actual nature of the relationship between the attorneys or the firm's practice. Florida Opinions 94-6; 93-7; 93-6.

Concerning this particular issue, the Supreme Court of Tennessee has criticized the practice of holding out in-house attorneys as a distinct autonomous law firm which is independent of the employer insurer. In re Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995). In this case the Supreme Court of Tennessee found that the holding out of

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an in-house attorney-employee as a separate and independent law firm constitutes an unethical and deceptive practice. The court stated that "false, misleading fraudulent and deceptive representations are by their very nature harmful to the profession whose credibility is dependent upon its integrity." Id. at 332.

Ethics committees in other states have specifically found that it is unethical and deceptive for salaried in-house attorneys, employed by an insurance company, to represent themselves to be outside counsel. Oklahoma Opinion 309; Virginia Opinion 775; Ohio Opinion 95-14; Tennessee Ethics Opinion 93-F-132; California Ethics Opinion 1987-91. The use of the fictitious firm name misleads the public and the insured client as to the true relationship between the insurance company and its attorneys. California Opinion 1987-91. For this reason the nature of the relationship between the attorneys and the insurer should be disclosed on the letterhead. Pennsylvania Formal Opinion 96-196; California Opinion 1987-91.

We therefore conclude that it is impermissible for in-house attorneys who are employed to represent insureds to state or imply that they practice in a separate independent law firm. Furthermore, the relationship between the attorney and the insurer should be fully disclosed to the client and appear on the letterhead and business card of the attorney. Lawyers who are employees of insurance companies must indicate their employment status and affiliation to their employer on their letterhead. In reaching this conclusion the committee withdraws Opinion 78-6 which permits in-house counsel to use letterhead that does not contain the corporate letterhead. Additionally, the committee does not address any unlicensed practice of law issues that may be raised by this arrangement.

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IN THE CIRCUIT COURT OF THE 11th
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

JUDGE PAUL SIEGEL

JORGE DELGADO,
Plaintiff,
vs. CASE NO.: 97-25826 CA (27)

MANUEL GONZALEZ,
Defendant.

STEFAN GRZYMSKI,
Plaintiff,
vs. CASE NO.: 98-12018 CA (27)

ROSEMARIE SCHWEIZER,
Defendant.

ROGER BERNSTIEIN,
Plaintiff,
vs. CASE NO.: 99-12680 CA (27)

BUDGET RENT-A-CAR SYSTEMS, INC.,
a Foreign Corp., and PETER W. JEDLICKA
Defendants.

EVELYN GOODMAN,
as Personal Representative of the ESTATE OF
BERNARD GOODMAN,
Plaintiff,
vs. CASE NO.: 0D~2S545 CA (27)

BERNARD GRAN and MARIS8A
ILENE GRAN,
Defendants.

JESUS VARGAS,
Plaintiff,
vs. CASE NO.: 01-08755 CA (27)

EDUARDO NO~UEIRAS,
Defendant.

ORDER PROHI~ITING INSURANCE COMPANY IN-HOUSIili ATTORNEYS
FROM USING FIRM NAMES IN DIVISION 27 PROCEEDINGS

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This cause is before the court for hearing on five related orders to show cause why the court should not enter orders relating to the attorneys for five different insurance companies which contain provisions similar to the court's June 15, 2001 "ORDER PROHIBITING ALLSTATE ATTORNEYS FROM USING LAW FIRM NAME IN DIVISION 27 PROCEEDINGS" (the "Allstate Order") which was issued in the case of Gutierrez V. Orellano, case number 99-07778 in Division 27, General Jurisdiction Division, of the Dade County Circuit Court, and having carefully considered the oral and written presentations of counsel and being fully advised in the premises, it is hereby FOUND AND ORDERED as follows:

1. As the court noted at the July 18, 2001 hearing, the proceeding initiated by the five orders to show cause is not a disciplinary proceeding under the Rules Regulating the Florida Bar. It is a proceeding to assist the court in administering Division 27 of the Circuit Court. The issue considered at the hearing is whether the court should prohibit the full-time staff attorneys for the five insurance companies subject to the orders to show cause from using law firm names in Division 27 proceedings, including the issue whether the "law firms" named in the orders are fictitious entities. The issue is not whether full-time insurance company staff attorneys may ethically defend insureds. That issue was disposed of by *In re Rules Governing the Conduct of Attorneys in Florida,* 220 So. 2d 6 (Fla. 1969). The undersigned specifically stated at the Allstate hearing and during the Gutierrez trial that he saw nothing wrong with that practice. The court has consolidated the five captioned cases solely for the purpose of issuing this order.

2. Five of the most prominent law firms in the State of Florida filed extensive memoranda on behalf of the insurance companies the day before the hearing, as did the Florida Insurance Council. The memoranda are more than two inches thick, and have been carefully reviewed by the court. The most striking aspect of these memoranda as a group is that they do not cite a single court decision from anywhere in the country which approves the practice of insurance company in-house law departments using traditional law firm names such as "A & B", "Law Offices of John Doe", "CD & Associates" or similar names. One can reasonably conclude that if these attorneys, with their extensive research staffs, have not located a case, it probably doesn't exist. Counsel have cited ethics opinions from other states which support their position. There are several supreme court decisions from other jurisdictions which specifically disapprove of the practice; they will be discussed in the next paragraph. Counsel also argue that the definition of "law firm" in Rule 4 of the Rules Regulating the Florida Bar includes "lawyers employed in the legal department of a corporation" and thus they are entitled to use law firm names. That argument does not follow logically from the definition, particularly since Rule 4-1.10 makes it clear that the purpose of the definition relates to imputed disqualification of all the lawyers in a firm when one is disqualified.

3. In re Youngblood, 895 8.W.2d 322 (Tenn. 1995) was already discussed and quoted in the Allstate Order. In *In re Weiss, Healey & Rea,* 109 N.J. 246, *536* A.2d 266, 268-70 (1988), the New Jersey Supreme Court stated:

> Lawyers and judges often ask, as did the playwright, "What's in a name?" Apparently a lot. At least, a lot of people think so. In this case, three attorneys seek to use their individual names to designate their professional association. * * *
>
> The question here is whether there is anything deceptive about the use of a name like "A, B & C" to describe the association of attorney employees of an insurance company. We believe that it is evident that the mere use of the name "A, B & C" does not convey "with accuracy arid clarity" the complex set of relationships that distinguish an association of attorneys representing a single insurer and its policy holders from an association of attorneys affiliated for the general practice of law. * * *

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> We believe that the message conveyed by the firm name "A, B & C" is that the three persons designated are engaged in the general practice of law in New Jersey as partners. Such partnership implies the full financial and professional responsibility of a law firm that has pooled its resources of intellect and capital to serve a general clientele. The partnership arrangement implies much more than office space shared by representatives of a single insurer. Put differently, the designation "A, B & C" does not imply that the associated attorneys are in fact employees, with whatever inferences a client might draw about their ultimate interest and advice. The public, we believe, infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the "kind and caliber of legal services tendered." * * *
>
> The State Bar Association has suggested a disclaimer to petitioners' firm name to state that petitioners are employed by the insurer. While, as noted above, *Opinion 593, supra,* 1 18 *N.J.L.J.* 580, generally rejects disclaimers of partnership, it may well be that a less burdensome statement would adequately convey "with accuracy and clarity" the nature, the quality, and the caliber of petitioners' practice. The difficulty in fashioning an appropriate disclaimer is that the more accurately it conveys the relationship of the associates to the insurer, the less valuable it may become to them. Still, we believe that nothing but benefit can be obtained by remitting to a special Supreme Court committee the question of whether we can accommodate the admitted interests of the petitioners by allowing them to communicate the genuineness of their association, while at the same time signifying, without deprecation, the true relationship that they have with their employer.

In *Cincinnati Insurance Company* v. *Wills,* 717 N.E.2d 151, 164-65 (Ind. 1999), the Indiana Supreme Court stated:

> The trial court found that the use of the name Berlon & Timmel by Cincinnati's attorneys was deceptive in violation of Professional Conduct Rule 7.2 because "that name implied independence." That Rule provides: "[a] lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive...." [Florida Bar Rule 4-7.lO is quite similar.]
>
> The attorneys who work at Berlon & Timmel are employed by Cincinnati and handle only matters for Cincinnati or its policyholders. No one contends that the attorneys perform legal services for the general public. All Berlon & Timmel clients are informed that the attorneys are employed by Cincinnati at the beginning of the representation. Berlon & Timmel's letterhead includes the following language printed along the bottom of the page: "Berlon & Timmel Is an unincorporated association, not a partnership, of individual licensed attorneys employed by The Cincinnati Insurance Company for the exclusive purpose of representing the Cincinnati Insurance Companies and their policyholders."
>
> We agree with the trial court that the use of the name Berlon & Timmel implies independence and that the ordinary person would assume "Berlon & Timmel" to be some form of outside counsel. As a result it is "misleading as to the identity, responsibility, or status" of the attorneys practicing under the name.
>
> Cincinnati contends that the disclosure language at the bottom of the letterhead is sufficient to dispel any misperception. The trial court noted that not all forms of communication include this disclosure. For example, Berlon & Timmel's phone book listing and door sign use only "Berlon & Timmel." The trial court concluded that the size and location of the disclosure was "not adequate to negate the

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> deceptiveness resulting from the independence indicated by the firm name, thc description on the office door, and the phone book listing." The court also found that the disclaimer was "susceptible to the interpretation that [Cincinnati] was not Berlon & Timmel's only employer" because it stated that "Berlon & Timmel is...employed by The Cincinnati Insurance Company for the exclusive purpose..." not that "Berion & Timmel is...exclusively employed by The Cincinnati Insurance Company..."
>
> Although similar disclosure language may be sufficient to permit sole practitioners who share office space to adopt a name that may appear as a law firm, it is not sufficient in this case. The use of a firm like name by a "captive firm" differs from sole practitioners sharing expenses in two respects. First, it may be read to imply not only a separate legal entity but also an independent status that is not enjoyed by the insurer's employees. There is greater danger for the public to be misled in permitting an insurance company to pass off its legal department as an independent entity. Second, there is at least some practical sense in permitting groups of financially independent lawyers to benefit from the economies of a shared name such as the convenience of one sign on shared offices or the cost savings of one advertisement. Cincinnati provides no rationale for using "Berlon & Timmel" as a designation for its house counsel. Perhaps the name was adopted without much reflection. In any event, it is difficult to come up with a proper reason for this designation and we conclude that it is improper to create the perception of a law firm at least partially independent of Cincinnati.

4. Based upon the reasoning and authorities in thc Allstate Order and the cases just cited, the full-time staff attorneys for State Farm Insurance, USAA Insurance, One Beacon Insurance, and Nationwide Insurance, respectively, are prohibited from using the law firm names Luis Ordonez & Associates", "Law Offices of James Gilmour", "Law Offices of Robert A. Glassman'[7], 'Figueroa, Gonzalez & Hoecker", or law firm names of a similar nature for pleadings and correspondence in Division 27 litigation. To do so would violate Rules 4-7.10 and 4-7.2(b) of the Rules Regulating the Florida Bar, and Ethics Opinion 98-3. Counsel for Progressive Insurance Company has represented to the court that his clients have permanently ceased using the name "Moffat & Tansey" and has requested that the court not include them in any order; the request seems reasonable and is granted. Except as noted in the next paragraph, the new letterheads and pleading signature blocks of the individual Progressive attorneys appear to comply with the Bar rules.

5. Progressive also requested that the court not immediately address the issue whether pleading signature blocks must contain a statement of insurance company relationship similar to letterheads. The Florida Bar has been requested to study and issue an opinion on this subject. Since this issue is not as clear-cut as the others, the court has also granted that request, and will defer ruling on that issue until the Florida Bar or the Florida Supreme Court does. Lest there be any doubt, the court believes that the rules require such a disclosure.

6. During the July 18 hearing, there was considerable discussion of whether any order the court might enter would be appealable. The insurers strongly preferred waiting until the Florida Bar studies the entire problem and issues more ethics opinions before this court acts. This court does not believe it is necessary to await further opinions from the Bar, since it has already spoken to the issue quite clearly in Ethics Opinion 98-3 and Staff Opinion 22624. All that remains is for those opinions to be enforced, which has not happened in the three years post 98-3. Staff Counsel of the Florida Bar attended both the June 15 and July 18 hearings, and expressed the view that the use of law firm names by full-time insurance company attorneys violates Bar rules. The court has little doubt that this order is appealable to the Third District Court of Appeal, either as a final order, a post-judgement order, or most likely because this "Order Prohibiting. . ." certain conduct is in reality an injunction. In the court's view, the issues dealt with in this order are best resolved by the Florida Supreme Court, and can be rapidly addressed by that court

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pursuant to its "pass through" jurisdiction of Rule 9.030(a)(2)(B) of the Florida Rules of Appellate Procedure because the issues are "of great public importance" *and* "have a great effect on the proper administration of justice."

7. Allstate Insurance Company filed motions addressing the Allstate Order. It requested reconsideration and stay of the order, and, most urgently, deletion of paragraphs five through nine of the order. Allstate's motions are denied. The court can understand that these paragraphs might distress the insurance company, but they provide an important part of the court's rationale for issuing the order. The possibility of false or misleading testimony at trial is a specific potential evil of the use of fictitious law firm names by insurance house counsel that has not been discussed by any of the courts or ethics bodies that have addressed the issue; it needs to be considered. Although all six insurance companies vigorously argue otherwise, the facts stipulated to at the June 15 and July 18 hearings show that all of the subject 'law firms" are fictitious entitles with no real estate leases, occupational licenses, equipment leases or purchases, supplies purchases, income and withholding tax returns, and only the smallest of the six had a checking account.

ORDERED at Miami-Dade County Florida this twentieth day of July 2001.

____

Paul Siegel
Circuit Judge

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STATES UNDER SIEGE:

Arizona, California, Texas & Utah

ARIZONA

Paradigm Insurance Co. v. Lagerman Law Offices

Paradigm, a medical malpractice insurer, sued Lagerman for legal malpractice, based on a case in which Lagerman was assigned to represent an insured doctor of Paradigm.

Paradigm's case was dismissed based on no duty of care to Paradigm. The Court of Appeals reversed finding a duty of care flowing from the tripartite relationship. The Supreme Court reversed in part, holding that a tripartite relationship didn't automatically exist between the parties.

The Supreme Court did, however, find that a defense attorney owes an insurer a duty of care irrespective of whether an attorney-client relationship exists.

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CALIFORNIA

Gafcon Inc. v. Posner & Associates

Gafcon, a construction management company, sued Travelers alleging they were provided inadequate repre-sentation by Travelers' staff counsel. Gafcon also alleged that staff counsel couldn't possibly act in its best interests since they were employees of Travelers. Gafcon asked the trial court to declare the practice of using staff counsel to represent insureds unlawful and specifically give insureds the right to independent counsel.

The Court granted Traveler's motion for summary judgment. Gafcon has appealed the ruling.

CALIFORNIA

Ricketts v. Farmers Group Inc.

Ricketts, a staff attorney for Farmers, sued for wrongful discharge alleging that he was terminated for raising ethical issues regarding control of litigation by claims employees.

The trial court's ruling in favor of Ricketts included a finding that Farmers was engaged in the "illegal" practice of law based on non-attorney control of litigation. Farmers has appealed the ruling.

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CALIFORNIA

AB 2069- Conflict of Interest Disqualification in the Tripartite Relationship

The California Bar Association Board of Governors have referred the AB 2069 Study Bill to a joint committee of the California Bar and California Judicial Council for further study. The joint committee will analyze several possible solutions to the conflicts of interest that can cause disqualification, discipline and malpractice problems based on the tripartite relationship.

The committee report and recommendations will be presented to the Board of Governors by March 31, 2002.

TEXAS

UPLC v. ALLSTATE

The Dallas Unauthorized Practice of Law Subcommittee brought this State Court action in Dallas against Allstate alleging that the use staff counsel to defend insureds constitutes the unauthorized practice of law.

The case is currently in the discovery stage.

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TEXAS
TRAVELERS v. UPLC

Travelers and AIG brought this State Court action in Dallas against UPLC. The parties have agreed to proceed with a motion for summary judgment on stipulated facts.

TEXAS
NATIONWIDE v. UPLC

Nationwide brought this Federal District Court declaratory judgment action against UPLC. The case was dismissed on UPLC's motion on the ground that it involved purely state law.

Nationwide has appealed and asked the Federal Court of Appeals to certify a question to the Texas Supreme Court. The court has decided to carry the motion with the case.

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TEXAS

PROPOSED LEGISLATION-2001 SESSION

- Staff Counsel -HB 3563 and HB 1383 were Bills that proposed the elimination of Staff Counsel. Neither bill passed.
- Third Party Audits -HB 1653 and HB 1433 were Bills that proposed the elimination of Third Party audits of defense counsel legal bills. Neither bill passed.
- Litigation Guidelines -SB 1654 proposed the elimination of defense counsel litigation guidelines. The bill passed but was vetoed by the Governor.

UTAH

Spratley , et al. v. State Farm

Two former State Farm staff counsel attorneys brought this pending action alleging that State Farm required them to represent the insurance company to the detriment of their insured clients. The plaintiffs maintain they were required by State Farm to breach their duty of loyalty and confidentiality to their insured clients in handling litigation. When they refused, they allege State Farm forced them to resign through demotions, reduction in pay and a hostile work environment. The case is currently in the discovery stage.

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