

INSURANCE DEFENSE IN THE  
 TWENTY-FIRST CENTURY: THE FLORIDA BAR'S  
 PROPOSED STATEMENT OF INSURED  
 CLIENT'S RIGHTS—A UNIQUE APPROACH TO THE  
 TRIPARTITE RELATIONSHIP

KATHERINE E. GIDDINGS\* AND J. STEPHEN ZIELEZIENSKI\*\*

I.	INTRODUCTION.....	856
II.	THE TRIPARTITE RELATIONSHIP .....	859
	A. <i>The Contractual Relationships</i> .....	859
	1. <i>The Insurance Contract</i> .....	860
	2. <i>The Retainer Agreement: The Contractual Relationship Between the Insurer-Client and the Defense Attorney</i> .....	861
	B. <i>Ethical Obligations in the Contractual Relationship</i> .....	863
	1. <i>Confidentiality</i> .....	863
	2. <i>Duty of Loyalty</i> .....	864
III.	LITIGATION MANAGEMENT PRACTICES.....	867
	A. <i>The Benefits of Litigation Management Practices</i> .....	867
	1. <i>Litigation Management Guidelines</i> .....	868
	2. <i>Auditing</i> .....	872
	B. <i>These Practices Do Not Violate Ethics Rules or Endanger Privileges</i> .....	872
IV.	ADVISORY OPINIONS LIMITING LITIGATION MANAGEMENT PRACTICES .....	875
	A. <i>State Ethics Opinions</i> .....	876
	1. <i>Contradictions with Substantive Law</i> .....	876
	2. <i>Misinterpretations of the Ethics Rules</i> .....	878

---

\* Katherine E. Giddings is an attorney with the law firm of Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A.'s Tallahassee, Florida office. She is a 1992 graduate of the Florida State University College of Law, where she graduated fifth in her class. From 1992 until 1999 she was employed as a Senior Staff Attorney to former Florida Supreme Court Justice Ben F. Overton, during which time she dealt frequently with issues involving attorney ethics. Since joining Katz, Kutter, Haigler in early 1999, Ms. Giddings has dealt extensively with ethical and economic issues involving the insurance tripartite relationship, including service as Florida and National Coordinating Counsel for the American Insurance Association (AIA). Ms. Giddings also served as a member of The Florida Bar's Insurance Practices Special Study Committee's drafting subcommittee for the Statement of Insured Client's Rights.

\*\* J. Stephen Zielezienski is Assistant General Counsel with the American Insurance Association in Washington D.C. He graduated from Columbia Law School in 1989, clerked for the Honorable Richard L. Nygaard of the United States Court of Appeals for the Third Circuit, and was engaged in private practice (including complex commercial litigation on behalf of property/casualty insurance companies) for six years prior to joining the AIA. Mr. Zielezienski is an active member of The Florida Bar and is also admitted to practice in the District of Columbia, New Jersey, Pennsylvania, and the United States Court of Appeals for the Third Circuit. He frequently speaks and writes on the interaction between insurance litigation management practices and attorney ethics.

The authors gratefully acknowledge the efforts of Brittany Adams, whose research added significantly to the material included in this Article. Portions of arguments in this Article are derived from various briefs filed by the AIA. The authors acknowledge the contribution of the authors of those briefs. Additionally, parts of this Article are adapted from arguments used in the Petition by the American Insurance Association before the Board of Governors of The Florida Bar in *In re* Review of Proposed Advisory Opinions 99-2, 99-3, and 99-4 of the Florida Bar Professional Ethics Committee. That brief was submitted by Katherine E. Giddings.

a. <i>Erroneous Interpretations of the Confidentiality Rules</i> .....	878
b. <i>Confusing Independent Judgment with Independent Action</i> .....	878
3. <i>The Imagined Threat to Attorney-Client Privilege</i> .....	880
4. <i>Issuance Without a Formal Process</i> .....	880
5. <i>Reliance on Opinions of Other States</i> .....	881
B. <i>The Montana Decision</i> .....	883
V. INSURANCE PRACTICES SPECIAL STUDY COMMITTEE AND THE STATEMENT OF INSURED CLIENT'S RIGHTS.....	886
A. <i>Participatory Process Leads to Workable Solutions Consistent with Substantive Law</i> .....	886
B. <i>Ethics Regulation and Economic Interests</i> .....	888
VI. CONCLUSION .....	890
APPENDIX A: CLIENT STATUS IN THE STATES .....	892
APPENDIX B: BAR ASSOCIATIONS' ETHICS OPINIONS .....	900
APPENDIX C: COMPARING THE STATEMENT OF INSURED CLIENT'S RIGHTS WITH ETHICS OPINIONS AND THE MONTANA SUPREME COURT DECISION .....	904

## I. INTRODUCTION

There has been much debate and discussion about the insurance “tripartite” relationship during the past few years,<sup>1</sup> as well as a lot of misunderstanding about the role of attorney ethics within that relationship. The authors would like to let the readers in on a secret: other than the fancy term used to describe it, the tripartite relationship is really no different from any other multiple-client representation in which the clients agree to allocate among themselves the responsibilities of managing the litigation and decisionmaking.<sup>2</sup>

When a claim is made against an insured person under a typical liability policy, a tripartite relationship is established between an insurance company, its insured, and the defense attorney hired to represent their joint interests in resolving the claim. The relationship is one that has existed and worked well for decades. It involves corresponding rights and obligations between the insurer and insured outlined in the insurance policy and obligations undertaken by the insurer and common counsel in the retention arrangement, as well as duties owed by the common counsel to both clients under the attorney ethics rules. The nature of the relationship is one of substantive contract law, with relevant concepts often embedded in statutes, regulations, and case law.

---

1. See, e.g., INSURANCE PRACTICES SPECIAL STUDY COMM., THE FLA. BAR, REPORT OF THE INSURANCE PRACTICES SPECIAL STUDY COMMITTEE 3 (June 2, 2000), [www.flabar.org/newflabar/images/downloads/rpts4fin.pdf](http://www.flabar.org/newflabar/images/downloads/rpts4fin.pdf) [hereinafter IPSSC REPORT].

2. This Article assumes the formation of an attorney-client relationship between an insurer and defense attorney when the defense attorney is hired by the insurer to defend a covered claim against an insured. Such a relationship normally exists. See *infra* Appendix A. While the authors would reach the same conclusions where the insurer is not a co-client with its insured (i.e., where the insurer is the insured's agent), the analysis differs under the ethics rules and this Article does not attempt to undertake that analysis.

Recently, numerous state bar ethics advisory opinions and at least one reported court decision have employed rather tortured analyses to disrupt the well-functioning tripartite relationship, using “ethics” concerns to indirectly place restraints on the role of insurers in the tripartite relationship. These restraints include prohibitions against two well-established litigation management practices: submission of legal billing statements to auditing firms engaged by the insurer and use of certain insurer litigation guidelines (such as a requirement that counsel seek insurer approval before performing certain legal tasks).

The state bar opinions, promulgated under the asserted umbrella of attorney ethics, are flawed in a number of respects. First, the opinions confuse contractual and ethical issues. Interfering with the business relationships between attorneys and insurers, they serve only to protect the economic interests of attorneys rather than advance the interests of the insured-clients. Second, they ignore the fundamental distinction between an *attorney’s* ability to exercise independent professional judgment and a *client’s* right to decide whether an attorney’s recommended course of action should be implemented and legal fees for that action incurred.

Such prohibitions are not only ill supported, they are ill advised. These practices—used by many noninsurer-clients as well—were designed to institute a measure of efficiency and consistency among retained defense firms, at the same time lowering the cost of skyrocketing legal fees and curbing attorney billing abuses. Eliminating these important safeguards threatens to artificially standardize the cost of legal defense and correspondingly increase liability insurance premiums for consumers.

Yet this is but one of several unintended consequences such opinions may have for liability insurance in this nation. Others include undermining an insured’s tort remedy of “bad faith” against an insurer that manages the defense improperly; altering the terms of state-approved insurance contracts; creating confusion in the practical application of the defense clause in an insurance contract; placing insureds in the untenable position of having to give specific, informed consent as to issues about which they have little or no knowledge—issues they believe they have agreed for the insurer to handle; and even causing insureds to possibly forfeit the right to a defense or to coverage. These are serious consequences, but they are logical outgrowths of bar opinions that take such a myopic view of attorney ethics.

In Florida, however, the issues may be starting to come into focus. In 1999, The Florida Bar took an alternative approach to these issues by appointing a special committee, the Insurance Practices Special

Study Committee (IPSSC), to study those issues.<sup>3</sup> After intensely studying the litigation management practices of insurance companies for over a year, the IPSSC concluded that there was “little harm” to insureds from the use of these practices.<sup>4</sup> Indeed, the record before the IPSSC reflects absolutely no evidence whatsoever of any harm to any insureds as a result of these practices.<sup>5</sup> The IPSSC recognized, however, that as with *any representation of a client where another person or client is paying for the representation*, the representation of an insured client at the request of the insurer creates a particular need for the attorney to be cognizant of the potential for ethical risks.<sup>6</sup>

To facilitate the attorney’s performance of ethical responsibilities in this regard and to assist Florida insurance consumers in understanding their basic rights as clients, the IPSSC developed and recommended the adoption of a disclosure statement, entitled Statement of Insured Client’s Rights (“the Statement”).<sup>7</sup> Rather than restricting insurer litigation management practices and endangering the tripartite relationship, the Statement would provide guidance to defense attorneys and disclose information about the representation to insureds.<sup>8</sup> In addition, comments to the Statement provide the basis for the adoption of similar statements for use in other recurring multiple-client contexts.<sup>9</sup>

On June 2, 2000, The Florida Bar accepted the recommendation of the IPSSC, voting to recommend amendment of Rule 4-1.8 of the Rules Regulating The Florida Bar to require use of the statement.<sup>10</sup> The proposed amendment is scheduled to come before the Florida Supreme Court later this summer. If adopted by the Florida Supreme Court as a new rule, this unique approach will be the first

---

3. See Gary Blankenship, *Insurance Practices Study Launched*, FLA. BAR NEWS (Aug. 1, 1999), <http://www.flabar.org/newflabar/publicmediainfo/TFBNews/aug1-2.html> (last visited Oct. 28, 2000).

4. IPSSC REPORT, *supra* note 1, at 13.

5. The IPSSC report states that it found “little harm” to insureds from insurer litigation management practices. The record before the IPSSC, however, reflects not one instance of any harm whatsoever to any insured. See Record of IPSSC (available at The Fla. Bar).

6. See *id.* at 20-21.

7. See *id.* at 17-22.

8. See *id.* at 20-21. Insurance industry associations originally opposed the Statement as being discriminatory against insurers. However, because the Bar was willing to accept input from the insurance industry in developing a statement that was workable, and because the Statement did not contradict established law or policy and did not otherwise jeopardize the ability of insurers to freely offer insurance products to Florida consumers, the industry associations working with the Bar agreed not to contest implementation of the Statement.

9. See IPSSC REPORT, *supra* note 1, at 20.

10. See Minutes of the Regular Meeting of the Board of Governors of The Florida Bar (June 2, 2000), [www.flabar.org/newflabar/organization/Board/jun00min.html](http://www.flabar.org/newflabar/organization/Board/jun00min.html).

of its kind and a level-headed response to the hysteria that has preceded issuance of some state bar ethics opinions.

Using Florida law as a model, Part II of this Article outlines the rights and duties that constitute the tripartite relationship, as established by relevant case law and ethics rules, and defines the proper role of the ethics rules in the context of that relationship. Part III describes current litigation management practices of insurers and others, with particular attention to the guidelines and auditing procedures which have been the subject of the recent controversy. Part IV then turns to the recent ethics opinions addressing these practices, analyzing them in light of the principles outlined in Part II and concluding that they reflect an inherently flawed approach. Part V then outlines the investigation and sound reasoning behind the Statement of Insured Client's Rights. Finally, Part VI concludes that with no evidence of actual ethical violations or harm to insureds, there is no reason to inject these types of economic and contractual issues into the arena of ethics regulation. It applauds the policy of full disclosure embodied in the Statement and urges the Florida Supreme Court to adopt it.

## II. THE TRIPARTITE RELATIONSHIP

To properly evaluate the ethical and economic debate that has marked this setting, it is important to first understand the relationships at issue and the proper role each party plays. Any approach to the current issues which ignores these now well-established roles would create unnecessary and inappropriate tension with settled law, with far-reaching consequences. Conversely, examining this "tripartite" relationship will reveal several principles which can guide an analysis of the issues.

### A. *The Contractual Relationships*

The aptly named insurance "tripartite" relationship involves, not surprisingly, three parties: (1) the insurance company that issues the liability insurance policy; (2) the insured against whom a claim is filed that is covered under the insurance policy; and (3) the attorney hired by the insurance company to defend the claim and represent the aligned interest of the insurer and insured. An important point, all too frequently ignored, is that these relationships are creatures of contract. The relationship between an insurer and a defense attorney arises from two separate, yet interrelated, contractual relationships. The first contract is the insurance policy between the insurer and the insured. The second contract is the retainer agreement between the insurer and the defense attorney.

### 1. *The Insurance Contract*

Through the insurance policy between insurer and insured, the insured purchases more than reimbursement for damages. The policy also requires the insurer to provide a defense against any covered claim filed against the insured.<sup>11</sup> Under most policies, the insurer must provide a defense even where the allegations against the insured are false, fraudulent, or groundless.<sup>12</sup> In exchange for the duty to provide a good faith defense for the insured, most liability policy defense clauses give the insurer the right to control the litigation.<sup>13</sup> That is, in exchange for the insurer's broad defense obligations, the insured agrees to cede control of the defense to the insurer and agrees to cooperate in that defense.<sup>14</sup>

Florida, like most states, has repeatedly reaffirmed these contractual underpinnings. For instance, in discussing the insurer's responsibilities under the insurance contract, the Florida Supreme Court stated as early as 1969 that "for a consideration it is contemplated that a business entity contracts to provide certain protection, including legal services, to its customers."<sup>15</sup> In that same opinion, the court emphasized that it is "the insurance contract which delineates the rights and duties of insurer and insured between themselves."<sup>16</sup>

More recently, the court expounded on those rights and duties:

In fulfilling its promissory obligation to defend, the insurer employs counsel for the insured, performs the pretrial investigation, and controls the insured's defense after a suit is filed on a claim. The insurer also makes decisions as to when and when not to offer or accept settlement of the claim.<sup>17</sup>

Thus, under the typical policy, an insured *surrenders* control over the handling of the claim, including all decisions with regard to litigation and settlement.<sup>18</sup> In return, the insurer undertakes the quasi-fiduciary obligation to conduct the litigation in good faith and with due regard for the interests of the insured.<sup>19</sup>

11. See *Doe ex rel. Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 373 (Fla. 1995).

12. See *Schuster v. South Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 176 (Fla. 1992).

13. See *id.*

14. See Kent D. Syverud, *The Ethics of Litigation Management Guidelines and Legal Audits*, 21 *Ins. Litig. Rep. (CBC)* 180, 187 (May 1, 1999).

15. *In re Proposed Addition to the Additional Rules Governing the Conduct of Att'ys in Fla.*, 220 So. 2d 6, 8 (Fla. 1969).

16. *Id.*

17. *Doe ex rel. Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 373-74 (Fla. 1995).

18. See *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980); *Hollar v. International Bankers Ins. Co.*, 572 So. 2d 937, 938-39 (Fla. 3d DCA 1990).

19. See *Gutierrez*, 386 So. 2d at 785; *Hollar*, 572 So. 2d at 938-39.

Importantly, the insurer's contractual defense obligation is not merely a requirement to fund the defense. Insurers are required to protect their policyholders' interests to the same degree that they protect their own interests and to make independent decisions about the goals of the litigation and the means to fulfill those goals.<sup>20</sup> In a litigation context, this is a major element of the duty of good faith owed by every insurer to its insureds.

Insurers cannot delegate this obligation to counsel, nor can they escape responsibility for an adverse result by looking to the defense attorney.<sup>21</sup> Should the insurer ignore these obligations, the insured can sue for breach of contract and associated damages.<sup>22</sup> Accordingly, under the contractual relationship between the insurer and the insured, the insurer protects its interests *and* the interests of its insured by assuming control of the defense and related costs.<sup>23</sup> As a result, the insurer ordinarily *must* protect its insured in order to protect itself. Thus, the insurer and insured have a common interest in securing quality representation in order to keep the settlement or verdict as low as possible.

### *2. The Retainer Agreement: The Contractual Relationship Between the Insurer-Client and the Defense Attorney*

Of course, the defense attorney hired by the insurer is not a party to the insurance contract. The formation of the attorney-client relationship and related contractual rights and obligations between the attorney and the insurer arise from the agreement under which an insurer retains the attorney. In the insurance defense context, this agreement defines the terms and conditions under which the attorney will provide representation with respect to a covered claim.<sup>24</sup>

Those terms and conditions commonly include certain litigation guidelines (including legal audit procedures), which are appended to, and form an integral part of, that contract. These guidelines assist

---

20. See *Schuster v. South Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 176 (Fla. 1992).

21. See *Doe*, 653 So. 2d at 374.

22. See *Time Ins. Co. v. Burger*, 712 So. 2d 389, 392 (Fla. 1998); *North Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1330 (Fla. 4th DCA 1996); see also FLA. STAT. § 624.155(1)(b)(1) (2000) (stating that the insured can sue the insurer if the insurer does not attempt to settle in good faith when the insurer could or should have done so).

23. See *Doe*, 653 So. 2d at 373-74.

24. See Richard E. Mulroy, *Issues of Outside Counsel Management*, ACCA DOCKET, May/June 1995, at 28, 29 ("Formal written retention documents are widely used. These include written engagement letters, billing policy statements, or a combination of both at the onset of any engagement. The intent of these documents is to describe the nature and scope of the engagement for the benefit of all parties.").

the insurer in fulfilling its contractual obligations to the insured,<sup>25</sup> namely, controlling the litigation and ensuring quality representation. Even in the atypical situation where the insured faces exposure in excess of policy limits, the insurer has both the incentive and the obligation to provide the insured with a proper defense.<sup>26</sup> Such guidelines are thus an important facet of both contractual relationships.

A significant feature of the retainer agreement in this context is the dual nature of the representation the defense counsel undertakes. In the overwhelming majority of jurisdictions, the attorney, either explicitly or implicitly, represents the common, aligned interests of *both* the insurer and the insured.<sup>27</sup> As the Florida Supreme Court has confirmed, “the legal responsibility placed on the insurance company give[s] pointed verification to the fact that the interest involved in defense of liability suits is primarily and ultimately the interest of the insurance company.”<sup>28</sup> Thus, the defense counsel may appropriately represent the interests of *both* the insurer and the insured so long as those interests are not in actual conflict.<sup>29</sup> This is true regardless of whether the attorney is employed staff counsel or retained outside counsel.<sup>30</sup>

In part, this now long-settled principle is premised on the fact that the vast majority of insured lawsuits involve claims fully covered by the policy and, therefore, the possibility of actual conflict is minimal.<sup>31</sup> Indeed, defense by an attorney representing both the insured and the insurer necessarily involves a case in which no collision of interests has occurred between the insurer and the insured that would create a material, irreconcilable conflict for the defense attorney in the representation.<sup>32</sup> Thus, unless and until an actual conflict of interest occurs, the insurance company’s status as a *client* of defense counsel is secured as a matter of contract.

25. See, e.g., *Shuster*, 591 So. 2d at 176-77 (finding that the insurer has exclusive authority to control settlement and be guided by its own self-interest where the language of the policy puts the insured on notice of the insurer’s right to do so). Under the most common policies, the insured being defended under an existing policy is indifferent to the costs of defense because the insurer must pay those without affecting the limits applicable to indemnification against judgments or settlements. However, some policies subtract defense costs from the limits or require the insured to contribute to those costs.

26. See Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1595-96 (1994).

27. See *infra* Appendix A.

28. *In re Proposed Addition to the Additional Rules Governing the Conduct of Att’y’s in Fla.*, 220 So. 2d 6, 8 (Fla. 1969).

29. See *id.* at 8 (citing a brief filed by Liberty Mutual Insurance).

30. See *id.*

31. See *id.*

32. See *id.*

### B. Ethical Obligations in the Contractual Relationship

The contractual relationships outlined above are fully consistent with the rules governing the professional conduct of attorneys.<sup>33</sup> In particular, application of Florida's ethics rules, found in the *Rules Regulating The Florida Bar*,<sup>34</sup> to the tripartite relationship demonstrates that neither the policy obligations of the insurer and insured nor the standard retainer agreement violate the attorney's duties to maintain confidentiality and remain free of conflicting interests.

#### 1. Confidentiality

Under the ethics rules, information may be shared between co-clients and their representatives by the attorney hired to represent them. Under Rule 4-1.6 of the *Rules Regulating The Florida Bar*, the attorney must maintain the confidences of the attorney-client relationship.<sup>35</sup> This is true in any attorney-client relationship.<sup>36</sup> However, subsection (c) allows disclosure "to the extent the lawyer reasonably believes necessary . . . to serve the client's interest unless it is information the client specifically requires not to be disclosed."<sup>37</sup> Thus, Rule 4-1.6 expressly permits disclosures "impliedly authorized" by the client.<sup>38</sup> 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."<sup>39</sup> The reporter for the *Model Rules of Professional Conduct* (from which chapter 4 of the *Rules Regulating The Florida Bar* was derived) has explained that "[t]his standard is taken from the law of agency, under which implied authority is inferred from the nature of the representation, the 'general usages' of similar relationships, and those acts which 'usually accompany' or are 'reasonably necessary' to the represen-

---

33. Even in those few states where the insurer is not recognized as a co-client, the insurer's role in the ethics constellation is resolved by noting that the insured, by entering into an insurance contract, "waives" certain ethical rights the insured might normally have. See, e.g., *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991). In *Bell*, Chief Justice Cavanagh's dissent—which disagreed with the majority only on its equitable subrogation ruling—reaffirms the coexistence of an attorney's contractual and ethical obligations to both the policyholder and the insurer, as well as the policyholder's consent to forego certain ethical rights during the representation. See *id.* at 299-304 (Bell, J., dissenting).

34. R. REGULATING FLA. BAR ch. 4, <http://www.flabar.org/lawpractice/Rules/rrrtfbch4.pdf> (last visited Jan. 2, 2001).

35. R. REGULATING FLA. BAR 4-1.6.

36. See R. REGULATING FLA. BAR 4-1.6 cmt.

37. R. REGULATING FLA. BAR 4-1.6(c).

38. R. REGULATING FLA. BAR 4-1.6 cmt.

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 7 (1998).

tation.”<sup>40</sup> Absent some concrete and substantial risk of harm to the insured, all that is required is utility or convenience in carrying out the representation.<sup>41</sup> Nor is there risk to the attorney-client privilege: because the insurer and the insured are co-clients of defense counsel, under the “common interest” doctrine, shared information is protected.<sup>42</sup>

When read together with the insured’s contractual obligation of cooperation with the insurer, this suggests that only if the attorney learns of information detrimental to the insured, or if the insured specifically asks that certain information be kept confidential from the insurer, must the attorney decline to share that information with the insurer. Otherwise, the information should be provided to the insurer to allow the insurer to properly manage the defense, including paying the attorney for appropriate legal services.

## 2. *Duty of Loyalty*

Under Rule 4-1.7, the attorney may represent multiple clients so long as their interests are aligned.<sup>43</sup> Obviously, when an actual conflict arises in the joint representation of the insurer and the insured, the attorney must refrain from representing the interests of one of the parties.<sup>44</sup> However, this is true in any attorney-client relationship where the attorney represents two or more clients in the same representation.<sup>45</sup>

In discussing the joint representation of the insurer and the insured, the Florida Supreme Court has noted that “[i]f the representation initially contemplates professional services to two clients with a mutuality of interests, the attorney carries the burden of clearly and distinctly disassociating himself from his allegiance to

40. Opinion of Geoffrey C. Hazard, Jr. at 27, *In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (No. 98-612) (citing RESTATEMENT (SECOND) OF AGENCY §§ 33-35 (1958)), State Law Library of Mont., <http://www.lawlibrary.state.mt.us/dscgi/ds.py/view/Collection-1831>.

41. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. g (Proposed Final Draft No. 1, 1996); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 398 (1995) (stating that a lawyer may disclose billing information to an outside service bureau to prepare bills).

42. See FLA. STAT. § 90.502(4)(e) (2000) (“(4) There is no lawyer-client privilege under this section when: . . . (e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.”) (indicating that the common interest doctrine protects shared client confidences unless and until a civil action arises between the co-clients to which the confidences are relevant); see also *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437 (Fla. 3d DCA 1987).

43. See R. REGULATING FLA. BAR 4-1.7, <http://www.flabar.org/lawpractice/Rules/rtrfbch4.pdf> (last visited Jan. 2, 2001).

44. See R. REGULATING FLA. BAR 4-1.7 cmt.

45. See *id.*

one whenever the interests of the two cease to be mutual and come into collision."<sup>46</sup> This is the same obligation imposed on any lawyer who represents multiple clients, and it is triggered only when "a conflict of interests between clients appears."<sup>47</sup> Thus, under the ethics rules, a defense attorney is to represent the interests of both the insurer and the insured just as the attorney would do in any other multiple-client representation.

The tripartite relationship is also fully consistent with Rule 4-1.8(f),<sup>48</sup> which governs when an attorney can accept compensation for representing a client from a third party, and which mirrors the third-party compensation rules of many other states.<sup>49</sup> That rule provides that such an arrangement cannot compromise the attorney's duty of loyalty to the client.<sup>50</sup> First, as noted, the insurer is not simply a third party paying the compensation for the representation under Rule 4-1.8; rather, the insurer *is* a client of defense counsel so long as the interests of the insurer and the insured are aligned and there is no actual conflict at issue in the representation.<sup>51</sup> As noted in the comments to Rule 4-1.7, which actually contemplate this joint representation:

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when *an insurer and its insured* have

---

46. *In re* Proposed Addition to the Additional Rules Governing the Conduct of Att'ys in Fla., 220 So. 2d 6, 8 (Fla. 1969).

47. *Id.* at 7.

48. Rule 4-1.8(f) provides as follows:

Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by rule 4-1.6.

R. REGULATING FLA. BAR 4-1.8(f), <http://www.flabar.org/lawpractice/rules/rtrfbch4.pdf> (last visited Jan. 2, 2001).

49. Rule 4-1.8(f) is drawn from Model Rule of Professional Conduct 1.8(f) without change.

50. *See id.*

51. Ironically, even some defense attorneys mistakenly believe they represent only the insured. However, as pointed out by a recent Maryland ethics opinion, this assumption conflicts with substantive law and could jeopardize some of the insured's rights, especially in the area of attorney-client privilege, when necessary information must be disclosed to the insurer. *See* Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 00-23 (2000), LEXIS, Ethics Library, ETHOP File. Moreover, many defense firms actually list insurers as "representative clients" on their brochures, websites, and Martindale-Hubbell listings. *See, e.g., Butler Burnette Pappas—Representative Client List*, at <http://www.bbplaw.com/clients.htm> (last visited Jan. 31, 2001); Search of Martindale-Hubbell Lawyer Locator, at <http://lawyers.martindale.com/Executable/Firm.php3> (Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A. listing) (last visited Jan. 31, 2001).

*conflicting interests* in a matter arising from a liability insurance agreement and the insurer is required to provide *special counsel* for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.<sup>52</sup>

As anticipated by this comment, until such time as the insurer and its insured have conflicting interests, the insurer is a co-client. However, once an actual conflict arises, the insurer may be required to provide special counsel and be considered a third-party payor of legal services.<sup>53</sup>

Also, as with all multiple-client representations, defense counsel owes a duty of loyalty to *both* the insurer and the insured. Under the ordinary insurance contract, the insurer has the responsibility to protect the interests of the insured, but the insured has agreed to allow the insurer, as a mutual co-client of the defense attorney and as agent for the insured, to control the costs and management of the litigation.<sup>54</sup> The insurer has a right to control the litigation where the policy so specifies.<sup>55</sup> The fact that the insurer is paying the fees and controlling the cost of litigation does not, in and of itself, in any way compromise defense counsel's loyalty to the insured-client. Thus, as in any co-client representation where one client is authorized to control the litigation, no ethical dilemma exists for the defense counsel in adhering to an insurer's decision regarding the defense unless such decision actually impairs defense counsel's duty of loyalty to the insured. The defense attorney is faced with an ethical decision *only* when the interests of the attorney's two clients, the insured and insurer, actually come into conflict.<sup>56</sup>

In short, the insurance contract ordinarily permits joint representation of the insurer and insured as well as exercise of

52. R. REGULATING FLA. BAR 4-1.7 cmt. (emphasis added), <http://www.flabar.org/lawpractice/rules/rrtffbch4.pdf> (last visited Jan. 2, 2001).

53. See *id.*

54. See *Doe ex rel. Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 373-74 (Fla. 1995).

55. See *Shuster v. South Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 176-77 (Fla. 1992).

56. See *In re Proposed Addition to the Additional Rules Governing the Conduct of Att'ys in Fla.*, 220 So. 2d 6, 7 (Fla. 1969). The Court stated:

The rule, as suggested, seems to emphasize the employer-employee relationship as the element which would distinguish the lawyer's responsibility to *one of two clients* . . . .

. . . The point we make merely is that when a conflict does arise the ethical decision which the lawyer faces is the same in both relationships—if he is employed to represent two clients.

*Id.* (emphasis added).

control by the insurer. Additionally, the retainer agreement between the defense attorney and the insurer is consistent with, and is a means of, complying with the conditions of the insurance contract. Only if some concrete situation discloses a substantial risk of harm to the insured arising from the insurer's decisions is there an ethical problem for the attorney.

### III. LITIGATION MANAGEMENT PRACTICES<sup>57</sup>

#### A. *The Benefits of Litigation Management Practices*

Litigation management has become increasingly important in recent years to all businesses, including insurers. Over the last thirty years, American businesses and insurers have experienced an unprecedented increase in litigation. The main reasons behind this steady, at times explosive, growth have been the expansion of causes of action and the liberalization of tort rights.

A sampling of the more significant legal developments include adoption of strict liability for products;<sup>58</sup> comparative negligence in place of contributory negligence;<sup>59</sup> environmental exposures;<sup>60</sup> employment practice liabilities;<sup>61</sup> expanded duties of directors and officers to stockholders and customers;<sup>62</sup> and availability of class actions.<sup>63</sup> Clearly, these expanded exposures have vastly increased

---

57. Part III has been adapted in significant part from the amicus brief filed by the American Insurance Association (AIA) before the Montana Supreme Court in *In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000). That brief was submitted to the Court by Jacqueline T. Lenmark but was authored primarily by instant author J. Stephen Zielezienski. Specifically, all portions of that brief included herein were authored by Mr. Zielezienski. In its decision in the *In Re Rules of Professional Conduct*, the Montana Supreme Court did not address the benefits of litigation management practices. Further, as discussed *infra* at Part IV.B, the Montana Supreme Court rejected AIA's arguments based on its corresponding rejection of the dual-client status of the insurer and the insured in the tripartite relationship, which places Montana in the very small minority of states rejecting the dual-client status of the insurer and the insured.

58. See, e.g., *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 900 (Cal. 1963).

59. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

60. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9626, 9651-9661, 9671-9675 (1994 & Supp. V 1999)); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700 (Fla. 1993).

61. See, e.g., Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (requiring employers to provide unpaid medical or pregnancy leave) (codified as amended at 5 U.S.C. §§ 2105, 6301, 6381-6387 & 29 U.S.C. §§ 2601-2654 (1994 & Supp. V 1999)); Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 703(a), 704(a), 708 Stat. 253, 255, 257 (prohibiting sexual discrimination and retaliation, among other things) (codified as amended at 42 U.S.C. §§ 2000e-2(a), -3(a) (1994)).

62. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 872-74 (Del. 1985).

63. A survey conducted by the Federalist Society indicates that between 1988 and 1998 the number of class actions pending in state courts increased by 1315%, while the

the cost to American business and insurers of defending themselves and their insureds. A comprehensive study of the U.S. tort system from 1930 to 1994 concluded:

tort costs have grown almost four times faster than the U.S. economy over the past 64 years . . . .

. . . .  
The U.S. tort system is by far the most expensive in the industrialized world . . . . [The cost of the U.S. tort system is] substantially higher than that of any other country studied and two and a half times the average.<sup>64</sup>

These data demonstrate that litigation has ceased to be a matter of only occasional concern; it has become a major expense item in annual budgets, necessitating comprehensive management controls. Litigation management, by necessity, has become a full-time enterprise within the enterprise, commonly requiring oversight of millions, occasionally billions, of expense dollars as well as the companion (and much greater) costs of settlements, verdicts, and corporate reputation. As a part of litigation management, insurers implement a number of tools, such as requiring outside counsel to follow litigation management guidelines and hiring in-house or retained auditors to review legal bills. In other instances, insurers simply use in-house attorneys to handle the defense of covered claims.

### *1. Litigation Management Guidelines*

As noted earlier, litigation management guidelines are frequently incorporated into the retention contract between the insurer and the defense attorney. At the outset of the representation, the attorney is typically provided with a copy of any applicable guidelines and, in agreeing to undertake the representation, the attorney agrees to abide by the cost controls set forth in those guidelines. In all critical respects, insurer guidelines bear a substantial resemblance to the guidelines used by other entities. In fact, a number of issues typically discussed in litigation guidelines have been specifically addressed and approved by case law. For example, courts have uniformly denounced bills that include incomplete or vague entries and have held it improper to

---

number in all federal courts increased by 340%. *See Analysis: Class Action Litigation—A Federalist Society Survey, Part II*, CLASS ACTION WATCH, Spring 1999, at 1, 6, Federalist Society, <http://www.fed-soc.org/classaction1-2.pdf> (last visited Nov. 3, 2000). Preliminary findings for a second group of respondents indicated similar results: a 550% increase in the number of pending state court class actions from 1988 to 1998. *See id.*

64. ROBERT W. STURGIS, TILLINGHAST-TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 3 (1995).

charge multiple parties for work that has only been done once.<sup>65</sup> Among other things, typical guidelines detail the entity's right to be consulted,<sup>66</sup> what activities need prior approval,<sup>67</sup> and how attorneys will be compensated.<sup>68</sup>

Most importantly, all guidelines set forth the organization's right to control the decisions regarding the representation. For example, CIBA-GEIGY Corporation's litigation guidelines state, "The Company is self-insured and exercises direct control of the liability cases against it. Accordingly, we have an understanding with outside counsel that retention of a firm is subject to our direct supervision and control."<sup>69</sup> The guidelines stress, "All important decisions with respect to the litigation are under our control."<sup>70</sup> Other corporate litigation guidelines convey similar expectations.<sup>71</sup>

Exercise of this kind of meaningful control can be critical to an entity confronted by litigation. For example, an entity may wish to determine the way its positions in litigation or otherwise are

---

65. See *H.J., Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (affirming fee reduction based on district court finding that numerous entries were inadequate and vague); *Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co.*, 406 F. Supp. 828, 832 (N.D. Cal. 1976).

66. See CIBA-GEIGY Corp., *Litigation Procedures for Outside Counsel* (July 1986) (Guideline 3.1), in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 705 (1987) ("During the first three months (90 days) following the assignment of a new case, your firm should prepare, *in consultation with us*, an overall plan and budget for this litigation . . . ." (emphasis added)); McDonnell Douglas Corp., *Policies for Firms Providing Legal Services to McDonnell Douglas Corporation*, in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 735 (Apr. 1998) ("Outside counsel is required to communicate on a regular basis to the MDC responsible attorney. The MDC responsible attorney should be immediately informed of all court and discovery dates . . . .").

67. See Chevron Corp., *Chevron Corporation Guidelines for Outside Counsel* (Guideline F.2), in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 758 (June 1992) ("Advance approval from the responsible Chevron attorney is required before you engage in any of the following: (1) preparing pretrial motions that would resolve the matter . . . (3) preparing discovery motions; . . . (5) selecting or retaining expert witnesses . . . ."); E.I. Du Pont de Nemours & Co., *Du Pont Guidelines for Outside Counsel* (Guideline 4), in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 784 (June 1993) ("The Du Pont staff attorney should participate in and approve in advance all decisions regarding important aspects of the case and all projects that will require a significant expenditure of time and resources.").

68. See Liberty Mut. Ins. Co., *Standards for Outside Counsel*, in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 791-92 (May 1995).

69. CIBA-GEIGY Corp., *Litigation Procedures for Outside Counsel* (July 1986) (Principle 1), in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 702 (1987).

70. *Id.* (Principle 3).

71. See Coleman Co., *Sample Engagement Letters and Billing Instruction Form*, in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 738 (Apr. 1997) ("Except for the interests of excess insurance carriers, we retain total control over this file."). Some guidelines state that decisions are made collaboratively by the corporation and the outside counsel. See, e.g., McDonnell Douglas Corp., *Policies for Firms Providing Legal Services to McDonnell Douglas Corporation*, in 1 *Company Pol'y Statements* (Bus. Laws, Inc.) 735 (Apr. 1997) ("Substantive pleadings . . . may not be filed or served in any matter until they have been reviewed and approved by the [McDonnell Douglas Corporation] responsible attorney.").

conveyed to the public. Provisions retaining control and requiring consultation accomplish this objective. Often, through its experience and familiarity with the circumstances surrounding the representation, an entity is in a superior position to assess litigation strategy, including which witnesses should be called and the areas in which attorneys should focus their efforts.

In addition, for businesses and insurers that defend or prosecute hundreds or thousands or tens of thousands of lawsuits each year, two critical factors underlie their approach to litigation. One is the need for consistency, both in approach and in quality. The other is the need to achieve an acceptable balance between legal dollars invested and the results returned on that investment.

Coupled with an auditing mechanism, litigation management guidelines provide corporations and insurers the means of implementing their litigation philosophies in a consistent manner. Such guidelines further enable corporations and insurers to evaluate the quality of legal representation both within and across jurisdictional lines and to ascertain whether their legal dollars have been expended according to their wishes. Chevron Corporation's guidelines, for example, under a category entitled "General Expectations," explain:

We want our relationship with outside counsel to be a close working one, with expectations and duties running in both directions. It is important that our communications be open and direct. You should not be offended if we point out instances when we believe your work has not been of the quality we expect or has not been performed on a cost-effective basis. To the same extent, we need to be told when we have failed to fulfill our obligations to you (*e.g.*, failure to provide timely or complete responses to requests for information).<sup>72</sup>

Litigation guidelines used by Overnite Transportation Company, on the other hand, approach the same goal from a different direction:

One of the realities of the trucking industry marketplace today is intensely brutal competition. Essential to our success in this environment are productivity and cost control. The need for maximizing productivity and efficiency and minimizing cost extends to every Overnite functional department, including the law department and its outside counsel. To that end, it is essential that every effort be made to hold down the cost of legal services.<sup>73</sup>

---

72. Chevron Corp., Guidelines for Outside Counsel (Guideline A.3), *in* 1 Company Pol'y Statements (Bus. Laws, Inc.) 754-55 (June 1992).

73. Overnite Transp. Co., Outside Counsel Guidelines (June 1993), *in* 1 Outside Counsel Management (Am. Corp. Counsel Ass'n) 339 (1994).

As these excerpts illustrate, entities value consistency for several different, but equally valid, reasons.

First, a consistent philosophy and set of rules allow purchasers of legal services to measure the effectiveness and efficiency of the law firms they hire. Commonly, corporations and insurers litigate the same matters in multiple jurisdictions over and over again. In order to adequately represent their interests (and, in the case of insurers, the interests of their insureds as well), they must engage tens or sometimes hundreds of firms. Applying the same benchmarks to all their firms permits them to fairly judge the firms' work product and relative costs, and to select and reward those firms whose expertise and efficiency are most closely aligned with their goals.

Second, a lack of consistency in legal representation can create extraordinary liability and legal fee exposures. Without a corporate litigation policy and the means of implementing it, decisionmaking is erratic and subject to the biases of the individual litigation manager and attorney. Inconsistent decisions can lead to unnecessary countersuits, ruined relationships with business partners and customers, and discovery of documents and deposition testimony that can be used adversely in subsequent litigation. As one commentator noted:

It is vital that a corporate defendant set its goals and priorities for handling its significant litigation. Cases should not be considered "inventory" and ignored once they are put on the shelf with an outside trial counsel. Product integrity issues resolved in litigation conducted without strong and capable company stewardship may result, through inattention, in the termination of some company's product lines.<sup>74</sup>

Third, a lack of consistency needlessly wastes money. Corporations and insurers oversee huge volumes of litigation, which translates into knowledge of what works and what does not work. These clients quickly amass storehouses of information and research that aid and guide litigation, eliminating duplicative work and futile efforts. Finally, litigation guidelines also benefit the attorneys engaged by these businesses, public entities, and carriers. By clearly communicating expectations up front to the attorney, guidelines provide attorneys with a roadmap of sorts and ensure future business so important to the growth and stability of the firm.<sup>75</sup>

---

74. Edward Lowenberg, *Consolidated Defense Experience: Working with Co-Defendants to Really Minimize Costs*, in FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE 75, 78 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5184, 1994) (discussing the concept of shared outside counsel litigation guidelines in the context of a joint defense arrangement), WESTLAW, 497 PLI/Lit 75.

75. Notably, litigation guidelines are routine for shared outside counsel in joint defense situations. See Lowenberg, *supra* note 74, at 96.

## 2. *Auditing*

Like litigation management guidelines, auditing legal bills serves the interests and obligations of all parties in the tripartite relationship. The audit process improves the quality of legal representation by allowing the insurer to monitor the defense attorney's performance and thus ensure that the attorney is advancing the litigation goals identified at the outset of the representation. In addition, the audit process allows the insurer to ensure that the insurer and insured are receiving an effective defense, based on reasonable fees, which, in turn, keeps future premiums at the lowest possible level.

Audit services are best performed by a person or entity with experience reviewing attorney billing statements. A client may lack the expertise or internal resources to audit the charges effectively. In these situations, a client should be entitled to consult with outside service vendors, in much the same way that an insurer is entitled to retain an accountant to help it adjust the business interruption on a fire loss. Indeed, corporate law departments, public entities, and self-insured businesses routinely engage outside auditors to analyze billings of their retained law firms.<sup>76</sup> In fact, the Florida Supreme Court has actually required the use of third-party auditors in certain disciplinary actions.<sup>77</sup>

### *B. These Practices Do Not Violate Ethics Rules or Endanger Privileges*

The insured's contractual duty to cooperate, in concert with the insurer's defense obligations, requires disclosures to the insurer that are reasonable or necessary to the defense of a claim.<sup>78</sup> Further, as recognized above, counsel representing more than one client in the same matter generally are permitted to share information gleaned from the representation among all clients.<sup>79</sup> Certainly, "[s]haring of information among the co-clients with respect to the matter involved in the representation is normal and typically expected."<sup>80</sup> In summary, defense counsel's disclosure of information to justify fees facilitates the defense of a claim and serves the mutual interest of the insurer and insured in obtaining quality legal representation at the lowest possible cost.

76. See Syverud, *supra* note 14, at 183.

77. See, e.g., Florida Bar v. Valladares, 698 So. 2d 823, 825 (Fla. 1997) (requiring an attorney, as a condition of probation, to employ an accountant to render reports on his operating and trust accounts).

78. See Doe *ex rel.* Doe v. Allstate Ins. Co., 653 So. 2d 371, 374 (Fla. 1995).

79. See *supra* Part II.B.1.

80. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. 1 (Proposed Final Draft No. 1, 1996).

Nor does disclosure of legal bills to a third-party auditor endanger the attorney-client privilege. In Florida, section 90.502, *Florida Statutes*,<sup>81</sup> governs the attorney-client privilege. Under that statute, a communication between an attorney and client is “confidential” if it is not intended to be disclosed to third persons *other than: 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.*”<sup>82</sup> Thus, “the attorney-client privilege ‘extends to the necessary intermediaries and agents through whom such communications are made.’”<sup>83</sup> Similarly, protected work product loses its protection only if disclosed to someone likely to pass it on to an adversary of the client.<sup>84</sup> Accordingly, disclosure of the basis for an attorney’s billing statement to an insurer does *not* violate ethical duties of confidentiality and does *not* lead to the waiver of privileges.

These conclusions are not altered because an outside auditing firm reviews the billing statements.<sup>85</sup> This is rooted in the protection granted to disclosures made to outside contractors in furtherance of litigation.<sup>86</sup> These independent contractors may include expert witnesses, expert consultants, computer database companies, accounting firms, data processing and storage firms, printing firms, photocopying firms, paper disposal firms, or anyone else “further[ing] . . . the rendition of legal services to the client.”<sup>87</sup> Absent client consent for disclosure, these independent contractors have a duty to maintain the confidentiality of the information provided to them by the attorney.<sup>88</sup> The confidential information is being disclosed to further the defense of the insured, and the insured is in no way exposed to a waiver of privilege.<sup>89</sup> Likewise, if an individual is acting as an agent for the client, then the communication is confidential.<sup>90</sup>

Moreover, the defense attorney is not precluded by any ethical obligation from sharing that information with the independent contractor.<sup>91</sup> It would defy common sense, for example, to assert that

---

81. FLA. STAT. § 90.502 (2000).

82. *Id.* § 90.502(1)(c)(1) (emphasis added).

83. *Gerheiser v. Stephens*, 712 So. 2d 1252, 1254-55 (Fla. 4th DCA 1998) (quoting *State v. Kociolek*, 129 A.2d 417, 424 (N.J. 1957), and *City of San Francisco v. Superior Court*, 231 P.2d 26, 31 (Cal. 1951) (en banc)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. 1 (Proposed Final Draft No. 1, 1996) (confidential information of co-clients); *id.* § 120 cmt. f (attorney-client privilege).

84. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 140(4) & cmt. b (Proposed Final Draft No. 1, 1996).

85. *See, e.g., Morgan v. State*, 639 So. 2d 6, 10 (Fla. 1994).

86. *See id.*

87. FLA. STAT. § 90.502(1)(c)(1) (2000).

88. *See* § 90.502(2).

89. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. g (Proposed Final Draft No. 1, 1996) (attorney-client privilege).

90. *See Gerheiser v. Stephens*, 712 So. 2d 1252, 1254 (Fla. 4th DCA 1998).

91. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. f (Proposed Final Draft No. 1, 1996); ABA Comm. on Ethics and Professional Responsibility,

an attorney is prohibited—either ethically or legally—from sending information that needs to be copied to an outside photocopying vendor, or that a client’s permission need be obtained beforehand. A defense attorney “may disclose confidential client information for the purpose of facilitating the lawyer’s law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken.”<sup>92</sup> Indeed, attorneys need not obtain client consent before sending detailed time-sheet information to a data processing firm for bookkeeping purposes.<sup>93</sup>

This idea is consistent with ethics rules generally, including the *Rules Regulating The Florida Bar*.<sup>94</sup> As indicated above, in defending a claim an insurer has explicit authority from the insured (the co-client) to *control* the case.<sup>95</sup> As such, the insurer as co-client and as the ceded agent for the insured has the authority to disclose information to agents acting on behalf of the insurer, such as auditors.<sup>96</sup>

Bill auditing by an insurer is as much a part of the litigation process as the functions performed by a defense attorney or a retained outside contractor. In these instances, the work being done is fundamental to the litigation process; it matters not whether the work is performed by the defense attorney, the insurer’s employees, or by outside contractors. All of these persons and entities are acting in furtherance of the insured’s defense. There is simply no adversity of interest or other problem of disclosure that would undercut available privileges or lead to the breach of policyholder confidences.<sup>97</sup>

Moreover, ethics rules universally prohibit attorneys from charging excessive fees.<sup>98</sup> The extensive list of factors to be

Formal Op. 398 (1995) (recognizing that attorneys use outside contractors, and that they may do so as long as they “make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information”).

92. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 cmt. g (Proposed Final Draft No. 1, 1996); *see also, e.g.*, R. REGULATING FLA. BAR 4-1.6, <http://www.flabar.org/lawpractice/Rules/rtrfbch4.pdf> (last visited Jan. 2, 2001).

93. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1364 (1976); *see also, e.g.*, R. REGULATING FLA. BAR 4-1.6.

94. R. REGULATING FLA. BAR 4-1.6 cmt.

95. *See supra* text accompanying notes 18-19.

96. *See Gerheiser v. Stephens*, 712 So. 2d 1252, 1254 (Fla. 4th DCA 1998) (extending attorney-client privilege to necessary intermediaries and agents through whom such communications are made).

97. The Montana Supreme Court recently concluded that the release of information to a third-party auditor requires specific consent of the insured. *See In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 821 (Mont. 2000). As discussed below in Part IV.B, this conclusion is simply unreasonable and unwise.

98. For example, The Florida Bar forbids its members from charging or collecting an “illegal, prohibited, or clearly excessive fee.” R. REGULATING FLA. BAR 4-1.5(a).

considered when determining the reasonableness of legal fees<sup>99</sup> is clear evidence that fees were meant to be examined as part of the litigation process. Auditing is simply a mechanism by which one client (the one paying the defense bills) is able to verify its obligation to pay for legal services. It is both unrealistic and unlawful for an attorney to demand that attorneys' fees be paid without fully justifying the fees. This is simply a matter of attorney accountability.

In summary, an attorney does not violate any ethical rules of confidentiality when that attorney shares information with the carrier *or* a third-party auditor retained by the carrier to further the representation. To claim otherwise would be to state that the attorney ethics rules could be used to erode any existing contractual obligations the attorney might have or could be used to diminish the bargaining position of all purchasers of legal services. In addition, if the submission of billing statements to an outside auditor were unethical or waived evidentiary privileges, it would be impossible to resolve billing disputes among the insurer, insured, and defense attorney. Indeed, courts routinely employ outside auditors to determine the amount of legal fees to be awarded. No attorney has the right to demand a fee from an insurer or any other client without providing reasonable justification for that fee.

#### IV. ADVISORY OPINIONS LIMITING LITIGATION MANAGEMENT PRACTICES

Permitting an attorney to cancel or avoid bargained-for litigation management guidelines would be crippling to businesses trying to compete effectively in the marketplace while facing a mounting onslaught of lawsuits. However, under the guise of "ethical considerations" one state court<sup>100</sup> and at least thirty-two bar associations have issued opinions attempting to do just that.<sup>101</sup> Analysis of these opinions reveals that they are typified by a number of analytical flaws. Among the most significant are issuing opinions in a factual vacuum,<sup>102</sup> misapplying existing case law,<sup>103</sup> failing to recognize the insurer's status as a co-client (or, at

---

99. See R. REGULATING FLA. BAR 4-1.5(b).

100. See *In re Rules of Prof'l Conduct*, 2 P.2d 806.

101. See *infra* Appendix B.

102. See, e.g., Alaska Bar Ass'n Ethics Comm., Ethics Op. 99-1 (1999); Haw. Sup. Ct. Disciplinary Bd., Formal Ops. 36, 37 (1999); Ind. State Bar Ass'n Legal Ethics Comm., Op. 4 (1998); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Op. 99-01 (1999); Or. State Bar Ass'n, Formal Op. 1999-157 (1999); Wis. State Bar Prof'l Ethics Comm., Ethics Op. E-99-1 (1999) (absence of specific hypothetical facts).

103. See Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998) (misconstruing *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997)); Colo. Bar Ass'n Ethics Comm., Formal Op. 91 (1993) (same); Ind. State Bar

a bare minimum, as an agent of the insured),<sup>104</sup> and erroneously interpreting ethics rules.<sup>105</sup> These are all exacerbated by a tendency of the opinions to cite to one another as authority without investigating whether the underlying laws of the states are the same or whether the cited opinion actually conforms to the law of its own state.<sup>106</sup> Further, many rely on out-of-state opinions that were ultimately invalidated.<sup>107</sup>

### A. State Ethics Opinions<sup>108</sup>

#### 1. Contradictions with Substantive Law

One of the most common failings of state ethics opinions in this area is intruding into areas of substantive law. Not only are issues of contract law, for example, outside the jurisdiction of bar staff, but bar staff have shown a dangerous tendency to get it wrong. A pointed illustration is provided by Florida Bar Staff Opinions 20,591<sup>109</sup> and

Ass'n Legal Ethics Comm., Op. 3 (1998) (same); Miss. Bar Ethics Comm., Op. 211 (1993) (same); R.I. Sup. Ct. Ethics Advisory Panel, Op. 99-18 (1999) (same).

104. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 716 (1999) (asserting that only the insured is the client); Me. Prof. Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 164 (1998) (same); S.D. State Bar, Ethics Op. 99-2 (1999) (same); Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999) (same); Vt. Prof'l Responsibility Comm., Advisory Ethics Op. 98-7 (1998) (same); Wash. State Bar Ass'n, Formal Op. 195 (1999) (same); see also Mo. Office of the Chief Disciplinary Counsel, Informal Advisory Op. No. 980,188 (1998) (referring to insured as "the client"); S.C. Bar Ethics Advisory Comm., Op. 98-36 (1998) (same); W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 99-02 (1999) (describing insured as "the primary client").

105. See, e.g., Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999) (failing to appreciate the distinction between independent judgment and independent action); Idaho State Bar Ass'n Board of Comm'rs, Formal Ethics Op. 136 (1999) (same); Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 99-7 (1999) (requiring express consent of insured before disclosing information to third-party auditor).

106. See, e.g., Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999).

107. See Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998); Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999); D.C. Bar Legal Ethics Comm., Op. 290 (1999); Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 99-7 (1999); Cincinnati Bar Ass'n Ethics and Prof'l Responsibility Comm., Ethics Inquiry 98-99-02 (1998); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-32 (1998); Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999); Vt. Prof'l Responsibility Comm., Advisory Ethics Op. 98-7 (1998); Va. State Bar Comm. on Legal Ethics, Op. 1723 (1998); W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 99-02 (1999).

108. After this Article was drafted but before publication, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association issued Formal Opinion 01-421, Ethical Obligations of a Lawyer Working Under Company Guidelines and Other Restrictions, Feb. 16, 2001. While the authors have some reservations as to the wording of the conclusions reached in the opinion, the authors believe the opinion contains (contrary to most state bar association opinions) a thorough factual presentation; excellent, comprehensive research; thoughtful and balanced analysis of competing issues; and most importantly, sound guidance for attorneys founded upon practical realities.

109. Fla. Bar Staff, Op. 20,591 (1997) (on file with The Fla. Bar), available at <http://www.dri.org/research/opinions/op6.html>.

20,762<sup>110</sup> and three successor proposed advisory opinions (the “PAOs”)<sup>111</sup> which were ultimately rejected by Florida’s Board of Governors.<sup>112</sup>

Both staff opinions, which underwent no formal review, contain the erroneous, extra-jurisdictional statement that “an insurance defense lawyer’s client is the insured, not the insurance company.”<sup>113</sup> The question of who *is* a client, however, is an issue of contract law.<sup>114</sup> Indeed, the Florida Supreme Court, in *In re Proposed Addition to the Additional Rules Governing Conduct of Attorneys in Florida*<sup>115</sup>—issued *before* the staff opinions—recognized that a Florida defense attorney may represent *both* the insurer and the insured.<sup>116</sup> In fact, The Florida Bar’s Ethics Committee ultimately deleted that statement from the PAOs.<sup>117</sup>

Yet even the PAOs continued to analyze the issues as if the insurance company were nothing more than a third-party payor for legal services and as if a defense attorney cannot represent the interests of both an insured and his or her insurance company as co-clients.<sup>118</sup> The PAOs also wrongly denied the authority of the insurer to settle cases, despite statutory and contract law to the contrary.<sup>119</sup> This type of assertion is an obvious source of confusion to defense counsel.

Furthermore, by paying inadequate attention to relevant contract law, the opinions risked causing insureds to forfeit the insurer’s duty to defend. By requiring the attorney not only to inform the insured regarding the attorney’s employment relationship with the insurer,

---

110. Fla. Bar Staff, Op. 20,762 (1998) (on file with The Fla. Bar), *available at* <http://www.dri.org/research/opinions/op5.html>.

111. *See* Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-4 (1999), <http://www.flabar.org/newflabar/images/downloads/99-04pao.pdf> (last visited Nov. 15, 2000); Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-3 (1999), <http://www.flabar.org/newflabar/images/downloads/99-03pao.pdf> (last visited Nov. 15, 2000); Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-2, <http://www.flabar.org/newflabar/images/downloads/99-02pao.pdf> (1999) (last visited Nov. 15, 2000).

112. *See* Minutes of the Regular Meeting of the Board of Governors of The Florida Bar (Dec. 15, 2000), <http://www.flabar.org/newflabar/organization/Board/dec00min.html>.

113. Fla. Bar Staff, Op. 20,591 (1997); Fla. Bar Staff, Op. 20,762 (1998).

114. *See supra* Part II.A.2.

115. 220 So. 2d 6 (Fla. 1969).

116. *Id.* at 8; *see also supra* Part II.A.2.

117. *See* sources cited *supra* note 111.

118. *Compare* Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-3, <http://www.flabar.org/newflabar/images/downloads/99-03pao.pdf> (last visited Nov. 15, 2000), *with In re Proposed Addition to the Additional Rules*, 220 So. 2d at 8. *See also* IPSSC REPORT, *supra* note 1, at 19 (the Statement).

119. *Compare* Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-3, <http://www.flabar.org/newflabar/images/downloads/99-03pao.pdf> (last visited Nov. 15, 2000), *with Shuster v. South Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 176 (Fla. 1992). *See also* IPSSC REPORT, *supra* note 1, at 19 (the Statement).

but also to obtain the consent of the insured,<sup>120</sup> they erroneously implied that an insured may decline representation by a staff attorney. This completely ignores the consequences such an action can have under contract law: that is, the insured would possibly nullify the insurer's duty to defend by declining such representation.

## 2. *Misinterpretations of the Ethics Rules*

*a. Erroneous Interpretations of the Confidentiality Rules.*—The Florida opinions are again typical in misinterpreting the ethics rules. For example, PAO 99-2 would have prohibited the release of all confidential information to all third parties without first obtaining permission from the insured.<sup>121</sup> Yet, such an interpretation can be reached only by ignoring the exceptions to the nondisclosure provisions discussed in Part II above. In view of those exceptions, the restrictions imposed by the opinions are simply unwarranted.

*b. Confusing Independent Judgment with Independent Action.*—Many opinions also confuse independence of judgment with freedom to carry out that judgment without regard to the client's wishes.<sup>122</sup> For instance, the Florida PAOs sought to prohibit the use of certain litigation management guidelines based on the erroneous conclusion that such guidelines adversely affect an attorney's independent professional judgment.<sup>123</sup> Examination of Florida's ethics rules illustrates this error. For example, Rule 4-1.2 of the *Rules Regulating The Florida Bar* states, in pertinent part, that “[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.”<sup>124</sup> Furthermore, as the comments to the rule provide:

The *client* has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a *right to consult with the lawyer about the means* to be used in pursuing those objectives. . . . A clear distinction between objectives and means sometimes cannot be drawn, and in

120. Compare Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-4, <http://www.flabar.org/newflabar/images/downloads/99-04pao.pdf> (last visited Nov. 15, 2000), with *In re Proposed Addition to the Additional Rules*, 220 So. 2d at 8. See also IPSSC REPORT, *supra* note 1, at 18-19 (the Statement).

121. Compare Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-2, <http://www.flabar.org/newflabar/images/downloads/99-02pao.pdf> (last visited Nov. 15, 2000), with R. REGULATING FLA. BAR 4-1.6 cmt., <http://www.flabar.org/lawpractice/Rules/rtrfbch4.pdf> (last visited Jan. 2, 2001); see also IPSSC REPORT, *supra* note 1, at 19 (the Statement).

122. See, e.g., Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998).

123. See Fla. Bar Prof'l Ethics Comm., Proposed Advisory Op. 99-3 (1999), <http://www.flabar.org/newflabar/images/downloads/99-03pao.pdf> (last visited Nov. 15, 2000).

124. R. REGULATING FLA. BAR 4-1.2(a), <http://www.flabar.org/lawpractice/Rules/rtrfbch4.pdf> (last visited Jan. 2, 2001).

many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but *should defer to the client* regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.<sup>125</sup>

Thus, under Rule 4-1.2, the attorney is responsible for the technical and legal tactical issues while the client controls the means to be used in pursuing those objectives.<sup>126</sup> For instance, an attorney cannot file a specific action without the client's consent.<sup>127</sup> Likewise, a client is typically able to control whether depositions and research should be conducted based on whether the client wishes to incur fees for such expenses.<sup>128</sup> Because the insured has ceded the right to control litigation to the insurer, it is the insurer, as co-client, that controls the litigation and the accrual of accompanying fees.<sup>129</sup>

Attorneys clearly must be free to exercise their independent professional judgment by forming and voicing their opinions if they are to provide the best possible advice to their clients (independent judgment). On the other hand, *clients, not attorneys*, have the right to decide which advice to accept and which attorney action to authorize (independent action).<sup>130</sup> If attorneys are unimpeded by their clients' wishes during the course of the representation, clients are effectively held hostage by their own counsel. Absent a material and irreconcilable conflict with the insured, to deny insurers the right to direct their insureds' litigation is to negate the right of all clients to decide the conduct of their cases. As stated in the preamble to the *Florida Rules of Professional Conduct*, a "lawyer is a representative of clients . . . [and] as a representative of clients, a lawyer performs various functions."<sup>131</sup> These include acting as adviser, advocate, negotiator, and intermediary.<sup>132</sup> These valuable functions all require the exercise of independent professional judgment, but independence of judgment should not be confused with ultimate decisionmaking responsibility, which is the prerogative of the client.

---

125. R. REGULATING FLA. BAR 4-1.2 cmt. (emphasis added).

126. *See id.*

127. *See Florida Bar v. Hayden*, 583 So. 2d 1016, 1017 (Fla. 1991).

128. *See* R. REGULATING FLA. BAR 4-1.2 cmt.

129. As noted earlier, if the insurer's decisions regarding fees are not made in good faith, the insured has a remedy in an action for bad faith. *See supra* text accompanying note 19.

130. *See* R. REGULATING FLA. BAR 4-1.2 cmt.

131. R. REGULATING FLA. BAR preamble to ch. 4.

132. *See id.*

### 3. *The Imagined Threat to Attorney-Client Privilege*

Several opinions cite to *United States v. Massachusetts Institute of Technology*<sup>133</sup> for the proposition that the disclosure of information by an insurer or attorney to a third-party auditor waives the attorney-client privilege and thus may be detrimental to the insured.<sup>134</sup> This is simply untrue. As noted above, under the common interest doctrine, information may be shared among co-clients and their agents acting pursuant to confidentiality agreements.<sup>135</sup>

Furthermore, the *MIT* opinion does nothing to undermine that black letter law. The actual facts of that case (which are not readily apparent from reading the opinion itself) reflect that the information disclosed in that case was disclosed to the *opposing* party,<sup>136</sup> and not to a party that falls within the scope of the common-interest doctrine or to a party necessary to properly effect the representation.<sup>137</sup> Thus, it is inappropriate to rely on this case for the proposition that the use of third-party auditors poses a threat to the insured.

### 4. *Issuance Without a Formal Process*

Moreover, complicating these errors, most ethics opinions are issued without any court approval process, or other approval process, for allowing the contents of the ethics opinions to be contested.<sup>138</sup> Again, Florida Staff Opinions 20,591 and 20,762 offer a good example. Both of these opinions were prepared by Florida Bar ethics staff without any formal approval process. After these staff opinions were issued, formal advisory opinions (the PAOs) addressing the same issues and containing much of the same language were proposed and ultimately contested before The Florida Bar's Board of Governors.<sup>139</sup>

133. 129 F.3d 681 (1st Cir. 1997).

134. See Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998); Alaska Bar Ass'n Ethics Comm., Ethics Op. 99-1 (1999); Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999); Ind. State Bar Ass'n Legal Ethics Comm., Op. 4 (1998); Ky. Bar Ass'n, Advisory Ethics Op. E-404 (1998); Miss. Bar Ethics Comm., Op. 246 (1999); Or. State Bar Ass'n, Formal Op. 1999-157 (1999); R.I. Sup. Ct. Ethics Advisory Panel, Op. 99-17 (1999).

135. See *supra* text accompanying note 42.

136. See *MIT*, 129 F.3d at 681-82 (stating that MIT had previously disclosed the information to an auditing agency of the Department of Defense, but then asserted privilege as to the IRS).

137. See Fla. Bar Ins. Practices Special Study Comm., transcript of public hearing at 113-14 (Nov. 4, 1999) (available at The Fla. Bar, Tallahassee, Fla.) (statement of Bill Barker).

138. See, e.g., FLA. BAR PROCEDURES FOR RULING ON QUESTIONS OF ETHICS Rule 2(c), <http://www.flabar.org/newflabar/memberservices/ethics/ethrules.html> (last visited Oct. 29, 2000).

139. See sources cited *supra* note 111.

As the AIA and other insurers argued,<sup>140</sup> the PAOs were outside the jurisdiction of the Professional Ethics Committee, in part because they attempted to establish broad policy tantamount to rules governing bar member's conduct—without the benefit of a particularized set of facts regarding specific, contemplated conduct of a member of the Bar.<sup>141</sup> This, in turn, led to substantive errors in the PAOs. On December 15, 2000, the Board of Governors unanimously rejected the PAOs because of “concerns regarding the procedures under which the opinions were promulgated.”<sup>142</sup>

Further, state ethics opinions are often drafted by bar staff attorneys<sup>143</sup> who are unlikely to have much experience with evaluating ethics in the specific context of insurance defense. Most likely, the failure to provide adequate process is a result of the “advisory” nature of almost all state bar ethics opinions. However, even if such opinions cannot be used to bring a disciplinary action against an attorney, they are nonetheless official pronouncements of, if not the Bar, the very counsel that may be charged with bringing disciplinary actions against attorneys. Thus, many ethics opinions have the potential to constitute essentially new ethics rules, to the extent that they represent broad policy decisions by individuals with the powers of prosecutorial discretion. It is therefore unsettling for these types of issues to be resolved without *any* proper rulemaking process.

### 5. *Reliance on Opinions of Other States*

At least eighteen state bar ethics opinions cite to, rely on, or claim to be consistent with, ethics opinions of other states.<sup>144</sup> However, in

---

140. See Fla. Bar Board Review Committee on Professional Ethics, transcript of hearing at 6-25 (Dec. 14, 2000) (on file with authors) (statements of Stephen Grimes and Steve Day).

141. The Florida Bar's procedures provides that members of The Florida Bar may request an advisory opinion from Bar Staff and then from the Committee “about their contemplated professional conduct . . .” FLA. BAR PROCEDURES FOR RULING ON QUESTIONS OF ETHICS Rule 2(a), <http://www.flabar.org/newflabar/memberservices/ethics/ethrules.html> (last visited Oct. 29, 2000) (emphasis added). In fact, Rule 2(b) specifically provides that “[e]ach request shall present in detail all operative facts upon which the request is based, including a statement affirming that the inquiring member is requesting an advisory ethics opinion concerning the member's own contemplated conduct.” Rule 2(b).

142. Minutes of the Regular Meeting of the Board of Governors of The Florida Bar (Dec. 15, 2000), <http://www.flabar.org/newflabar/organization/Board/dec00min.html>.

143. See FLA. BAR PROCEDURES FOR RULING ON QUESTIONS OF ETHICS Rule 2(c).

144. See Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998); Colo. Bar Ass'n Ethics Comm., Formal Op. 91 (1993); D.C. Bar Legal Ethics Comm., Op. 290 (1999); Idaho State Bar Ass'n Bd. of Comm'rs, Formal Ethics Op. 136 (1999); Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct 98-08 (1999); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Op. 99-01 (1999); Ky. Bar Ass'n, Advisory Ethics Op. E-404 (1998); Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 99-7 (2000); Miss. Bar Ethics Comm., Op. 246 (1993); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 716 (1999); Cincinnati Bar Ass'n Ethics and Prof'l Responsibility Comm., Ethics Inquiry 98-99-02 (1998); Or. State Bar Ass'n, Formal

making that claim, those ethics opinions do not analyze the cited states' substantive law to determine whether the law in those states is consistent with the law of the state in which the opinion is issued.<sup>145</sup> Further, some have cited to opinions that either contradicted their own states' case law or were subsequently withdrawn or overruled.

A pointed illustration is the reliance of other states, such as Vermont, on Florida Staff Opinions 20,591 and 20,762. At least eleven states cite to Florida Bar Staff Opinions 20,591 or 20,762 for support,<sup>146</sup> despite the substantive and procedural flaws outlined above. In fact, the statement that "an insurance defense lawyer's client is the insured, not the insurance company," was repeated verbatim in Vermont Professional Responsibility Committee, Advisory Ethics Opinion 98-7, which cites to Florida Bar Staff Opinion 20,762 for support.<sup>147</sup> Yet, as noted above, this statement contradicted Florida's substantive law. In fact, it appears to contradict *Vermont's* substantive law as well.<sup>148</sup>

In short, by relying on unapproved, legally incorrect Florida staff opinions, Vermont and other states have perpetuated ethics opinions that are based in large part on erroneous conclusions and supposition. Because of the potential for error, no foreign opinion should ever be used as the basis for an ethics opinion *unless*: (1) the foreign opinion was issued based on a proper process; (2) the foreign opinion is first compared with the underlying law of that state's jurisdiction (including substantive law regarding the formation of attorney-client relationships and the law of insurance); (3) the law of the foreign jurisdiction is then compared with the law of the issuing state; and (4) the underlying facts of the foreign opinion provide an

Op. 1999-157 (1999); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-32 (1998); R.I. Sup. Ct. Ethics Advisory Panel, Op. 99-18 (1999); Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999); Vt. Prof'l Responsibility Comm., Advisory Ethics Op. 98-7 (1998); Va. State Bar Comm. on Legal Ethics, Op. 1723 (1998); W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 99-02 (1999).

145. See, e.g., Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999).

146. See Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998); Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999); D.C. Bar Legal Ethics Comm., Op. 290 (1999); Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 99-7 (1999); Cincinnati Bar Ass'n Ethics and Prof'l Responsibility Comm., Ethics Inquiry 98-99-02 (1998); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-32 (1998); Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999); Vt. Prof'l Responsibility Comm., Advisory Ethics Op. 98-7 (1998); Va. State Bar Comm. on Legal Ethics, Op. 1723 (1998); W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 99-02 (1999).

147. Vt. Prof'l Responsibility Comm., Advisory Ethics Op. 98-7 (1998).

148. See *In re Illuzi*, 632 A.2d 346, 355 (Vt. 1993) (finding that the plaintiff's attorney violated ethics rules by speaking directly to the insurer instead of communicating through the attorney hired to defend the insurer). The dissenting opinion in *Illuzi* disagreed only as to the sanction and affirmed that at the beginning of the litigation, the attorney may represent both the insured and the insurer. See *id.* at 492 (Allen, C.J., dissenting).

adequate basis for applying the state's ethics rules in the proper legal context.

### B. *The Montana Decision*

Even in the one opinion where a state supreme court has actually addressed the use of third-party auditors and billing guidelines, the legal analysis is illogical and fundamentally flawed. In *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*,<sup>149</sup> the Montana Supreme Court concluded that billing guidelines per se interfere with the independent judgment of defense counsel<sup>150</sup> and that defense counsel cannot disclose billing information to third-party auditors without first obtaining the insured's contemporaneous and fully informed consent.<sup>151</sup> The court based its decision on a number of irrational factors and conclusions. The court: (1) concluded that under ethics rules, the insurer is not a co-client of defense counsel, while upholding prior Montana decisions holding just the opposite;<sup>152</sup> (2) concluded that those prior Montana decisions finding that the insurer and insured were co-clients of defense counsel were inapposite because they did not address the relationship under the *Rules of Professional Conduct*;<sup>153</sup> (3) defined independence of professional judgment as freedom of independent action;<sup>154</sup> (4) treated mere potential conflicts of interest as actual conflicts of interest;<sup>155</sup> and (5) treated the disclosure of detailed billing statements to a third-party auditor as disclosure to a potential adversary.<sup>156</sup> Each of these conclusions is flawed.

First, as explained above, client status is not afforded by the *Rules of Professional Conduct*.<sup>157</sup> Rather, it is a function of the substantive contract law of the state.<sup>158</sup> Ethics rules address attorney obligations and behavior toward clients and nonclients alike.<sup>159</sup> Clearly, those obligations will differ depending on whether an affected person is a client, a represented party, a witness, an officer of the court, or even a stranger to the proceeding. But the rules do not determine the

---

149. 2 P.3d 806 (Mont. 2000).

150. *Id.* at 815.

151. *Id.* at 821-22.

152. *See id.* at 810-14.

153. *See id.* at 810.

154. *See id.* at 817.

155. *See id.* at 814.

156. *See id.* at 821.

157. *See supra* Part II.A.2.

158. *See supra* Part II.A.2.

159. *See, e.g.*, R. REGULATING FLA. BAR preamble to ch. 4, <http://www.flabar.org/lawpractice/Rules/rrtfbch4.pdf> (last visited Jan. 2, 2001).

affected person's status; they merely set forth the obligations accompanying the person's status.<sup>160</sup>

Second, the Montana Supreme Court's rationales for assigning client status for purposes of substantive law and withholding it for purposes of ethics law reveal a glaring inconsistency. If the total control afforded by the insurance contract suffices to make insurers *liable* for the conduct of defense counsel and suffices to make insurers "clients" within the scope of the attorney-client privilege, then it does not logically follow that an insurer cannot exercise the control *afforded by the insurance contract* because no attorney is permitted to follow its instructions *under ethics rules*. It is an empty gesture to note that Montana case law permits the insurer to control the defense of covered claims but to nonetheless conclude, using a tortured interpretation of ethics rules, that the insurer cannot exercise that control. Arguably, the Montana Supreme Court's decision that contractual control must give way to the ethics rules would undermine the law of bad faith in Montana.

Third, as noted above, equating freedom of action with independence of judgment is erroneous because it would allow an attorney's advisory role to expropriate actual decisionmaking authority typically reserved to the client or its agents.<sup>161</sup> As the United States Supreme Court determined in *Evans v. Jeff D.*,<sup>162</sup> attorneys must be free to offer candid advice and to recommend a course of action to those who retain them.<sup>163</sup> However, the choice to act or refrain from acting on the attorney's advice must always be a separate decision for the client, or its assignee or agent, to make.<sup>164</sup> Despite this fact, the Montana court concluded that billing and practice rules violate the *Rules of Professional Conduct* by interfering with defense counsels' freedom of action.<sup>165</sup>

The ethics rules require attorneys to ensure they retain the freedom to give advice,<sup>166</sup> but they limit what action attorneys can take in the context of the clients' decisionmaking authority.<sup>167</sup> To the extent that the insured-client has ceded that decisionmaking

160. Under the ABA's Model Rules of Professional Conduct (after which both Florida's and Montana's rules were modeled), Rules 4.1 through 4.4 all relate to the attorney's behavior toward nonclients, *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1998) (regarding dealings with unrepresented persons), while Rules 1.1 through 1.17 detail obligations toward clients, *see, e.g.*, Rule 1.4 (regarding communicating with a client).

161. *See supra* Part IV.A.2.b.

162. 475 U.S. 717 (1986).

163. *Id.* at 728.

164. *See, e.g.*, R. REGULATING FLA. BAR 4-1.2 cmt.

165. *See In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 815 (Mont. 2000).

166. *See, e.g.*, R. REGULATING FLA. BAR 4-1.7(b).

167. *See, e.g.*, R. REGULATING FLA. BAR 4-1.2 cmt.

authority to another, the attorney's right to act is still limited. The Montana court's statements seem to imply that the threat of withholding payment always acts to chill an attorney's independent professional judgment<sup>168</sup> (because, for example, the attorney does not want to risk harm to a future stream of business). This is nonsense because the same would be true in *any* situation where an attorney gets most of his or her business from a few large clients. At bottom, any issue of payment is a matter between the attorney and the client, *not* a matter to be resolved in the name of *ethics*.

Fourth, the court fails to appreciate the critical difference between merely potential and actual conflicts of interest. The court notes that "[b]efore the final resolution of any claim against an insured, there clearly exists the potential for conflicts of interest to arise."<sup>169</sup> This, however, is true in every situation involving multiple clients or an agency relationship. At this level of abstraction, virtually no legal relationship is immune to a potential conflict of interest.

However, the ethics rules (and supporting case law) deal with actualities, not mere potentialities. The Tennessee Supreme Court in *In re Youngblood*,<sup>170</sup> a case ironically cited with approval by the Montana Supreme Court in its decision,<sup>171</sup> specifically based its holding on a rejection of potential conflict as a basis for overturning an ethical opinion adverse to insurers.<sup>172</sup> The Tennessee court stated that "[b]ecause the opinion bases its finding upon the potential for conflict in the relationship of employer-employee rather than particular facts which demonstrate there is, in fact, a conflict of interest, *it does not reflect a proper interpretation of the Code [of Professional Conduct]*."<sup>173</sup> Tellingly, the three examples of potential conflict used by the Montana court<sup>174</sup> are all examples of actual conflict and would fall outside the community of interests upon which the insurers rely when giving directions to defense attorneys. *In none of these cases would litigation guidelines even be in use.*

Finally, the Montana court erroneously assumes that cost control measures are, by their nature, "adversarial."<sup>175</sup> This cannot be true. Otherwise, insurers would not be able to audit an attorney's bills *internally*. More importantly, *no* payor for legal services (whether client or not) would be able to scrutinize the attorney's bills without running the risk of creating an adversarial relationship.

---

168. See *In re Rules of Prof'l Conduct*, 2 P.3d at 815.

169. *Id.* at 814.

170. 895 S.W.2d 322 (Tenn. 1995).

171. See *In re Rules of Prof'l Conduct*, 2 P.3d at 815.

172. See *In re Youngblood*, 895 S.W.2d at 330.

173. *Id.* (emphasis added).

174. See *In re Rules of Prof'l Conduct*, 2 P.3d at 813.

175. *Id.* at 821.

V. INSURANCE PRACTICES SPECIAL STUDY COMMITTEE AND THE  
STATEMENT OF INSURED CLIENT'S RIGHTS

In early 1999, The Florida Bar, like many other bar associations throughout the country, was asked to address issues related to the insurance tripartite relationship.<sup>176</sup> The Bar examined these issues through two separate committees working on parallel tracts: the Professional Ethics Committee ("Ethics Committee") and the Insurance Practices Special Study Committee ("IPSSC"). The IPSSC was created by the Bar's leadership and was charged with:

protect[ing] the public and those insured by policies of insurance issued in the State of Florida from the business practices of certain insurance companies that may (1) constitute the unauthorized practice of law by nonlawyer employees of the insurers; (2) give rise to conflicts of interest or other violations of the Rules Regulating the Florida Bar by defense counsel; (3) compromise the quality of the defense provided to Florida insureds; or (4) fail to adequately inform Florida insureds of the limitations and restrictions imposed upon defense counsel by the insurers and the ethical concerns that arise from those limitations and restrictions.<sup>177</sup>

As noted above, the recommendations of the Ethics Committee were ultimately rejected. The recommendations of the IPSSC, however, were accepted.

*A. Participatory Process Leads to Workable Solutions Consistent  
with Substantive Law*

The IPSSC was an appropriate body for examining factual issues and making recommendations for the adoption of rules governing the professional conduct of attorneys.<sup>178</sup> To that end, the IPSSC engaged in an exhaustive fact-finding process. The IPSSC held two full days of public hearings, heard extensively from interested parties representing conflicting positions on the issues before it, prepared and received responses to surveys addressing these issues, and collected volumes of information in this regard.<sup>179</sup> The IPSSC also allowed and welcomed interested parties to both comment and participate at all of its more than eleven meetings (including full committee and subcommittee meetings).<sup>180</sup>

176. This information is based on personal conversations between the authors and the Board of Governor's members.

177. IPSSC REPORT, *supra* note 1, at 5.

178. See R. REGULATING FLA. BAR 2-8.1, 2-8.2.

179. See IPSSC REPORT, *supra* note 1, at 2-3, 6.

180. See *id.* at 6. In contrast, one of the authors attended the Ethics Committee's last two meetings in January and March 2000, which specifically prohibited any public testimony regarding the PAOs. Additionally, the author attended the Committee's three-

At the conclusion of its work, the IPSSC issued a final report making several recommendations to the Board of Governors of The Florida Bar,<sup>181</sup> the most significant of which was the proposal of the Statement of Insured Client's Rights<sup>182</sup> (the Statement) and an accompanying implementation rule governing distribution of the Statement.<sup>183</sup> The Statement was developed to facilitate an attorney's ethical responsibilities in insurance defense representation and to assist insured clients in understanding their basic rights.<sup>184</sup> Notably, however, the IPSSC specifically noted in its comments to the proposed rule that there was a potential for ethical risks *any* time an attorney undertakes the representation of multiple clients.<sup>185</sup>

The work of the IPSSC also recognizes the import of the tripartite relationship, the contractual obligations of both the insurer and the insured, the highly variable nature of insurance, and the impracticality of establishing a statement of rights or a rule applicable to all forms of insurance.<sup>186</sup> In fact, the comments to the Statement specifically exclude workers' compensation insurance from its scope.<sup>187</sup> Further, the IPSSC's report acknowledges that, under most policies, the insurer pays for and controls the defense.<sup>188</sup>

The Statement was designed to assist the attorney in explaining to the insured how the representation will be handled.<sup>189</sup> The Statement does not prohibit guidelines or otherwise undermine the provisions of the insurance contract.<sup>190</sup> Rather, it advises the insured that the insurer may impose guidelines, and that the attorney must notify the insured if the attorney is denied authorization to provide a service or action the attorney believes, in his or her independent professional judgment, to be necessary.<sup>191</sup> The Statement and implementing rule reflect a recognition that: (1) the attorney may have a duty to share confidential information with the insurer,<sup>192</sup> (2) insurers frequently have a contractual right to make the final

---

hour hearing on the original PAOs during which the Committee heard only limited testimony.

181. See IPSSC REPORT, *supra* note 1, at 13-29.

182. See *id.* at 17-22.

183. See *id.* at 17. The IPSSC also recommended the implementation of CLE courses regarding the tripartite relationship, provided a copy of its record to the Florida Department of Insurance for review, and suggested that The Florida Bar Unauthorized Practice of Law Committee should review any issues regarding the unauthorized practice of law since it was a more appropriate forum to address those issues. See *id.* at 23-27.

184. See *id.* at 2.

185. See *id.* at 20-21.

186. See *id.* at 13-16.

187. See *id.* at 21.

188. See *id.* at 18.

189. See *id.* at 16.

190. See *id.* at 18.

191. See *id.*

192. See *id.*

decision regarding settlement of a claim,<sup>193</sup> and (3) it is sometimes impractical in the circumstances of insurance defense practice to require a attorney to obtain an insured's consent before taking action.<sup>194</sup> In essence, the Statement is consistent with and assists the ethical obligations of an attorney by promoting a mutual understanding of the attorney's role in the particular representation and providing an opportunity for insureds to communicate their preferences to the lawyer; but *it does not undermine existing law* governing the tripartite relationship and the insurance contract. Further, the Statement is fully consistent with Florida ethics rules.<sup>195</sup>

This is the critical difference between the Statement and the ethics opinions being issued by various state bar associations. The chart in Appendix C illustrates these distinctions in more detail.<sup>196</sup> The distinctions outlined in the appendix show that, as currently framed, the IPSSC's recommendations are sensible, realistic, and grounded in practical application. In contrast, most ethics opinions (as well as the Montana decision) are vague, unrealistic, and unworkable.

### *B. Ethics Regulation and Economic Interests*

The IPSSC heard extensive testimony regarding the important distinction between illegitimate economic interference and legitimate regulation of attorneys' ethics.<sup>197</sup> Many commentators correctly asserted that attorney disgruntlement and complaints regarding insurer litigation management practices—as well as the amount and type of services for which an insurer will pay—are purely economic issues affecting business relationships.<sup>198</sup> That is, these practices become ethics issues only if an insurer actually induces an attorney to behave unethically.<sup>199</sup>

Obviously, attorneys must be able to offer candid advice and recommend a course of action to those who retain them; this is what is meant by exercising independence of judgment. As long as the defense attorney is able to exercise independent judgment by recommending a course of action to the insurer and the insured co-

193. *See id.* at 19.

194. *See id.* at 21.

195. In fact, the proposed rule specifically states, "Nothing in the Statement . . . shall be deemed to augment or detract from any substantive or ethical duty of a lawyer . . ." *Id.* at 17.

196. *See infra* Appendix C.

197. *See* IPSSC REPORT, *supra* note 1, at 6-7.

198. *See, e.g.*, Fla. Bar Ins. Practices Special Study Comm., transcript of public hearing at 146-47 (Nov. 19, 1999) (available at The Fla. Bar, Tallahassee, Fla.) (statement of Charles Silver).

199. *See, e.g.*, Fla. Bar Ins. Practices Special Study Comm., transcript of public hearing at 129-30 (Nov. 4, 1999) (available at The Fla. Bar, Tallahassee, Fla.) (statement of Bill Barker).

clients and to actually perform the services needed to protect their interests, the state bar associations have no jurisdiction to intervene in the economic relationship between the defense attorney and the insurer. Even though the IPSSC heard extensively from interested parties on these issues, not a *single case* was presented to the IPSSC in which an insured was *actually* harmed by third-party bill review, litigation guidelines, or the use of staff counsel to carry out the representation.<sup>200</sup>

Ethics opinions that single out one segment of the Bar to the potential benefit of another segment or that artificially standardize the cost of legal services raise serious questions of unfair competition. The U.S. Supreme Court has recognized that the practice of law is both a profession and a business.<sup>201</sup> Yet, the Court has also recognized that “[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . .”<sup>202</sup> As a result, the Court has not hesitated to apply the antitrust laws to those attorneys who have used the self-regulatory process or the legal “profession” to shield anticompetitive business behavior.<sup>203</sup> If a court agrees that there is no evidentiary basis for finding that insurers’ practices result in actual harm to insureds—or that a committee lacked jurisdiction to issue non-fact-specific pronouncements that amount to surreptitious rulemaking—then members of the public and others, including the courts, may conclude that such ethics opinions are an illegal act motivated by economic interest.

The interests of some attorneys in protecting their own incomes are directly at odds with the interests of insurance consumers in purchasing coverage at prices not inflated by unnecessary defense costs. State bar associations ought not exploit ethics rules to advance attorney interests over those of their insured clients. Clearly, economic protectionism and competitive restraints are not legitimate purposes of the *Rules of Professional Conduct* or ethics opinions interpreting those rules.

---

200. See, e.g., Fla. Bar Ins. Practices Special Study Comm., transcript of public hearing at 1-265 (Nov. 4, 1999) (available at The Fla. Bar, Tallahassee, Fla.); Fla. Bar Ins. Practices Special Study Comm., transcript of public hearing at 1-308 (Nov. 19, 1999) (available at The Fla. Bar, Tallahassee, Fla.).

201. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

202. *Id.* at 787.

203. See *id.* at 791 (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 422-25 (1990) (holding that a boycott by a group of court-appointed criminal attorneys aimed at increasing compensation for taking criminal cases of indigent defendants constituted a per se violation of federal antitrust law); see also *Hoover v. Ronwin*, 466 U.S. 558, 582-84 (1984) (Stevens, J., dissenting) (comparing occupational restrictions to medieval guilds).

## VI. CONCLUSION

The various ethics opinions issued recently by state bar associations, as well as the Montana decision, essentially seek to impose a remedy where there is no problem. Absent an actual conflict between an insurer and an insured, there are simply no existing ethical dilemmas in need of solution by way of ethics or court opinions. Indeed, the only dilemma is one of economics, which is simply a contractual issue between the insurer and the defense attorney. Further, these ethics opinions seemingly discriminate against the insurance industry without a reasonable basis for the distinction and frequently contradict clear legal precedent. In the overwhelming majority of states, that precedent has unquestionably sanctioned the insurance contract and the duties, responsibilities, and rights established thereunder. Under that precedent, defense counsel owes a duty to both the insurer and the insured, and the insurer has an obligation to act in the best interests of the insured.<sup>204</sup>

Unlike the ethics opinions, the Statement of Insured Client's Rights acts to facilitate, not undermine, those obligations. The authors believe that the Statement provides a great example to other state bars of finding a responsible, balanced way to handle business issues between attorneys and insurers in a way that aids insurance consumers without jeopardizing the benefits they receive when they buy liability insurance. This is a welcome change from the misguided, closed processes which have produced opinions that potentially damage the nature of liability insurance in those states.

All attorneys are bound by the rules regulating their professional conduct. Moreover, the need for qualified attorneys with high ethical standards is obviously essential. However, little or no evidence exists that any ethics complaints relating to conflicts of interest have been filed against attorneys acting within the insurance tripartite relationship. Further, there is simply no evidence that the use of outside auditing or litigation guidelines has harmed any insured (or that there is no existing adequate remedy should such harm occur). Rather, it is the ethics opinions themselves that will harm insureds by undermining insurance contracts and causing an increase in premiums based on the corresponding cost in unchecked attorneys fees. Where insureds have not been harmed, it is simply unconscionable to adopt ethics rules that will increase litigation costs and premiums and single out the insurance industry without just cause. The Statement of Insured Client's Rights represents a viable, alternative mechanism for promoting the ethical obligations of the defense attorney in the tripartite relationship—without undermining

---

204. See, for example, the recent decision in *Paradigm Ins. Co. v. The Longerman Law Offices, P.A.*, 2001 Ariz. LEXS 87 (Ariz. 2001).

existing law or the insurance contract. It is thus hoped that the Florida Supreme Court will take the lead in this area by adopting this refreshing approach to the issue.

## APPENDIX A: CLIENT STATUS IN THE STATES

1. *Jurisdictions Recognizing Dual-Client Status in the Tripartite Relationship*

JURISDICTION	AUTHORITY
Alabama	<i>Mitchum v. Hudgens</i> , 533 So. 2d 194, 198 (Ala. 1988) (stating that when insurance company retains attorney to defend action against insured, attorney represents insured as well as insurer in furthering the interests of each other).
Alaska	<i>Home Indem. Co. v. Lane Powell Moss &amp; Miller</i> , 43 F.3d 1322, 1330 (9th Cir. 1995) (recognizing that insured and insurer are both represented by the attorney as long as there is no conflict of interest).
Arizona	<i>Paradigm Ins. Co. v. The Longerman Law Offices, P.A.</i> , 2001 Ariz. LEXS 87 (Ariz. 2001) (explaining that where there is no conflict a defense attorney can represent both the insurer and insured, and the attorney owes a duty to both).
California	<i>Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon &amp; Gladstone</i> , 93 Cal. Rptr. 2d 534, 542 (Cal. Ct. App. 2000) (recognizing that the attorney has two clients: the insured and insurer).
Delaware	<i>Hoechst Celanese Corp. v. National Union Fire Ins. Co.</i> , 623 A.2d 1118, 1124 (Del. Super. Ct. 1992) (discussing the relationship among different defendants to determine whether documents were privileged; court suggests the attorney may represent both the insurer and insured).
District of Columbia	<i>National Union Fire Ins. Co. v. Aetna Cas. &amp; Sur. Co.</i> , 384 F.2d 316, 317-18 (D.C. Cir. 1967) (finding that the attorney acted as insurer's representative while defending insured).
Florida	<i>In re Proposed Addition to the Additional Rules Governing Conduct of Attorneys in Fla.</i> , 220 So. 2d 6, 8 (Fla. 1969) (finding that both salaried and non-salaried insurance attorneys may represent insurer and insured if there is no conflict).

JURISDICTION	AUTHORITY
Georgia	Coscia v. Cunningham, 299 S.E.2d 880, 881 (Ga. 1983) (recognizing that an attorney represents both the insured and insurer).
Hawaii	Finley v. Home Ins. Co., 975 P.2d 1145, 1152 (Haw. 1998) (attorney can not represent both insurer and insured when there is a conflict, and citing authority that attorney represents them both when there is no conflict).
Idaho	Pendlebury v. Western Cas. & Sur. Co., 406 P.2d 129, 134 (Idaho 1965) (recognizing that the attorney may represent both; when there is a conflict, the attorney may be in an awkward situation and cannot take a position adverse to the interest of his client).
Illinois	Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322, 329 (Ill. 1991) (“[W]hen insurer retains attorney to defend insured, attorney represents both insured and insurer in furthering the interests of each.”).
Indiana	Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 160-61 (Ind. 1999) (recognizing that the attorney represents both the insured and insurer; dual representation is permissible even when the attorney was in-house counsel for the insurer, because their interests are aligned).
Iowa	Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 923 (Iowa 1958) (stating that the attorney represented both the insured and insurer, and the fact that another selects and pays for the attorney does not control the attorney-client relationship), <i>cited with approval in</i> Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995).
Kansas	Glenn v. Fleming, 781 P.2d 1107, 1113 (Kan. Ct. App. 1989) (finding that the insured’s attorney represented insurer as well, and insurer had a right to control and direct the litigation), <i>aff’d in part &amp; rev’d in part</i> , 799 P.2d 79 (Kan. 1990).

JURISDICTION	AUTHORITY
Louisiana	Hodges v. Southern Farm Bureau Cas. Ins. Co., 433 So. 2d 125, 132 (La. 1983) (recognizing that the attorney represented both the insurer and insured); Brasseaux v. Girouard, 214 So. 2d 401, 409 (La. Ct. App. 1968) (finding that an attorney may simultaneously represent the insured and insurer).
Maryland	Fidelity & Cas. Co. v. McConnaughy, 179 A.2d 117, 121 (Md. 1962) (stating that an attorney can represent insured and insurer unless a conflict develops).
Massachusetts	McCourt Co. v. FPC Properties, Inc., 434 N.E.2d 1234, 1235 (Mass. 1982) (“The law firm is attorney for the insured as well as the insurer.”).
Minnesota	Shelby Mut. Ins. Co. v. Kleman, 255 N.W.2d 231, 232 (Minn. 1977) (finding “no conflict of interest in the representation of an insurance company and an insured by a single law firm”).
Mississippi	Moeller v. American Guar. & Liab. Ins. Co., 707 So. 2d 1062, 1070 (Miss. 1996) (recognizing that an attorney has two separate and distinct clients, the insured and the insurer); Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255, 265 (Miss. 1988) (recognizing that the attorney may represent the insured and insurer, but insured’s interests are paramount if a conflict arises).
Missouri	<i>In re Allstate Ins. Co.</i> , 722 S.W.2d 947, 952 (Mo. 1987) (stating that an attorney may represent the insured and the insurer).

JURISDICTION	AUTHORITY
Nebraska	Hawkeye Cas. Co. v. Stoker, 48 N.W.2d 623, 632 (Neb. 1951) (stating attorney can not represent both insurer and insured when their interests conflict); Shahan v. Hilker, 488 N.W.2d 577, 581 (Neb. 1992) (“[C]ommunication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him.”).
Nevada	Campbell v. Maestro, 996 P.2d 412, 414 (Nev. 2000) (explaining that a “dual agency” relationship exists between the insured, insurer, and attorney, and the insurer has the right to control the litigation); Stubli v. Big D Int’l Trucks, Inc., 810 P.2d 785, 788 (Nev. 1991) (Rose, J., dissenting) (recognizing attorney represents insured and insurer).
New Hampshire	Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781, 784 (N.H. 1971) (finding communications between insurer and insured and the attorney were not privileged as between them because they were both clients of the attorney in the previous action).
New Jersey	Lieberman v. Employers Ins. of Wausau, 419 A.2d 417, 424 (N.J. 1980) (recognizing attorney has two clients, the insured and insurer unless a conflict arises, then the attorney may not continue to represent both); Gray v. Commercial Union Ins. Co., 468 A.2d 721, 725 (N.J. Super. Ct. App. Div. 1983).
New York	Goldberg v. American Home Assurance Co., 439 N.Y.S.2d 2, 4 (N.Y. App. Div. 1981) (stating attorney represented both insurer and insured).

JURISDICTION	AUTHORITY
Ohio	Netzley v. Nationwide Mut. Ins. Co., 296 N.E.2d 550, 561 (Ohio Ct. App. 1971) (“We hold that both Nationwide [the insurer] as well as . . . its insured, were clients of the legal counsel retained by Nationwide.”).
Oregon	<i>In re</i> Conduct of O’Neal, 683 P.2d 1352, 1356 (Or. 1984) (referencing dual representation of insurer and insured as example of situations where attorney can represent multiple clients if it is obvious the lawyer can represent the interests of each client without conflict).
Pennsylvania	Swedloff v. Philadelphia Transp. Co., 187 A.2d 152, 152-53 (Pa. 1963) (referring to the insurance company and the insured as clients of the attorney); Molitoris v. Woods, 618 A.2d 985, 989 (Pa. Super. Ct. 1992) (recognizing attorney can represent both an insured and insurer’s subrogation interest).
Rhode Island	Employers’ Fire Ins. Co. v. Beals, 240 A.2d 397, 403 (R.I. 1968) (finding that if there is no conflict, or the insured consents, an attorney may represent both the insured and the insurer), <i>abrogated on other grounds</i> by Peerless Ins. Co. v. Viegas, 667 A.2d 785 (R.I. 1995).
South Carolina	Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D 37, 41-42 (E.D.S.C. 1964) (recognizing attorney represented insurer and insured; therefore, communications were not privileged).
Vermont	<i>In re</i> Illuzzi, 632 A.2d 346, 355 (Vt. 1993) (finding plaintiff’s attorney violated ethics rules by speaking directly to insurer instead of communicating through the attorney hired to defend insured; dissent as to sanction affirms that, at the beginning of the litigation, an attorney may represent both an insured and insurer, but if a conflict arises, he may only represent the insured).

JURISDICTION	AUTHORITY
Virginia	State Farm Mut. Auto. Ins. Co. v. Floyd, 366 S.E.2d 93, 97 (Va. 1988) (“During their representation of both insurer and insured, attorneys have the duty to convey settlement offers to the insured . . . .”); Norman v. Insurance Co. of N. Am., 239 S.E.2d 902, 907 (Va. 1978) (“[A]n insurer’s attorney, employed to represent an insured, is bound by the same high standards . . . .”).
Washington	Barry v. USAA, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999) (noting that normally an attorney operates on behalf of two clients, the insurer and the insured).
Wisconsin	Roeske v. Deifenbach, 226 N.W.2d 666, 668 (Wis. 1975) (recognizing the attorney represented both the insured and insurer, but on appeal this was not appropriate because there was a conflict of interest).
Wyoming	Suchta v. Robinett, 596 P.2d 1380, 1385 (Wyo. 1979) (suggesting an attorney represents insurer and insured: “Both clients, the paying one and the one who had the company’s attorney assigned to him . . . .”).

2. *Jurisdictions Apparently Rejecting Dual-Client Status in the Tripartite Relationship*

JURISDICTION	AUTHORITY
Connecticut	Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 63 (Conn. 1999) (stating the attorney's duty is to his client, the insured, and not to the insurer); <i>but see</i> King v. Guiliani, No. CV92-0290380-S, 1993 WL 284462, at *6 (Conn. Super. July 27, 1993) (stating attorney can represent insurer and insured unless conflict arises).
Kentucky	American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 572 (Ky. 1996) (refusing to disturb ethics opinion, the court stated that the interests of the insured and the insurer are not always alike, and the attorney's duty is to the insured, not the one who is paying him, the insurer); <i>but see</i> Moore v. Roberts <i>ex rel.</i> Roberts, 684 S.W.2d 276, 278 (Ky. 1982) (acknowledging that the insured and insurer were represented by the same counsel and strongly advising attorney that the attorney choose one client where conflict such as coverage dispute exists).
Michigan	Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 496 N.W.2d 373, 378 (Mich. Ct. App. 1992) (stating that "[n]o attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured"), <i>aff'd</i> , 519 N.W.2d 864 (Mich. 1994); Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991).
Montana	<i>In re</i> Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 814 (Mont. 2000) (holding that "the insured is the sole client of defense counsel").
Texas	State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 627 (Tex. 1998) (stating insured is client; however, specifically stating that insurer may control defense and steps into the "shoes of the client" if there is no conflict of interest).

JURISDICTION	AUTHORITY
West Virginia	State <i>ex rel.</i> Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75, 88 (W. Va. 1998) (disagreeing with the majority view that attorney represents both the insurer and the insured; instead, the attorney represents the insured).

## APPENDIX B: BAR ASSOCIATIONS' ETHICS OPINIONS

JURISDICTION	AUTHORITY
United States of America	American Bar Ass'n, Formal Op. 01-421 (2001).
Alabama	Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02 (1998), LEXIS, Ethics Library, ETHOP File.
Alaska	Alaska Bar Ass'n Ethics Comm., Ethics Op. 99-1 (1999), WESTLAW, AK Eth. Op. 99-1.
Colorado	Colo. Bar Ass'n Ethics Comm., Formal Op. 107 (1999), <a href="http://www.cobar.org/comms/ethics/fo/fo_107.htm">http://www.cobar.org/comms/ethics/fo/fo_107.htm</a> (last visited June 22, 2001); Colo. Bar Ass'n Ethics Comm., Formal Op. 91 (1993), <a href="http://www.cobar.org/comms/ethics/fo/fo_91.htm">http://www.cobar.org/comms/ethics/fo/fo_91.htm</a> (last visited June 22, 2001).
Connecticut	Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 94-5 (1994), WESTLAW, CT. Eth. Op. 94-5.
District of Columbia	D.C. Bar Legal Ethics Comm., Op. 290 (1999), LEXIS, Ethics Library, ETHOP File.
Hawaii	Haw. Sup. Ct. Disciplinary Bd., Formal Op. 36 (1999), <a href="http://www.hsba.org/Hawaii/Admin/Disc/36.htm">http://www.hsba.org/Hawaii/Admin/Disc/36.htm</a> (last visited June 22, 2001); Haw. Sup. Ct. Disciplinary Bd., Formal Op. 37 (1999), <a href="http://www.hsba.org/Hawaii/Admin/Disc/37.htm">http://www.hsba.org/Hawaii/Admin/Disc/37.htm</a> (last visited June 22, 2001).
Idaho	Idaho State Bar Ass'n Bd. of Comm'rs, Formal Ethics Op. 136 (1999) (on file with the Idaho State Bar).
Illinois	Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct 98-08 (1999), WESTLAW, IL Adv. Op. 98-08.
Indiana	Ind. State Bar Ass'n Legal Ethics Comm., Op. 3 (1998), LEXIS, Ethics Library, ETHOP File; Ind. State Bar Ass'n Legal Ethics Comm., Op. 4 (1998), LEXIS, Ethics Library, ETHOP File.

JURISDICTION	AUTHORITY
Iowa	Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Op. 99-01 (1999), LEXIS, Ethics Library, ETHOP File.
Kentucky	Ky. Bar Ass'n, Advisory Ethics Op. E-404 (1998), LEXIS, Ethics Library, ETHOP File.
Louisiana	La. State Bar Ass'n Ethics Advisory Serv. Comm., unnumbered advisory opinion, <i>reprinted in LSBA Ethics Advisory Service Committee Renders Non-Binding Opinions</i> , 45 LA. B.J. 438 (1998) (Question 3), LEXIS, LEGNEW Library, LOUBAR File.
Maine	Me. Prof. Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 164 (1998) (on file with the Me. Bar Ass'n), <i>summarized in J. Scott Davis, Bd. of Overseers of the Bar, Bar Counsel's 1998 Annual Report</i> , 14 ME. B.J. 284, 290 (1999), LEXIS, LEGNEW Library, MEBARJ File.
Maryland	Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 99-7 (1999), LEXIS, Ethics Library, ETHOP File; Md. State Bar Ass'n Comm. on Ethics, Ethics Docket 00-23 (2000), LEXIS, Ethics Library, ETHOP File.
Mississippi	Miss. Bar Ethics Comm., Op. 246 (1999), LEXIS, Ethics Library, ETHOP File; Miss. Bar Ethics Comm., Op. 211 (1993), LEXIS, Ethics Library, ETHOP File.
Missouri	Mo. Office of the Chief Disciplinary Counsel, Informal Advisory Op. 980,188 (1998), <a href="http://www.mobar.net/opinions/search.htm">http://www.mobar.net/opinions/search.htm</a> (last visited June 22, 2001).
Montana	Mont. State Bar, Ethics Op. 900,517 (1990), <a href="http://www.montanabar.org/ethics/ethicsopinions/900517.html">http://www.montanabar.org/ethics/ethicsopinions/900517.html</a> (last visited June 22, 2001).
New York	N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 716 (1999), WESTLAW, NY Eth. Op. 716.
North Carolina	N.C. State Bar, 98 Formal Ethics Op. 10 (1998), WESTLAW, 1998 NC Eth. Op. 10.

JURISDICTION	AUTHORITY
Ohio	Cincinnati Bar Ass'n Ethics and Prof'l Responsibility Comm., Ethics Inquiry 98-99-02 (1998) (on file with the Cincinnati Bar Ass'n).
Oregon	Or. State Bar Ass'n, Formal Op. 1999-157 (1999), WESTLAW, OR. Eth. Op. 1999-157.
Pennsylvania	Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-32 (1998), WESTLAW, PA Eth. Op. 98-32.
Rhode Island	R.I. Sup. Ct. Ethics Advisory Panel, Op. 99-17 (1999), LEXIS, Ethics Library, ETHOP File; R.I. Sup. Ct. Ethics Advisory Panel, Op. 99-18 (1999), LEXIS, Ethics Library, ETHOP File.
South Carolina	S.C. Bar Ethics Advisory Comm., Op. 98-36 (1998), LEXIS, Ethics Library, ETHOP File.
South Dakota	S.D. State Bar, Ethics Op. 99-2 (1999), <a href="http://www.sdbar.org/members/ethics/1999/eo99-02.htm">http://www.sdbar.org/members/ethics/1999/eo99-02.htm</a> (last visited June 22, 2001).
Tennessee	Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143(a) (1999), WESTLAW, TN Eth. Op. 99-F-143(a); Tenn. Sup. Ct. Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999), WESTLAW, TN Eth. Op. 99-F-143.
Utah	Utah State Bar Ethics Advisory Op. Comm., Op. 98-03 (1998), WESTLAW, UT Eth. Op. 98-03.
Vermont	Vt. Prof'l Responsibility Comm., Advisory Ethics Op. 98-7 (1998), LEXIS, Ethics Library, ETHOP File.
Virginia	Va. State Bar Comm. on Legal Ethics, Op. 1723 (1998), LEXIS, Ethics Library, ETHOP File.
Washington	Wash. State Bar Ass'n, Formal Op. 195 (1999), <a href="http://www.wsba.org/c/RPC/fo/195.htm">http://www.wsba.org/c/RPC/fo/195.htm</a> (last visited June 23, 2001).

JURISDICTION	AUTHORITY
West Virginia	W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 99-02 (1999), LEXIS, Ethics Library, ETHOP File.
Wisconsin	Wis. State Bar Prof'l Ethics Comm., Ethics Op. E-99-1 (1999), LEXIS, Ethics Library, ETHOP File.

## APPENDIX C: COMPARING THE STATEMENT OF INSURED CLIENT'S RIGHTS WITH ETHICS OPINIONS AND THE MONTANA SUPREME COURT DECISION

THE STATEMENT OF INSURED CLIENT'S RIGHTS:	MANY BAR ETHICS OPINIONS AND THE MONTANA DECISION:
States that an attorney, at the outset of the representation, should determine if the attorney will be representing both the insured and the insurer. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 21.	Analyze aspects of the relationship between the attorney and the insured as if the insured is the only client. <i>See, e.g., In re</i> Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 814 (Mont. 2000).
States that under most policies, the insurer pays all fees and costs of defending the claim. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 18.	Prohibit an attorney from accepting compensation from the insurer under certain circumstances even if the insured agrees. <i>See, e.g., In re Rules of Prof'l Conduct</i> , 2 P.3d at 817.
States that, under most policies, the insurance company will control the defense and the attorney will take instructions from the insurance company. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 18.	Ignore this contractual relationship and the law approving the insurance contract. <i>See, e.g., Ala. State Bar Disciplinary Comm'n, Formal Op. RO-98-02</i> (1998).
States the insured clients may communicate their preferences to the attorney. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 18.	Provide vague standards for determining when a guideline impairs an attorney's professional judgment and thus effectively allow the attorney to both determine the governing standard and dictate how a case is to be conducted without regard to the insurer's or insured clients' preferences. <i>See, e.g., Wis. State Bar Prof'l Ethics Comm., Ethics Op. E-99-1</i> (1999).

THE STATEMENT OF INSURED CLIENT'S RIGHTS:	MANY BAR ETHICS OPINIONS AND THE MONTANA DECISION:
<p>States that the attorney, upon request by the insured, is to explain the guidelines to the insured or provide them with a copy of the guidelines; additionally states that the attorney must tell the insured if the attorney is denied authorization to provide a service or undertake an action the attorney believes necessary. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 18.</p>	<p>Prohibit certain guidelines regardless of insured client agreement. <i>See, e.g.,</i> Wash. State Bar Ass'n, Formal Op. 195 (1999).</p>
<p>Informs the insured that the attorney may be required to withdraw from the representation if an actual conflict arises. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 19.</p>	<p>Presume a nonwaivable conflict in the presence of certain guidelines. <i>See, e.g.,</i> Wash. State Bar Ass'n, Formal Op. 195 (1999).</p>
<p>Recognizes that the release of confidential information to a third-party auditor does not necessarily waive or jeopardize available privileges, and thus informs the insured that the attorney will advise the insured if the attorney believes a bill review or other action releases information in a manner that is contrary to the insured's interests. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 19.</p>	<p>Presume that the release of confidential information is detrimental to the insured client and require that the insured must be contacted each time any information will be released. <i>See, e.g.,</i> Utah State Bar Ethics Advisory Op. Comm., Op. 98-03 (1998).</p>
<p>Provides that the attorney is responsible for identifying conflicts of interest. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 19.</p>	<p>Presume a conflict of interest. <i>See, e.g.,</i> Iowa Sup. Ct. Bd. of Prof'l Ethics &amp; Conduct, Op. 99-01 (1999).</p>

THE STATEMENT OF INSURED CLIENT'S RIGHTS:	MANY BAR ETHICS OPINIONS AND THE MONTANA DECISION:
<p>Informs the insured of the possibility of an excess judgment. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 19.</p>	<p>Do not address the difference between settlements within policy limits and settlements exceeding policy limits.</p>
<p>States that there is a potential for ethical conflicts any time another person or client is paying for the representation. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 20.</p>	<p>Presume an actual conflict and fail to recognize numerous other situations where one client pays for and controls the litigation. <i>See, e.g.</i>, Idaho State Bar Ass'n Bd. of Comm'rs, Formal Ethics Op. 136 (1999).</p>
<p>Acknowledges that it is impractical to require the attorney to obtain the insured client's signature. <i>See</i> IPSSC REPORT, <i>supra</i> note 1, at 21.</p>	<p>Require specific consent. <i>See, e.g.</i>, Utah State Bar Ethics Advisory Op. Comm., Op. 98-03 (1998).</p>