

Avoiding the Minefields—  
The Ethical Dilemmas Posed by the  
Attack on the Tripartite Relationship  
*Litigation Guidelines*

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# Avoiding the Minefields—The Ethical Dilemmas Posed by the Attack on the Tripartite Relationship

*Litigation Guidelines*

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# Avoiding the Minefields—The Ethical Dilemmas Posed by the Attack on the Tripartite Relationship

## *Litigation Guidelines*

### I. Introduction

“No one can serve two masters; for either he will hate the one and love the other, or he will hold to the one and despise the other.” Book of Matthew, 6:24

The “tripartite relationship” is a contractual alliance between three parties: 1) the insurance company that issued the policy; 2) the insured against whom a claim is made and 3) the attorney hired by the insurance company to defend the insured. Most liability insurance policies give the insurer “the right, as well as the duty” to defend the insured against potentially covered claims. It flows from that “right and duty” that the insurer typically retains control over the defense of the claim. (Peter J. Kalis *et al.*, *Policyholders Guide to the Law of Insurance Coverage* §4.04 (2005 ed.) In exchange for the defense being provided through the insurer, the insured usually agrees to cooperate and aid in defense of the claim. *Id.*

When a claim is made against an insured, and is subsequently “tendered” to the liability carrier for defense, the liability insurer retains defense counsel who, although paid by the insurer, owes a primary duty of loyalty to the insured. *See* Model Rules of Prof’l Conduct r. 5.4(a)(4)(c) (2004). This awkward relationship raises complex ethical and conflict-of-interest problems for the defending attorney. It is, therefore, obviously important for attorneys with insurance defense practices to be aware of the ethical issues they will face as they strike this delicate balance between their two clients—the insurer and the insured.

One of the problems defense counsel faces in the tripartite relationship is determining who is “the client” in specific instances. In some jurisdictions, both the insurer and the insured are the client, while other jurisdictions have held that the insurer is merely a third party payer and only the insured is the client. *See* ABA Standing Committee on Ethics and Prof’l Responsibility, Formal Op. 01–421, notes 6–7 (2001) (discussing a lawyer’s ethical obligations when working under insurance company litigation guidelines). While the American Bar Association has declined to endorse either position, it noted, “Regardless of whether the insurer is a client, Rule 5.4(c) states that a lawyer ‘shall not permit a person who recommends, employs or pays a lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering. . . legal services.’” *Id.* Thus, whether the client is the insured, the insurer, or both, the lawyer’s ethical duty requires preservation of her independent professional judgment regarding defense of the insured.

In most instances, there is little or no tension between the interests of the insurer and the insured—both want to prevent or minimize any recovery by the plaintiff. However, there are some instances where the interests of the insurer and insured may not be identical. One such potential instance could be an effort by liability insurers to minimize defense costs that may inadvertently affect the independent professional judgment of the defense counsel retained to defend an insured.

### II. Litigation Guidelines

#### Overview

In the early-1990’s, liability insurers began embracing the practice of “litigation guidelines,” initially as a means of ensuring some uniformity among the defense practices of retained defense counsel. Over time the litigation guidelines came to be seen more as an effort by liability insurers to attempt to manage or reduce

the costs associated with claim defense by controlling the amount or type of work a defense attorney may do or otherwise influencing the course of the defense. See ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001). Such guidelines can be entirely benign—simply describing the role of insurer, insured, and defense counsel—or they can overstep the bounds of propriety—infringing on the defense lawyer's exercise of independent professional judgment. *Id.*

The insurer has a legitimate interest in monitoring and controlling the costs of litigation, so some measure of scrutiny and containment of litigation costs is appropriate. However, the ABA and many states that have issued opinions on litigation guidelines and those opinions essentially agree: If a lawyer complies with a litigation guideline that supercedes the lawyer's independent professional judgment, that lawyer breaches her ethical duty to her client. This can create an ethical dilemma for defense counsel, who must choose to either violate the ethical rules, or refuse to comply with the insurer's litigation guidelines, potentially resulting in the insurer denying payment for legal fees, or at a minimum, some hard feelings with the insurer client.

This ethical dilemma has caused many states, as well as the ABA, to issue ethics opinions in an attempt to guide insurance defense attorneys through the pitfalls of insurance litigation guideline compliance. When defense counsel believes that litigation guidelines pose an ethical problem, the ABA believes the attorney's initial obligation is to "try to persuade the insurer to withdraw the limitation." However, "if the lawyer is unable satisfactorily to resolve the conflict implicated by the insurer's guidelines, the lawyer may seek to withdraw pursuant to Rule 1.7 or 1.16(b)." *Id.* Unfortunately for defense attorneys, many state ethics opinions do not delineate actual litigation guidelines that are impermissible, but instead conclude that the attorney must determine the ethicality of each litigation guideline on a case-by-case basis.

#### Applicable Model Rules

Because of the wide variance in state ethical rules, this article cannot cover every state's pertinent ethical rules. However, there are five ABA Model Rules of Professional Conduct most commonly applicable to litigation guideline dilemmas:

- 1) ABA Model Rule 1.2(a), dealing with the scope of representation;
- 2) ABA Model Rule 1.6, dealing with confidentiality;
- 3) ABA Model Rule 1.7 dealing with conflicts of interest
- 4) ABA Model Rule 1.8 dealing with conflicts of interest and
- 5) ABA Model Rule 5.4, dealing with professional independence.

Most states have comparable rules, although the various states may interpret the rules differently.

#### Permissible Litigation Guidelines

The ABA has identified permissible litigation guidelines, allowing guidelines that describe "the rights and duties of the insurer, the insured, and defense counsel..." ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001). Most states agree that litigation guidelines are generally permissible if they do not interfere with the independent professional judgment of defense counsel, do not constitute a breach of client confidentiality, and in some cases, do not constitute aiding a non-lawyer in the practice of law.

#### Problem Areas

While it is universally accepted that an attorney may not comply with litigation guidelines that interfere with the attorney's exercise of independent professional judgment, several states have issued opinions discussing specific prohibited guidelines, or highlighting particular guidelines that *may* create ethical problems for defense attorneys. The following is a list of the states that identify specific problem areas. This section does

not cover state ethics opinions that only discuss the impermissible release of confidential client information to a third party auditor.

- 1) Alabama—The Disciplinary Commission of the Alabama State Bar issued an opinion that many of the requirements in an insurance company’s Litigation Management Guidebook “could cause an interference with the lawyer’s independence of professional judgment.” Alabama State Bar Opinion No. 1998–02 (2002). The Guidebook required:
  - a) claims professionals and defense attorneys to jointly develop initial case analysis and integrated defense plan;
  - b) attorneys to secure consent of the claims professional before more than one attorney may be used at deposition, trial, conferences or motions;
  - c) claims professionals to approve retaining of experts;
  - d) claims professionals to approve research time over three hours;
  - e) attorney’s deposition preparation cannot take longer than the deposition.
- 2) Arizona—The State Bar of Arizona issued Opinion No. 99–08 in September, 1999, analyzing a litigation agreement that required an attorney to comply with the insurance carrier’s compliance review and audit program. The Opinion stated,

[T]he audit program interferes with the lawyer’s independent professional judgment by: 1) allowing the audit examiner and not the attorney the right to choose which motions will be filed based upon the audit examiner’s belief as to the motion’s chance of success; 2) allowing the audit examiner the right to withhold authorization of those services for which the attorney must seek pre-authorization before he performs them if he is going to be paid; 3) restricting the amount of research that will be compensated; and 4) directing that certain tasks be undertaken without the supervision of an attorney.

The State Bar opinion also stated that allowing the audit examiner to choose which attorney would represent the client violated the ethical rules.

- 3) Colorado—The Colorado Bar Association Ethics Committee issued Formal Opinion No. 91 in Jan., 1993, stating that the Colorado ethical rules prohibit fee agreements “whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client’s interest.”
- 4) Hawaii—The Disciplinary Board of the Hawaii Supreme Court issued Formal Opinion No. 37 on March 27, 1999, listing the following guidelines that violate professional ethics:
  - a) Guidelines that prohibit an activity the lawyer believes to be necessary to the representation;
  - b) Guidelines that provide the lawyer a disincentive to perform necessary tasks.

In addition, “[U]nreasonable restrictions on preparation and discovery, and the limitation on compensable communication among attorneys in an office regarding a legal matter,” are impermissible guidelines.

- 5) Indiana—The Indiana State Bar Association Legal Ethics Committee issued Opinion 3 of 1998, which listed guidelines that the Indiana State Bar considered unethical:
  - a) “[N]egotiated financial terms [that] result in a material disincentive to perform those tasks which, in the lawyer’s professional judgment, are reasonable and necessary to the defense of the insured. . . .”

- b) Provisions “which tend to curtail reasonable discussion between members of the defense team on a day-to-day basis...”
  - c) Provisions “which seek to dictate the use of personnel within the lawyer’s own office.”
  - d) Provisions which provide “that if the senior litigator performs a particular service...which could have been performed ‘suitably’ (in the carrier’s view) by an associate or paralegal, the service may be billed only at the hourly rate for the associate or paralegal...”
  - e) Provisions that do not allow the attorney to substitute an assigned associate without prior approval by the carrier.
  - f) Provisions that “require, or even...permit, counsel to rely upon legal research by an unsupervised paralegal...”
- 6) Kentucky—The Kentucky Bar Association issued Ethics Opinion KBA E-416 in March, 2001, stating that litigation guidelines may not:
- a) “Require approval by the insurer before the lawyer undertakes any discovery, conducts any legal research, or files any motion...”
  - b) “Require all investigative work or all records review to be performed only by the insurer’s employees or, if performed by the lawyer’s firm, to be billed only at a paralegal rate.”
- 7) Massachusetts—The Massachusetts Bar Association issued ethics opinion No. 00-4, stating that the attorney may not delegate to a paralegal tasks that cannot be performed competently by the paralegal.
- 8) Montana—The Supreme Court of Montana held litigation guidelines that require the carrier’s prior approval for billing and practice rules “fundamentally interferes with defense counsels’ exercise of their independent judgment...” In the Matter of the Rules of Professional Conduct and Insurer Imposed billing Rules and Procedures, 299 Mont 321, 336, 2 P3d 806, 815 (2000).
- 9) New York—The New York State Bar Association Committee on Professional Ethics issued Opinion NO. 721 in Sept. 1999, delineating the following impermissible litigation guidelines:
- a) Guidelines specifying the use of outside legal research service where the use of the service diminishes effective representation of the client.
  - b) Guidelines or instructions from the carrier instructing the attorney not to do any additional research, or not to adequately supervise the outside research firm.
- 10) Ohio—The Ohio Supreme Court Board of Commissioners on Grievances and Discipline issued Opinion No. 2000–3 in June, 2000, stating that the following guidelines interfere with the attorney’s professional judgment:
- a) “Guidelines that restrict or require prior approval before performing computerized or other legal research are an interference with the professional judgment of an attorney...”
  - b) “Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate, or senior attorney...”
  - c) “Guidelines that require approval before conducting discovery, taking a deposition, or consulting with an expert witness...”
  - d) “Guidelines that require an insurer’s approval before filing a motion or other pleading...”
- 11) Oregon—The Oregon State Bar issued Formal Opinion No. 2002–166 listing the following impermissible guidelines:



- a) Guidelines dictating that a paralegal perform certain tasks are impermissible if they constitute a lawyer aiding a non-lawyer in the unlawful practice of law.
  - b) Guidelines that require production to carrier of status reports or litigation plans that reveal confidences or secrets of insured inappropriately.
  - c) Guidelines that force an attorney to “choose between complying with restrictive rules of an insurance company client that pays Lawyer’s fees, and the duty to exercise independent judgment in defense of the insured.”
- 12) Rhode Island—The Rhode Island Supreme Court Ethics Advisory Panel issued Opinion No. 99–18 in October, 1999, stating that the following guidelines impermissibly infringe on the attorney’s independent professional judgment:
- a) Requirements that the attorney obtain the carrier’s prior approval before “conducting legal research in excess of three hours; filing counterclaims; cross-claims or third-party actions; visiting the accident scene; preparing substantive dispositive motions or briefs; customizing interrogatories or document requests; and scheduling depositions.”
  - b) Requirements that the defense attorney obtain the insurer’s prior approval “before counsel incurs expenses related to any of the following: retaining expert witnesses; scheduling independent medical examinations or peer reviews; instituting surveillance; and conducting additional investigations.”
- 13) Tennessee—The Board of Professional Responsibility of the Supreme Court of Tennessee issued Formal Ethics Opinion 2000-F-145, stating:
- [A]n attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of his or her representation of the insured in any manner, including the decision whether or not to appeal a judgment against the insured, whether or not to demand a jury, or whether or not to participate in mediation on the insurer’s behalf, unless the client-insured has expressly agreed with any or all of the conditions limiting the nature or scope of the representation, and such agreement is confirmed in writing by the client-insured to the attorney.
- 14) Washington—The Washington State Bar Association issued Informal Opinion 2012 in 2003, stating that the following guidelines are impermissible:
- a) Guidelines stating, “defense lawyers must agree to a .65 percent reduction (or one percent reduction) from the gross amount of each invoice submitted.”
  - b) Any guidelines requiring the attorney to share confidential information with the insurance company or an outside audit firm.
  - c) “[A] billing guideline that arbitrarily and unreasonably limits or restricts compensation for the time spent by counsel performing services which counsel considers necessary to adequate representation, such as periodic review of pleadings, conducting depositions, or in preparing or defending against a summary judgment motion. . . .”
  - d) “A billing guideline that imposes ‘*de facto*’ or arbitrary rates for certain services performed by a lawyer, such as compensating a lawyer at prevailing paralegal rates when the firm does not employ paralegals. . . .”

It may also be unethical to comply with guidelines that “direct assigned counsel to not object to a pleading unless certain conditions are met; that prevent the attorney to not move [sic] to change venue unless previously approved and direct that counsel may attend only those court hearings that directly involve the insured. . . .”

### **III. Conclusion**

Insurance defense attorneys must still decide most ethical dilemmas involving litigation guidelines on a case-by-case basis. The underlying ethical rules remain the same: The guidelines must not interfere with the attorney’s independent professional judgment, and they must not demand that the attorney share privileged and confidential information with third parties if doing so will violate the client’s privilege. However, their application in each state is a changing ethical minefield in which all of the prohibited practices have not yet been expressly spelled out.

The keys to avoiding these problems are trust and communication. Liability carriers should use counsel that they trust will not “churn” the files and will be conscious of defense costs. If the carriers trust their counsel, they will not need explicit “do” and “don’ts” or arbitrary time limitations. At the same time, defense counsel that communicate with their insurance company clients in advance about why certain work is being undertaken will probably find an understanding client that really has no interest in interfering with the defense counsel’s independent judgment.

# Appendix

## State Listing of Ethics Opinions and Legal Decisions Regarding Litigation Guidelines

### 1. ABA

The ABA Committee on Ethics and Professional Responsibility issued its Opinion No. 01-421 in February of 2001. That opinion expressly addressed the issue of insurer Litigation Guidelines. The Opinion does not identify express guidelines that would be problematic, but rather speaks of any “guidelines [that] materially impair [the attorney’s] representation of the insured.” In such an instance, the attorney should consult both the insurer and the insured. If the insurer insists on enforcing the guideline in question, and if the insured refuses to consent to the “limited representation” that would be created by the enforcement of the guideline in question, the attorney would need to withdraw from the case.

### 2. Alabama

- a. Alabama State Bar opinion No. 1998-02. “A lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer’s independence of professional judgment in rendering such legal services through the acceptance of litigation management guidelines which have that effect.”

#### i. Problems:

1. Lawyer and defense attorney jointly developing an initial case analysis and integrated defense plan
2. Attorney must secure consent of claims professional before more than one attorney may be used at depositions, trial, conferences or motions
3. Claims professional must approve retaining experts
4. Claims professional must approve research time over three hours
5. Deposition preparation cannot take longer than the deposition.

### 3. Alaska

- a. Alaska Bar Association Ethics Opinion No. 99-1
- b. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P2d 1113 (Alaska, 1993).
  - i. Insured has a right to independent counsel under circumstances involving a coverage defense

### 4. Arizona

- a. Opinion No. 99-08
  - i. Problem: litigation agreement specifying compliance with an audit program that requires the lawyer to provide confidential information to a third party auditor.
- b. DRI:
  - i. “While there is nothing wrong with the carrier attempting to reduce defense costs, the attorney cannot ethically participate in such an effort if it involves the use of procedures that allow a third party to regulate or direct the lawyer’s independent professional judgment on behalf of his client.”

### 5. Arkansas—None found

## 6. California

- a. State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1987-91
- b. Gulf Insurance Co. v. Berger, Kahn et al., 79 Cal. App. 4th 114 (2000).
  - i. “A disqualifying conflict exists if ‘insurance counsel had . . . incentive to attach liability to the insured’ . . . . The test is whether the conflict ‘precludes the insurer-appointed defense counsel from presenting a quality defense for the insured.’” [internal citations omitted].
  - ii. “Attorneys are under an ethical stricture to avoid conflicts of interest.”
  - iii. “The Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both.”

## 7. Colorado

- a. Colorado Bar Association Ethics Committee Formal Opinion No. 91 (Jan. 16, 1993).
  - i. “This Committee has concluded that in the context of this tripartite relationship, the better rule is that the lawyer’s client is the insured and not the carrier.”
  - ii. Ethical duties owed to the client (insured) are “the duty of loyalty, the duty to preserve the confidentiality of client information and the duty to advise the client concerning the client’s legal interests.”
  - iii. Duty of Loyalty
    1. Restrictions on Defense Costs
      - a. ask insurer, if no, and insured insists, ask insured to pay for it. *If not*, advise insured to seek independent counsel.
    2. Flat Fee Agreements
      - a. attorneys must comply with Colorado rules of Professional Conduct (fees reasonable, costs are the responsibility of the client (carrier), lawyer must maintain independent judgment)
      - b. Rules prohibit fee agreements ‘whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest.’
  - iv. Confidentiality of Client info.
    1. Disclosures made within the attorney-client relationship
      - a. Attorney cannot disclose to carrier without insured’s consent
    2. Fraudulent conduct
      - a. Even if the info relates to perpetration of a fraud on the insurance company, insured is still the client and the lawyer cannot disclose the info. But lawyer may not assist in fraudulent conduct nor use false evidence. Withdrawal is mandatory if attorney’s services will be used to perpetrate the fraud.
    3. Disclosure of info that is a matter of record

- a. Duty of loyalty may limit disclosure
- b. Info detrimental to insured's coverage
  - i. Where the info is detrimental to insured's coverage interests, but the failure to disclose may jeopardize coverage because of the insured's duty to cooperate in the defense of the lawsuit, the attorney must advise insured. If the insured consents, disclosure to insurer must be limited to facts, not advising carrier of potential coverage effects.
  - ii. If no consent, advise insured to retain separate counsel.
- c. Info not detrimental to insured's coverage
  - i. Attorney must decide whether disclosure is implied in authorization to carry out representation. May have ethical duty to alert insured of intent to disclose
- v. Duty to Advise and Inform Insured about Matters that may affect the insured's interests, rights and obligations
  - 1. Settlement offers
    - a. Keep insured advised of offers, etc
    - b. Where policy allows insured to refuse/approve settlement, attorney must obtain specific authority from insured to make, accept or refuse settlement offers or demands
  - 2. Potential Counterclaims
    - a. Inform insured about potential counterclaims to the extent necessary so the insured can decide whether to seek independent counsel.
  - 3. Duties where there are multiple covered and non-covered claims or a reservation of rights
    - i. Divergent interests
      - 1. existence of a coverage question should not be allowed to interfere with the lawyer's duty to exercise independent professional judgment on behalf of the insured. Attorney must give full advice to insured as to the potential conflict and its possible ramifications.
    - ii. Mutuality of interest
      - 1. where objectives of insured/insurer are parallel, attorney may simultaneously represent both.
  - 4. Disclosures required if attorney's firm is retained by a carrier on numerous cases or is employed by carrier
    - a. A lawyer who has represented or is representing the insurance company in other matters must evaluate on a case-by-case basis whether the facts of the case present sufficient danger of a conflict of interest between the insured and the carrier to warrant disclosure to the insured.
    - b. Attorney should take no action which misleads insured into believing that the attorney has a relationship with the insurer other than that which exists.
- vi. Waiver or Consent to Certain Conflicts

1. Where a lawyer is asked to both defend insured and to issue a coverage opinion, lawyer cannot ethically do both at the same time
2. Situations where even a waiver will not allow continued representation
  - a. Where the attorney recognizes a divided duty of loyalty between insured and insurer
  - b. Where there is actual adversity between the insured/insurer
- vii. Limited exceptions by virtue of the insurance contract
  1. Insurance company has the right to control the defense of a third party claim against its insured. Attorney must advise insured of all significant matters, which are the subject of the attorney's correspondence with the insurance company and the proposed course of action.
  - b. Colorado Bar Association Ethics Committee Opinion No. 107
    - i. "As there are no 'bright lines' that could be drawn to distinguish the point where counsel's professional judgment might be compromised, counsel should not agree to abide by such guidelines until he or she has had a chance to evaluate their impact in cases to which they would apply and should continue to monitor their effect in the course of representation."
    - ii. "Whereas counsel may comply with guidelines that do not interfere with their professional judgment, if counsel believes that such guidelines do represent an unreasonable interference, they must either (1) obtain the insurer's permission not to follow the guidelines; (2) withdraw; (3) obtain the insured's permission, after consultation, to forego action that is contrary to the guidelines; or (4) agree to forego payment for such tasks or seek payment directly from the policyholder."
8. Connecticut
  - a. Connecticut Bar Association Informal Opinion 00-20 (9.25.00)
    - i. Attorney may not disclose billing records to third party auditing firm as it constitutes a breach (and waiver) of attorney-client privilege.
9. Delaware—None found
10. District of Columbia
  - a. Ethics Opinion 290
    - i. Lawyer may not disclose billing statements to independent auditors until lawyer has made appropriate disclosure to insured and obtained consent.
11. Florida
  - a. Amendments to rules regulating the Fla. Bar, 820 So 2d 210, 253 (Fla., 2002)
    - i. Litigation Guidelines. Many insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance company should either explain the guidelines

to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the insurance company has declined authorization for the service or action.

12. Georgia

- a. Issue is not settled in Georgia after submission and rejection by Supreme Court of State Bar of Georgia Formal Advisory opinion 99-R2, recommending that the Supreme Court hold that lawyers are not bound to follow insurance company litigation guidelines.

13. Hawaii

- a. Disciplinary Board of the Hawaii Supreme Court Formal Opinion No. 37 (3.27.99)

- i. "Billing guidelines of insurance companies which form a part of the contract with an insurance defense attorney are ethically impermissible if adherence to those guidelines interferes with the attorney's exercise of independent professional judgment on behalf of the client.

- ii. OK guidelines:

1. Requiring defense counsel to report on a regular basis and provide an analysis of the case with recommendations
2. basic financial arrangement can be arranged by contract

- iii. Not OK guidelines

1. Provisions which prohibit activity which, in the lawyer's professional judgment are necessary in the representation of the client
2. Provisions which provide a distinctive (possibly 'disincentive') to perform those tasks
3. Unreasonable restrictions on preparation and discovery; limitation on compensable communication among attorneys in an office regarding a legal matter

- b. *Finley v. Home Insurance Co.*, 90 Haw 25, 34, 975 P2d 1145, 1154 (1998).

- i. "while the insurer may have a contractual right to select defense counsel, the insurer's desire to limit expenses must yield to the attorney's professional judgment and his or her responsibility to provide competent, ethical representation to the insured. 'Whatever the rights and duties of the insurer and the insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to his client.'" Citing ABA Opinion

14. Idaho

- a. Idaho State Bar Formal Ethics Opinion No. 136

- i. A lawyer being paid pursuant to billing guidelines of a person other than the client must initially consult with the client at the outset of the representation, and consult with the client periodically thereafter as circumstances may require, and obtain the client's informed consent to any limitations imposed on the lawyer's representation.

- ii. Where a lawyer reasonably believes that representation of the client will be materially affected by any limitations in billing guidelines of the person paying the billings, the lawyer must withdraw, subject to the requirements of IRPC 1.15, and notify the client of the basis of the withdrawal.

15. Illinois

- a. Illinois State Bar Advisory Opinion on Professional Conduct No. 98-08 (May, 1999).
  - i. Any restrictions on the lawyer's scope of representation should have the insured's informed consent. Thus if an insurer's proposed restrictions on the scope of activity necessary for the defense of a claim compromises the lawyer's professional judgment, continuing the representation would be contrary to Rule 5.4(c).

16. Indiana

- a. Indiana State Bar Association Legal Ethics Committee Opinion 3 of 1998
  - i. Insured is primary client to which duty is owed
  - ii. Guidelines OK
    - 1. To the extent that litigation guidelines merely define the financial relationship between an insurance carrier and its defense counsel, including communications between them
  - iii. Guidelines not OK

If the negotiated financial terms result in a material disincentive to perform those tasks which, in the lawyer's professional judgment, are reasonable and necessary to the defense of the insured,

- 1. Provisions which tend to curtail reasonable discussion between members of the defense team on a day-to-day basis
- 2. Provisions, which seek to dictate the use of personnel within the lawyer's, own office.
- 3. Provisions which provide that if the senior litigator performs a particular service which could have been performed 'suitably' by an associate or paralegal, the service may be billed only at the hourly rate for the associate or paralegal
- 4. Provisions dictating supervision of assignment of associate to the task
- 5. Provisions requiring or permitting counsel to rely upon legal research by an unsupervised paralegal (invites malpractice).

17. Iowa

- a. Iowa Supreme Court Board of Professional Ethics and Conduct Opinion No. 99-01 (9.8.1999).
  - i. "Only the lawyer and the client (insured) have the right to direct and control the legal services rendered to the client. Accordingly, the Board concluded that 'it would be improper for an Iowa lawyer to agree to, accept or follow guidelines which seek to direct, control or regulate the lawyer's professional judgment or details of the lawyer's professional judgment or details of the lawyer's performance; dictates the strategy or tactics to be employed; or limit the professional discretion or control of the lawyer.'"

18. Kansas—None found

19. Kentucky

- a. Kentucky Bar Association Ethics Opinion KBA E-416 (March, 2001)
  - i. "A lawyer may not agree to abide by such guidelines *unless*:



1. the lawyer determines that the guidelines will not interfere with the lawyer's independent professional judgment and other duties owed to the insured under the Kentucky Rules of Professional Conduct; and
  2. the lawyer discloses the guidelines' existence to the insured, and provides a practical explanation of their import, at the outset of the representation and as may become necessary in specific situations thereafter, and the insured consents after consultation to any guideline that materially limits the representation; and
  3. the lawyer, upon undertaking the representation, performs all duties imposed by the Rules, regardless of compensation under the guidelines, so long as the representation continues
  4. Every lawyer is strongly cautioned that the insured is entitled to adequate representation despite limitations prescribed by the insurer. A lawyer who is unable or unwilling to accept the potential burden of this responsibility must decline representation at the outset."
- ii. OK guidelines:
1. require prior approval of compensation for additional lawyers or experts with whom the principal lawyer may wish to confer, or for a lawyer's trial preparation exceeding a specified pretrial period—if and only if such limitations are reasonable in relation to the issues in the case and the guidelines provide a process for ongoing consultation.
  2. Prescribe detailed billing and reporting procedures, with deadlines for certain submissions—if and only if such procedures do not create material disincentives to adequate representation of the insured and do not abridge the insured's right to confidentiality
  3. guidelines setting a reasonable tentative budget and providing a process for ongoing consultation
  4. guidelines establishing an appropriate allocation of lawyer and non-lawyer/paralegal tasks
  5. setting a reasonable tentative budget for investigative work or document review
- iii. Not OK guidelines
1. require prior approval by the insurer before the lawyer undertakes any discovery, conducts any legal research, or files any motion.
  2. Requiring all investigative work or all records review to be performed only by the insurer's employees or, if performed by the lawyer's firm, to be billed at the paralegal rate.
- iv. Defense lawyer hired by insurer has only one client—insured. Insurer is third party payer
- v. Adopts Third restatement §134(2): A lawyer may accept direction from a person other than the client if, but only if, (a) the direction does not interfere with the lawyer's independence of professional judgment (b) the direction is reasonable in scope and character, *e.g.*, reflecting obligations borne by the person directing the lawyer; and (c) the client gives informed consent to the direction.

20. Louisiana—None found

21. Maine

- a. Professional Ethics Commission Opinion No. 164 (December 2, 1998)
  - i. “Consequently, without client consent the inquiring law firm here may not provide, or agree to provide, information containing confidences or secrets of a client-insured, either to the insurance company, or to an agent of the company, such as a retained auditing company.
- 22. Maryland
  - a. Maryland Bar Association Ethics Committee Opinion 00–23
    - i. Litigation guidelines do not necessarily conflict with state ethics rules
    - ii. Both the insured and insurer are owed an obligation by the defense counsel.
    - iii. Whether an actual conflict exists must be decided on a case-by-case basis.
- 23. Massachusetts
  - a. Massachusetts Bar Association Ethics Opinion No. 00–4
    - i. A lawyer retained by an insurer to defend its insureds is obliged to make an independent, case-by case determination as to whether aspects of the insurer’s litigation guidelines which mandate the use of paralegals for certain tasks is ethically permissible under the Mass. Rules of Prof. Conduct. Irrespective of the insurer’s directives, the lawyer may not delegate to a paralegal tasks that cannot be performed competently by the paralegal.
    - ii. Lawyer may not provide confidential invoices to an outside auditor for the purpose of periodic review and payment without insured’s express consent after consultation.
- 24. Michigan
  - a. No opinion on litigation guidelines, but
  - b. State Bar of Michigan Ethics Opinion No. RI-89 (June 10, 1999)
    - i. When an insurer retains a lawyer to defend an insured, the insured is the lawyer’s client and the lawyer must advocate the insured’s position even if it is adverse to the insurer.
- 25. Minnesota
  - a. No ethics opinion
  - b. Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 NW 2d 444 (Minn. 2002).
    - i. The defense counsel may have an attorney-client relationship with both the insured and the insurer if:
      - 1. there is no apparent conflict of interest between the two
      - 2. the insured has consulted with an independent attorney and the attorney advised the insured that obtaining separate counsel was unnecessary, and
      - 3. the insured has given his/her express consent to the dual representation with knowledge of the circumstances.
    - ii. Where liability insurance contract give the insurer rights to participate in and control the defense of claims against the insured, and where the interests of the insured and insurer differ, defense counsel must look to the above factors to determine whether to continue representation of both clients.

- iii. Where there is a conflict of interest between the two, dual representation is not appropriate.
26. Mississippi
- a. Opinion No. 246 of the Mississippi Bar (April 8, 1999)
    - i. A lawyer may not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independence of professional judgment or with the lawyer/client relationship, the Committee held that counsel may not ethically enter into any agreement that allows a third party insurer to interfere with counsel's exercise of independent judgment for the insured client.
    - ii. Attorney may not ethically enter into any agreement that allows a third party insurer to interfere with the attorney's exercise of independent judgment for the benefit of an insured client and with the respect to that representation, may provide a detailed billing statement to a third party legal auditing service for review only with the informed consent of the insured client.
27. Missouri
- a. Missouri Bar Informal Opinion Number 980188
    - i. Attorney may only comply with insurance company's guidelines requiring submission of bills to outside auditing company with the client's informed consent. IF the insured does not consent and the company does not waive its guideline, attorney must withdraw
  - b. Missouri Bar Informal Opinion Number 980124
    - i. Billing guidelines limiting services attorney may provide to client are only allowed if the client consents. If no consent, attorney may not represent client subject to the limitations.
28. Montana
- a. Montana State Bar Association Ethics Opinion 900517
    - i. When the insurer has agreed to defend under a reservation of rights and has allowed insured to obtain independent counsel, it has given up its right to control the representation of the insured. Independent counsel may not comply with the insurer's "billing practices and procedures" and "litigation plan of action."
    - ii. Independent counsel's client is the insured (when insurer is defending under reservation of rights), and he may not represent that client he has responsibilities to the insurer that materially limit his representation.
  - b. In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures Ugrin, Alexander, Zadick & Higgins, P.C. and James, Gray, Bronson & Swanberg, P.C., 2 P3d 806 (Mont. 1999).
    - i. Montana RPC state that insurance defense counsel only represents the insured—the insurer is not a client. However, defense counsel still has an ethical obligation to only charge reasonable fees for services, and defense counsel can be held accountable for its work.
    - ii. The terms of the insurance policy do not supercede or circumvent the rules of professional conduct.

- iii. The threat of withholding payment to defense attorney prevents the exercise of independent professional judgment.
  - iv. “The requirement of prior approval fundamentally interferes with defense counsels’ exercise of their independent judgment, as required by Rule 1,8(f), M.R. Prof. Conduct. Further, prior approval creates a substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day-to-day details of a defense. . . . We hold that defense counsel in Montana who submit to the requirement of prior approval violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds.”
  - v. “we caution further that the mere *requirement* that counsel must consult with an insurer with respect to certain tasks may be indistinguishable, in its interference with a defense counsel’s exercise of independent judgment and ability to provide competent representation, from a requirement that counsel may not undertake such work without prior approval.”
29. Nebraska
- a. Nebraska State Bar Ethics Opinion No 00–01 (2000)
    - i. Problem area: Submitting a bill to an insurance company for representing insureds which are often submitted to an outside auditor for review, or submitting the bill directly to the outside auditor if such bill contains information which constitutes confidence or secrets of the client.
    - ii. Following insurance company billing guidelines that interfere with independent professional judgment.
30. Nevada
- a. State Bar of Nevada Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 26
    - i. When an insurance company requests information from defense counsel that might be detrimental to the insured, defense counsel must pass such requests on to the client and inform the client of the ramifications of disclosure and non-disclosure.
31. New Hampshire
- a. Ethics Committee Advisory Opinion #2000–01/05 on release of billing statements to third party auditors
32. New Jersey—None found
33. New Mexico
- a. New Mexico State Bar Advisory Opinion 2000–2 (2000)
    - i. “Absent informed consent of the insured client, an insurance defense lawyer must not disclose legal defense bills pertaining to the representation of the insured to third parties, including auditing companies. Further, an insurance defense lawyer ordinarily may not seek consent from the insured because of inherent impermissible conflicts, which would compromise the lawyer’s independent professional judgment.”
    - ii. The lawyer owes a primary duty of loyalty to the insured.
34. New York

- a. New York State Bar Association Committee on Professional Ethics Opinion NO. 721 (9.27.99)
  - i. Litigation guidelines specifying use of outside legal research service permissible so long as the lawyer reviews the research and the “use of the service does not diminish the effective representation of the client.”
  - ii. The insurance company cannot instruct the defense lawyer not to do any additional research, or not to provide adequate supervision of the outside research firm.
  - iii. If a conflict of interest exists between the insured and insurer, insured may select independent counsel for which insurer must pay. *Nelson Electrical Contracting Corp. v. Trans-Continental Ins. Co.*, 231 A D 2d 207, 660 N Y S 2d 220 (1997).
    - 1. Insurer can not contend that insured’s refusal to agree to a tactical course of action it believed might not be in its best interests is a “failure to cooperate” upon which coverage can be denied.
  - iv. Must have informed consent of client to comply with litigation guidelines
  - v. Filing briefs with the brief bank might be inappropriate breach of confidentiality.
- 35. North Carolina
  - a. North Carolina State Bar 98 Formal Ethics Opinion 17 (1.15.99)
    - 1. If the insurance company guidelines and restrictions will restrain defense lawyer’s professional judgment in representing a particular insured, the lawyer is ethically prohibited from complying with the guidelines and restrictions.
- 36. North Dakota—None found
- 37. Ohio
  - a. Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion No. 2000–3 (June 1, 2000).
    - i. Defense attorney may not comply with guidelines that interfere with the professional judgment of the attorney.
    - ii. Not OK guidelines
      - 1. Guidelines that restrict or require prior approval before performing computerized or other legal research
      - 2. Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate, or senior attorney are an interference with an attorney’s professional judgment.
      - 3. Guidelines that require approval before conducting discovery, taking a deposition, or consulting with an expert witness
      - 4. Guidelines that require an insurer’s approval before filing a motion or other pleading
- 38. Oklahoma
  - a. Legal Ethics Committee proposed Advisory Opinion No. 1998–04 regarding submission of law firm invoices to third party auditors
- 39. Oregon
  - a. Oregon State Bar Formal Opinion No. 2002–166

- i. Lawyer may not comply with guidelines that will materially compromise lawyer's professional, independent judgment, or prevent lawyer from providing competent representation of client (insured).
  - ii. Not OK
    - 1. If the insurer "expresses a paramount interest in controlling or reducing its defense costs and, in the opinion of Lawyer, the case warrants a defense that is greater than the Guidelines permit." Lawyer may not comply with the guidelines
    - 2. Lawyer may not allow guidelines to impinge on his competent representation of client
    - 3. Guidelines dictating that a paralegal perform certain tasks not OK if they constitute Lawyer's aiding a non-lawyer in the unlawful practice of law.
    - 4. Required status reports or litigation plans that reveal confidences or secrets of insured inappropriately
    - 5. guidelines that force a Lawyer to "choose between complying with restrictive rules of an insurance company client that pays Lawyer's fees, and the duty to exercise independent judgment in defense of the insured."
  - iii. Lawyer must evaluate case-by-case whether guidelines comply with the ethical rules, and must continue to monitor the ethical aspects of compliance as the case goes on. "If Lawyer cannot ethically comply with any particular aspect of the Guidelines, Lawyer must obtain a modification of the Guidelines from Insurer, or decline or withdraw from the representation."
40. Pennsylvania
- a. Informal Opinion No. 97-119 regarding release of law firm invoices to third-party auditors
41. Rhode Island
- a. Rhode Island Supreme Court Ethics Advisory Panel Opinion No. 99-18 (10.27.99)
    - i. Insurance defense attorney hired to represent insured owes insured undivided loyalty.
    - ii. OK guidelines:
      - 1. guidelines that define the financial relationship between insurer and defense counsel
      - 2. guidelines that coordinate the roles of defense counsel and various employees of insurer assigned to the claim.
    - iii. Not OK
      - 1. guidelines that require insurer's pre-approval for specified legal services, such as research, filing counter or cross claims or third party actions, visiting the accident scene, preparing substantive dispositive motions or briefs, customizing interrogatories or document requests, or scheduling depositions.
      - 2. any guideline that interferes with professional judgment.
42. South Carolina
- a. Ethics Advisory Opinion No. 97-22 regarding release of law firm invoices to third party auditors
43. South Dakota
- a. Ethics Opinion 99-2 regarding release of law firm invoices to third party auditors

44. Tennessee
- a. Board of Professional Responsibility of the Supreme Court of Tennessee Formal Ethics Opinion 99-F-143.
    - i. Insured, not insurer is attorney's client.
    - ii. "The attorney should devote his complete loyalty to the insured-client and not allow the insurer, or anyone else, to regulate, direct, control, or interfere with his professional judgment. . . . An attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of his representation of the insured in any manner, including pre-trial discovery." (Ethics Opinion 88-F-113 (1988)).
  - b. Formal Ethics Opinion 2000-F-145
    - i. Guidelines not OK:
      1. "an attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of his or her representation of the insured in any manner, including the decision whether or not to appeal a judgment against the insured, whether or not to demand a jury, or whether or not to participate in mediation on the insurer's behalf, unless the client-insured has expressly agreed with any or all of the conditions limiting the nature or scope of the representation, and such agreement is confirmed in writing by the client-insured to the attorney."
      - ii. "Counsel receiving a retention purporting to require undeviating compliance should inform the insurer that such compliance cannot be assured, but that counsel will comply to the extent permitted by counsel's duties to the insured.
45. Texas
- a. Texas Supreme Court State Ethics Committee Opinion No. 533
    - i. "It is impermissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with an insurance company to restriction which interfere with the lawyer's exercise of his or her independent professional judgment in rendering such legal services to the insured/client."
46. Utah
- a. Utah State Bar Ethics Advisory Opinion Committee Opinion No. 02-03 (2.27.03)
    - i. "an insurance defense lawyer's agreement to abide by insurance company guidelines is not per se unethical and that the ethical implications of insurance company guidelines must be evaluated on a case-by-case basis. An insurance defense lawyer must not permit compliance with guidelines and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured."
    - ii. If compliance with the guidelines will be inconsistent with the lawyer's professional obligations, and if the insurer will not modify the guidelines, the lawyer must not undertake the representation.
47. Vermont
- i. Insurance defense attorney may not provide confidential billing material to outside auditing firm without client's informed consent.

48. Virginia
- a. Legal Ethics Opinion 1723 Nov. 24, 1998
    - i. “A lawyer hired by an insurance carrier to represent an insured “must represent the insured with undivided loyalty,” and may not: (1) agree to an insurance carrier’s restrictions on the lawyer’s representation of the insured “absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client’s rights will not be materially impaired by restrictions” such as limitations on discovery and the use of experts and other third party vendors, and requirements for “pre-approval for time spent on research, travel and the taking and summarizing of depositions”; (2) submit detailed information to a firm selected by the insurance carrier to audit billing statements, without the insured client’s consent after “full and adequate disclosure”; or (3) recommend that the client consent to such disclosure to the auditor if it would prejudice the client. (11/23/1998)”
49. Washington
- a. Washington State Bar Association Informal Opinion 2012 (2003).
    - i. Not OK guidelines
      1. guidelines stating that defense lawyers are obligated to accept a .65 percent or one percent reduction of advanced costs.
        - a. Violates prohibition on advancing or guarantying assistance to the client in a manner not permitted by the RPC
        - b. Violates prohibition on sharing legal fees with a non lawyer
      2. any guidelines requiring that attorney share confidential information with the insurance company or outside audit firm.
      3. “a billing guideline that arbitrarily and unreasonably limits or restricts compensation for the time spent by counsel performing services which counsel considers necessary to adequate representation such as the periodic review of pleadings, conducting depositions, or in preparing or defending against a summary judgment.”
      4. “A billing guideline that imposes ‘*de facto*’ or arbitrary rates for certain services performed by a lawyer, such as compensating a lawyer at prevailing paralegal rates when the firm does not employ paralegals”
      5. It may be unethical to comply with guidelines that “direct assigned counsel to not object to a pleading unless certain conditions are met; that prevent the attorney [from moving] to change venue unless previously approved, and direct that counsel may attend only those court hearings that directly involve the insured.”
50. West Virginia
- a. West Virginia State Bar Legal Ethics Opinions LEI 99-02
    - i. Billing guidelines that require confidential information sent to third party reviewers or auditors not ethical.
51. Wisconsin
- a. State Bar of Wisconsin Ethics Opinion E-99-1: Ethical Risks Inherent in Representing Both Insurers and Insureds.



- i. An insurance defense lawyer has both the insurance company and the insured as a client
- ii. Billing Guidelines: “A lawyer should not submit a bill for services that contains confidential information to an outside audit firm at the request of the insurer without the consent of the insured. Information in the lawyer’s bill for services could be used to the detriment of the insured.”
- iii. Insurer Restrictions and Limitations on the Representation of Insureds: “Insurers may manage the defense of claims. . . . Lawyers, however, cannot accept restrictions or limitations on the defense of claims that are so financially or otherwise onerous that they would prevent lawyers from satisfying their ethical obligations to their clients.”

52. Wyoming—None found

