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ETHICAL ISSUES IN REPRESENTING OR LITIGATING AGAINST ORGANIZATIONS

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I. CONFLICTS OF INTEREST

A. Conflicts Involving Insurance

If an employer maintains insurance coverage for labor and employment law claims made against them, often insurers will provide defense costs (and sometimes actually retain counsel to represent the insured) under a reservation of rights. In such cases, attorneys must be aware of the potential conflicts between the interests of the insurer and the insured. ABA Formal Ethics Opinion No. 96-403 (1996) declared that the rules of professional conduct, and not the insurance contract, govern the ethical obligations of a lawyer retained by the insurer to defend its insured.[2] Opinion No. 96-403 imposes special requirements on lawyers defending an insured under an insurance policy that permits the insurer to control the defense and settle within policy limits in its sole discretion. The Opinion also requires the lawyer to communicate to the insured the limitations that the policy places on her representation, "preferably early in the representation." Once the lawyer has so informed the insured, he need not consult the insured again before settling at the direction of the insured.[3] If the lawyer knows that the insured objects to a

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[1] This Paper is excerpted from Dennis P. Duffy, ETHICS AND PROFESSIONALISM HANDBOOK FOR LABOR AND EMPLOYMENT LAWYERS−12TH ED. © 1995-2015, NELI and Dennis P. Duffy (reprinted with permission).

[2] *See also* ABA Formal Ethics Op. No. 05-435 (2004) (unless the liability insurer is a party to the action brought by the lawyer's plaintiff-client, or unless under the particular circumstances of the case, the lawyer's taking testimony or discovery from the liability insurer presents a disqualifying adversity, representation of the plaintiff is not directly adverse and therefore does not present a concurrent conflict of interest to the lawyer's representation of the insurer in another action; however, a concurrent conflict may arise if there is a significant risk the representation of the individual plaintiff will be materially limited by the lawyer's responsibilities to the insurer, as for example, when it would be to the advantage of the plaintiff for the lawyer to reveal or use information relating to the representation of the insurer; if the lawyer concludes there is a concurrent conflict of interest, she may seek the informed consent of each affected client, confirmed in writing, to waive the conflict if she reasonably believes she will be able to provide competent and diligent representation); *APIE v. Garcia*, 876 S.W.2d 842, 844 n.6 (Tex. 1994) (the "client" of insurance defense counsel is the insured, not the insurance carrier who hires the attorney and pays for his services); *Bradt v. West*, 892 S.W.2d 56, 77 (Tex. App. 1994, *writ denied*) (retention of defense counsel does not create an attorney-client relationship between the insurance carrier and defense counsel).

[3] *See* Alaska Ethics Op. No. 2008-2 (2008) (where a lawyer represents an insured party whose claim is subrogated to a third-party insurer, subrogated insurer's right to receive proceeds from the insured plaintiff's recovery in a lawsuit does not make the insurer a "client" of the lawyer under the ethics rule); Ariz. Ethics Op. No. 94-03 (1994) (counsel appointed by insurer to defend an insured represents only the insured and not the insurer); *Amendments to Rules Regulating the Fla. Bar*, 838 So. 2d 1140 (Fla. 2003) (upon undertaking representation of an insured client at expense of insurer, lawyer has duty to ascertain whether lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of representation); Fla. Ethics Op. No. 02-7 (2002) (an attorney hired by an insurance company to defend an insured in an employment discrimination claim must provide a copy of the insured's statement of client's rights only if there is an element of personal injury involved in the claim; the attorney should make similar disclosure to the insured even if there is not an element of personal injury, but may choose the method of disclosure); *In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (insurer billing and practice guidelines, such as requiring that defense counsel seek prior approval for certain tasks, interferes with the defense counsel's exercise of independent judgment and may not be agreed to; court cautioned that its ruling should not be seen as a "blank check" to defense counsel to escalate litigation costs nor that defense counsel need not ever consult with insurers or that they cannot be held accountable for their work).

settlement, however, he may not settle the claim at the insurer's direction without giving the insured an opportunity to reject the insurer's defense and assume responsibility for its own defense at its own expense.[4] Note that so-called "monitoring" counsel, hired by the insurer to oversee the work of the lawyers directly representing the insured, have primary duty to the insurer as client and not to the insured.[5]

Similarly, ethics opinions uniformly hold that a lawyer must not permit compliance with "guidelines" and other directives of an insurance company relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing the insured.[6] Similarly, although a lawyer's flat-fee arrangement with an insurance company is not per se unethical, the lawyer should ensure that such arrangements do not impair the lawyer's ability to exercise independent judgment on behalf of the client.[7]

Insurance carriers typically will request that attorneys hired to represent the insured provide billing and other information concerning the insured client's case either to the insurance company directly or to an outside auditor. The majority of ethics committees that have considered the issue have held that a lawyer may not release an insured client's confidential information, including detailed work descriptions, to the insurer or an outside auditing firm hired by the insurer without appropriate disclosure and client consent.[8] Several states caution that such

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[4] *See* authorities cited at note 3, *supra*.

[5] *See Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223 (1999) (corporate parent was not "client" of law firm that served as "monitoring counsel" for parent's insurance underwriters as to claims against parent, for purpose of determining whether firm had conflict of interest in representing water district as to district's negligent engineering claims against corporate subsidiary).

[6] *See* ABA Formal Op. Ethics No. 01-421 (2001); Tex. Ethics Op. No. 542 (2002) (a lawyer is free to enter into a fee arrangement with an insurance company wherein the lawyer is compensated on a fixed fee basis for defined stages of representation in liability defense cases, but it is nevertheless duty of lawyer to ethically provide all necessary services to client, and fee arrangement may not provide that the lawyer is to pay the costs and expenses of such litigation); Tex. Ethics Op. No. 533 (2000) (lawyer retained by an insurance company to defend its insured, may not comply with litigation/billing guidelines, such as limits on the depositions to be taken, whether certain motions may be filed, whether to hire an expert in the case, whether particular depositions may be videotaped, and what legal research may be conducted, and means of periodic reporting to the insured which place restrictions which interfere with the lawyer's exercise of his/her professional judgment in rendering such legal services to the insured/client).

[7] *See* Tex. Ethics Op. No. 542 (2002) (a lawyer is free to enter into a fixed-fee arrangement; even with such an arrangement, it is the lawyer's responsibility to professionally and ethically render representation to the insured).

[8] *See, e.g.*, ABA Formal Ethics Op. No. 01-421 (2001) (a lawyer may disclose the insured's confidential information, including detailed work descriptions and legal bills, to the insurer if the lawyer reasonably believes that doing so will advance the interests of the insured; however, the lawyer may not disclose the insured's information to a third-party auditor hired by the insurer without the informed consent of the insured; if the lawyer reasonably believes disclosure of the insured's information to the insurer will adversely affect a material interest of the insured, the lawyer must not disclose such information without the informed consent of the insured); *In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (defense counsel cannot ethically submit their bills to a third-party auditing service without waiving the attorney-client privilege); *Tacke v. Energy West, Inc.*, 227 P.3d 601 (Mont. 2010) (The attorney-client privilege and work-product doctrine did not preclude employee from producing attorneys' billing records, when she moved for attorney fees in FLSA action against employer; in-camera review of the billing records by the trial court, accompanied with the use of redaction when necessary, would have accommodated the need for the billing records to demonstrate the reasonableness of the fees award while protecting the attorney-client privilege and complying with the work-product doctrine.); Tex. Ethics Op. No. 552 (2004) (lawyer who has been retained by an insurance company to defend its insured may not furnish to the insurance company's third-party auditor the lawyer's fee statements via electronic mail: "A lawyer's

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