

No. 45593-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

AMENDED REPLY BRIEF OF APPELLANT

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**I. REPLY TO RESPONSE BRIEF OF HEATHER
HOFFENBURG (“HOFFENBURG”)**

INTRODUCTION

[I]t’s not a secret at this point – I don’t think it’s ever been kept as a secret that there – I have not had contact with the named defendant in this lawsuit.

Morgan J. Wais, RP 25

The fact is, it was a secret to all but Morgan Wais (“Wais”) that he never had any communications whatsoever with his purported client, Heather Hoffenburg (“Hoffenburg”). Otherwise, the Court and the parties would not be entertaining this second appeal. At the trial court and in the first appeal,¹ Tori Kruger-Willis (“Kruger-Willis”) unsuccessfully argued that Wais acted in this matter at the direction of his employer, GEICO, and not at the direction of his purported client, Hoffenburg. At no time in response to Kruger-Willis’ foregoing allegations did Wais disclose to Kruger-Willis, to the trial court, and to this Court that he never had any communications whatsoever with Hoffenburg. CP 99, 107, 115, RP 25. Without contact between Wais and Hoffenburg, no attorney-client relationship had ever been formed. CP 107.

After pre-trial discovery; after an arbitration; after a trial de novo; after post-verdict proceedings; after an appeal; after this Court issued a mandate to the trial court; and after multiple post-mandate proceedings, Wais finally conceded over five years after the commencement of this

¹ Court of Appeals, Div II, No. 42417-7-II.

action that he never spoke to or communicated in any manner with Hoffenburg. CP 99, RP 25.

In all of Wais' pleadings filed with the trial court on behalf of Hoffenburg, Wais declared that he was the attorney of record for Hoffenburg. CP 99. He declared in all filed pleadings: "COMES NOW Defendant, Heather Hoffenburg, by and through her attorneys of record, Morgan J. Wais and Mary E. Owen & Associates..." Attached to all of Wais' filed pleadings was a declaration he signed under the penalty of perjury: "I, Morgan J. Wais, hereby declare under the laws of the State of Washington and subject to the penalty of perjury, that the following is true and correct to the best of my knowledge: 1. I am the attorney for Defendant Heather Hoffenburg in the above captioned matter..." CP 99.

How can Wais declare that he was the attorney of record for a party when he never had contact with that party and when he does not even know the true name of the party he purportedly represented? We now know that Wais discovered post-mandate from the first appeal in this matter that his client was not Heather Hoffenburg, but Heather *Hofferbert*. CP 94, 99. Kruger-Willis had properly named Heather Hofferbert as a party-defendant in the complaint at the outset of this matter. CP 94, 99, 107. The subsequent misnaming of Hofferbert to Hoffenburg was not due to a scrivener's error; rather it was done on Wais' motion to change the case caption from Heather Hofferbert to Heather Hoffenburg because, he

represented to the trial court, that was the correct spelling of his client's name. CP 94, 99, 107.

In all proceedings in this matter, Wais continued to hold himself out as Hoffenburg's attorney when he *knew* that he had never spoken to her and that he had never communicated in any manner whatsoever with her. Wais never disclosed the foregoing facts to Kruger-Willis, to the trial court, and to this Court, even when Kruger-Willis argued to the trial court and to this Court in the first appeal that Wais acted at the direction of his employer, GEICO, and not at the direction of his purported client, Hoffenburg. Thus, Kruger-Willis unsuccessfully argued, GEICO, as the de facto defendant, was not the "aggrieved party" permitted to file a trial de novo under MAR 7.1 and it was not the "prevailing party" entitled to costs and to reasonable attorneys fees under RCW 4.84.250. CP 99.

Finally, on August 9, 2013,² Wais declared in open court: "Well, Your Honor, it's not a secret at this point – I don't think it's ever been kept as a secret that there – I have not had contact with the named defendant in this lawsuit...I haven't spoken with the named defendant... That there hasn't been actual communication with that person despite my diligent efforts to accomplish that, doesn't, I believe, void coverage." RP 25. Likewise, in Hoffenburg's response brief, she states: "Morgan Wais, the attorney that was retained by GEICO to defend Heather Hoffenburg, has previously acknowledged that "despite diligent efforts" on his part, he

² A little over five years since the commencement of this action and after multiple filings and proceedings.

was unable to establish contact with his client during the course of litigation.” Response Brief of Respondent, 8 (citing RP 25).

Wais’ assertion to the trial court that he made diligent efforts to contact Hoffenburg lacked candor. Kruger-Willis provided to the trial court a copy of Hoffenburg’s (Heather Hofferbert) Washington Case Record printed on May 8, 2013. CP 100. *See Appendix A*. A case record search for a named person is readily available to the public without charge and it was readily available to Wais without charge, had he been inclined to use it.³ The case record search for “Heather Hofferbert” showed that Hoffenburg has been involved in numerous legal actions since Kruger-Willis initiated suit against her, with most of those actions taking place in Mason County. CP 100. From the May 8, 2013, record search for “Heather Hofferbert,” the latest case against her was November 7, 2012, well over eight months *after* Wais filed the Response Brief of Respondent in the first appeal.⁴ The case record search showed that Hoffenburg resided in or around Mason County the entire time since the commencement of Kruger-Willis’ action against her. CP 100. Had Wais’ efforts to locate Hoffenburg truly been diligent, as he represented to the trial court, then all he had to do to locate and to make contact with her was to search for her in Mason County.⁵

The truth of the matter is, Wais made no attempt to locate Hoffenburg until post-mandate proceedings because she was *irrelevant* to

³ www.courts.wa.gov. Diligence requires at least a little effort.

⁴ The Response Brief of Respondent was dated February 29, 2012.

⁵ Hoffenburg’s contact information would have been available in her court records.

him, even though she was the named defendant in this matter and even though she was legally and ethically his client, had an attorney-client relationship ever been formed. The truth is, as a GEICO-employed defense attorney, Wais always viewed GEICO as his client and not Hoffenburg, therefore, she was irrelevant to him because he was only concerned about GEICO'S interests and not Hoffenburg's interests in this matter. Even when Kruger-Willis unsuccessfully argued to the trial court and to this Court in the first appeal that GEICO was the de facto defendant in this matter because Wais acted at its direction and not at the direction of Hoffenburg, his purported client, Wais was less than candid with the trial court and with this Court when he responded to Kruger-Willis' allegations. Instead of disclosing to the trial court and to this Court that he had never spoken to or communicated with Hoffenburg, Wais argued:

Plaintiff attempts to misdirect this Court with regard to who the Defendant, in fact, is. Plaintiff, in her briefing, deceptively refers to Defendant's insurer, GEICO, rather than referring to Defendant, Heather Hoffenburg, as the party to the lawsuit. Plaintiff, having filed and served the underlying lawsuit, ought to know that GEICO has never been a party to the lawsuit, and GEICO is not a party to this appeal. GEICO is merely the insurance company indemnifying Defendant in the lawsuit and the present appeal. Thus, Plaintiff is correct when she argues that GEICO was not an aggrieved party – GEICO is not a party at all. The Plaintiff [sic] was indemnified by an insurance company was wholly immaterial to the case at trial, was wholly immaterial to the Trial Court's issuance of costs and attorneys fees, and it is wholly immaterial to this appeal.

Appendix B.

Since Wais, by his own admission, never spoke to or communicated in any manner with Hoffenburg, no attorney-client

relationship had ever been formed between them. Thus, he did not have Hoffenburg's authority to act on her behalf, which is legally and ethically required in Washington. RCW 2.44.020, RCW 2.44.030, and WSBA Advisory Opinion 928 (1985) (a lawyer retained by an insurance company must have contact with the client before he or she has authority to act on the client's behalf). *Appendix C*.

If Hoffenburg could not be Wais' client due to no communication whatsoever between them, then who was Wais' client? His client could only be his employer, GEICO, despite Wais' disingenuous arguments to the contrary. Wais had a duty under RPC 3.3⁶ and RPC 3.4⁷ to disclose to the trial court, to this Court, and to Kruger-Willis that he had never had contact with Hoffenburg when he denied Kruger-Willis' allegations that GEICO was the de facto defendant in this matter. In fact, Wais had a duty to inform the trial court and Kruger-Willis *six years ago* that he had never had contact with Hoffenburg. Failure on his part to do so was prejudicial to the administration of justice.

A. REPLY TO ISSUES OF LAW

In her response brief, Hoffenburg does not dispute that her purported defense counsel, Wais, did not communicate with her throughout the lawsuit. Response Brief of Respondent, 1.

Hoffenburg argues that Wais had an affirmative duty to defend her and that he took no action that prejudiced her rights. As Kruger-Willis

⁶ Candor Toward Tribunal

⁷ Fairness to Opposing Party and Counsel

argues below, without any communication whatsoever between Wais and Hoffenburg, Wais had no authority from Hoffenburg to appear in this matter and thus, he had no authority to act on her behalf because no attorney-client relationship had ever been formed between them.

B. REPLY TO STATEMENT OF THE CASE

Hoffenburg misstates the following fact in her recitation with respect to the Statement of the Case:

The trial court did not order Kruger-Willis to issue payment of the costs and attorneys fees in the manner requested by Wais. (*See* Response Brief of Respondent, 4) (“The court rejected the Plaintiff’s arguments, in their entirety, ordering the Plaintiff to issue payment of the costs and attorney’s fees in the manner requested by Defense counsel). Wais moved the trial court for an order to direct Kruger-Willis to issue payment to GEICO.⁸ CP 91.

C. REPLY TO STANDARD OF REVIEW

Based on Hoffenburg’s response brief, there is no dispute between the parties that the standard of review on this appeal is *de novo*.

⁸ Payment was tendered to Mary E. Owens and Associate made *payable* to Hoffenburg, which was in compliance with the original trial court order that was the subject of the first appeal.

To date, the trial court has not decided Wais’ motion enforcing order and entering judgment against Kruger-Willis. CP 91. More than ninety days has passed since the trial court requested additional briefings from the parties with respect to Wais’ motion. CP 107, 112. Under RCW 2.08.240, the time limit for the trial court’s decision is ninety days from the date it gave the parties to submit the requested briefs. Kruger-Willis provided the trial court with the requested brief. Wais did not provide the trial court with the requested brief. CP 107.

D. REPLY TO ARGUMENT

A. THE TRIAL COURT IMPROPERLY DENIED KRUGER-WILLIS' MOTION TO PROVE WAIS' AUTHORITY TO ACT ON BEHALF OF HOFFENBURG

Kruger-Willis will rely on her Opening Brief with respect to the trial court's improper denial of her motion to prove Wais' authority to act on behalf of Hoffenburg.

B. WITHOUT ANY COMMUNICATION WHATSOEVER BETWEEN WAIS AND HOFFENBURG, WAIS HAD NO AUTHORITY TO ACT ON HOFFENBURG'S BEHALF

1. DUTY TO DEFEND UNDER THE INSURANCE CONTRACT

No man can serve two masters simultaneously. Public policy forbids.

Van Dyke v. White, 55 Wn.2d 601, 612 349 P.2d (1960).

THE INSURANCE CONTRACT DID NOT CONFER AUTHORITY ON WAIS TO ACT ON BEHALF OF HOFFENBURG WITHOUT HER KNOWLEDGE AND HER CONSENT

“The relationship between the insurance company, the insured and defense counsel is a tripartite relationship wherein the insurer, pursuant to an insurance contract, pays the costs of defense including the lawyer's fee. *However, in Washington it is clear that legally and ethically the client of the lawyer is the insured.*” Washington State Bar Association Advisory Op. 195 (1999) (citing *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986); *Van Dyke v. White*, 55 Wn.2d 601, 349 P.2d (1960)) (emphasis added). *Supplement to Appendix AA.*

The relationship between an insurer and the insured is purely contractual.⁹ *McGregor v. Inter-Ocean Ins. Co.*, 48 Wn.2d 268, 292 P.2d 1054 (1956). Washington courts have consistently held that an insurance policy is a contract and is to be construed in the same fashion as any other contract. *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984). A careful review of the liability section of the insurance policy, which is applicable in this case, formed no reasonable basis for Wais to believe that he was permitted to act on Hoffenburg's behalf without her authority. See Section I, Liability Coverages, pp. 3-6. *Appendix C*. There is no language in the policy, and none that the Respondent's purported attorney has pointed to, that permitted Wais to act on Hoffenburg's behalf without her authority, which is required by law. RCW 2.44.020 and 2.44.030. CP 115.

Further, Wais was ethically required to have contact with Hoffenburg and to obtain her authorization for him to act on her behalf. A lawyer retained by an insurance company must have contact with the client before he or she has authority to act on the client's behalf. See WSBA Advisory Opinion 928 (1985). *Appendix C*. Wais conceded in open court that he had no contact whatsoever with Hoffenburg. RP 25.

Kruger-Willis does not dispute that GEICO had a duty to defend Hoffenburg under the terms of Lebeda's insurance contract once it determined that the collision at issue was a covered loss; however, in

⁹ Although not a party to the insurance contract between GEICO and Lebeda, as an authorized driver of Lebeda's vehicle, Hoffenburg was a third-party beneficiary under the terms of the insurance contract.

addition to the contractual obligation to provide a defense for Hoffenburg, Wais was statutorily and ethically obligated to obtain Hoffenburg's authority to appear for her in this matter. *See* RCW 2.44.020, RCW 2.44.030, RPC 1.2(f). The duty to defend clause under the insurance policy does not waive Wais' professional obligations under the RCW and the RPC. He was professionally obligated to communicate in some form with Hoffenburg and to obtain her authority before he acted on her behalf. Since he now concedes that he has never had contact with Hoffenburg, Wais breached his professional obligations under the RCW and the RPC.

**2. HARMS AND PREJUDICES AS A RESULT
OF WAIS' UNAUTHORIZED APPEARANCE**

HARMS AND PREJUDICE TO HOFFENBURG

CONFLICT OF INTEREST – LEBEDA, HOFFENBURG, GEICO

Hoffenburg argues in her response brief that Wais took no action that prejudiced her rights. Response Brief of Respondent, 1, 11. This argument is disingenuous.¹⁰ There was a conflict of interest from the outset of this case among, Lebeda, the insured; Hoffenburg, the permissible driver of Lebeda's vehicle; and GEICO, Lebeda's insurance company. Lebeda did not cause the collision that injured Kruger-Willis, however, it was foreseeable that in the event that the collision was not a covered loss under his policy, he would look to Hoffenburg to pay all of

¹⁰ While it is not Kruger-Willis' place to argue harms and prejudice to Hoffenburg as a result of Wais' unauthorized appearance, Kruger-Willis addresses this argument raised in Hoffenburg's Response Brief.

Kruger-Willis' property damage and it was foreseeable for Hoffenburg to look to Lebeda's insurer, GEICO, to cover Kruger-Willis' loss. CP 99.

Given the possibility that Hoffenburg could become solely or partially responsible for the Kruger-Willis' loss,¹¹ had she been provided with private counsel, or had she even been involved in the defense of her case for that matter, she would most likely object to Lebeda's dismissal from the case because she relied on his insurer to pay for the Kruger-Willis' loss. Hoffenburg had no contractual relationship with GEICO and if GEICO decided to deny coverage, Hoffenburg would become responsible for Kruger-Willis' loss.¹² With the dismissal from the case of Lebeda, the conflict between Hoffenburg and GEICO was especially perilous for Hoffenburg because the person to whom GEICO owed a duty was dismissed from the case. By dismissing Lebeda without her knowledge or her consent, Wais surrendered a substantial right of Hoffenburg – the guarantee of payment for the loss by GEICO by way of Lebeda's insurance contract with GEICO. "No client should be at the mercy of his attorney, who, without the authority or knowledge of his client stipulates away such a right directly contrary to the client's interest...If there is substantial doubt, the client's interest should be

¹¹ Or in excess of policy limits. In Washington, the standard limit for property damage is \$10,000. As Kruger-Willis' property damage claim was valued at approximately \$5,000, had she prevailed at trial and was awarded costs and attorney's fees, such an amount may exceed Lebeda's policy limits.

¹² Hoffenburg was charged with a criminal offense with respect to the collision that caused Kruger-Willis' property damage.

protected.” *Graves v. P.J. Taggares Co.*, 25 Wash.App. 118, 125, 605 P.2d 348 (1980). CP 99.

Additionally, by filing a request for a trial de novo after Kruger-Willis prevailed at arbitration, Wais exposed Hoffenburg to the possibility that she would be liable for Kruger-Willis’ damages in excess of Lebeda’s property damage limits. Lastly, before the trial de novo, Wais served Kruger-Willis with an offer of judgment that permitted Kruger-Willis to take judgment against Hoffenburg in the amount of \$1,000. An attorney may not surrender a substantial right of a client without special authority granted by the client. *Graves v. P.J. Taggares Co.*, 94 Wash.2d 298, 303, 616 P.2d 1223 (1980). CP 99.

CONFLICT OF INTEREST – HOFFENBURG AND GEICO

The problem of conflict has its roots in an attorney representing and having obligations to two clients. There is the inevitable tension and a potential that the attorney’s representation of one may be rendered less effective because of his representation of the other. *Spindle v.*

Chubb/Pacific Indemnity Group, 152 Cal. Rpt. 776, 780-81 (Ct. App.

1979). Moreover:

Most insurance defense attorneys have an on-going relationship with their insurers, and they work hard at developing future business. Conversely, few defense attorneys enjoy continuing relationships with the insureds they are hired to represent. It is this strong and perpetual economic linkage between insurers and their regular counsel that most concerns courts and insureds.

Richmond, Douglas R., “Lost in the Eternal Triangle of Insurance Defense Ethics,” 9 Georgetown Journal of Legal Ethics 475, 482 (1996). CP 99.

Appendix E.

Some of the conflict is due to the concept of dual representation or the dual client doctrine. Under this doctrine, the attorney represents both the insurer and insured. Richmond, Douglas R., “Lost in the Eternal Triangle of Insurance Defense Ethics,” 9 Georgetown Journal of Legal Ethics 475, 482 n.26 (1996). ***Washington does not follow the dual client doctrine:*** “RPC 5.4 demands that counsel understand that he or she represents only the insured, not the company.” *Tank v. State Farm*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986).¹³ “Both retained defense attorney and the insurer must understand that *only the insured* is the client.” *Id.* at 388 (emphasis added). CP 99.

RPC 1.7(b)¹⁴ requires informed consent whenever the lawyer’s representation of one client “may be materially limited by the lawyer’s responsibilities to another client.”¹⁵ RPC 1.8(f) and RPC 5.4 prohibit an attorney from accepting compensation from someone other than the client unless the client consents after consultation and there is no interference with the lawyer’s independent professional judgment. CP 99.

¹³ A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services. RPC 5.4(c).

¹⁴ RPC 1.7(b)(4).

¹⁵ RPC 1.7(a)(2).

HARMS AND PREJUDICE TO KRUGER-WILLIS

In her Response Brief, Hoffenburg agrees that Kruger-Willis has accurately stated the law with respect to RCW 2.44.020, which provides:

Appearance without authority -- Procedure.

If it be alleged by a party for whom an attorney appears, that he or she does so without authority, the court may, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear from the consequences of his or her act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his or her assumption of authority.

The trial court denied Kruger-Willis' motion under a different statute – RCW 2.44.030 – which moved the trial court to require Wais to prove the authority under which he appeared in this case. In response to Kruger-Willis' motion, Wais surprisingly conceded that he had never had contact with Hoffenburg. RP 25. While Kruger-Willis long suspected that Wais acted in this matter at the direction of GEICO and not Hoffenburg, Kruger-Willis never imagined that an attorney would hold himself out to represent a party without having any communication whatsoever with his purported client. CP 115.

Once there has been a judicial determination that Wais did not have the authority to appear on behalf of Hoffenburg, then a motion would be appropriate under RCW 2.44.020 to repair the injury to Kruger-Willis. However, since Hoffenburg raises this issue on appeal, Kruger-Willis will address her injuries:

1. A property damage claim in the amount of \$5,044. Due to the procedural history of this case, the statute of limitations has already expired on that claim, and

2. Costs and attorneys fees in the prosecution of this action from the date a Notice of Appearance and Answer and Affirmative Defenses were filed on Hoffenburg's behalf without her authority nearly six years ago.

When a party successfully challenges the authority of an attorney to appear for his opponent, an award of damages, including attorney fees, is a means of repairing the injury under RCW 2.44.020, which authorizes a trial court to compel an attorney to "repair the injury" resulting from the attorney's unauthorized appearance. *Johnsen v. Petersen*, 42 Wash.App. 801, 806, 719 P.2d 607 (1986).

C. THE COURT SHOULD DENY RESPONDENT'S REQUEST FOR COSTS AND REASONABLE ATTORNEYS FEES ON APPEAL

In her Response Brief, Hoffenburg moves the Court to award her costs and attorneys fees on appeal pursuant to RAP 14 et. seq. There was no briefing by Hoffenburg as to why she believes this Court should award her costs and attorneys fees on appeal so Kruger-Willis is unable to respond to the motion.

II. CONCLUSION

Kruger-Willis' vehicle was damaged through no fault of her own by Hoffenburg. Kruger-Willis was not even in the vehicle at the time of

the collision. Her vehicle was lawfully parked outside her place of employment when Hoffenburg crashed into her vehicle and then Hoffenburg fled the scene of the collision. For leaving the scene of the collision, she was charged with a crime. CP 107. In this respect, Kruger-Willis was the innocent victim of a crime – hit and run. When she initiated legal action for property damage against Hoffenburg, she was victimized a second time by an overzealous insurance defense attorney who forgot, or chose to ignore, the basic principle of an attorney-client relationship – that regardless of who pays him, he owes undivided loyalty and fidelity to his client, Hoffenburg.¹⁶ However, before there can be an attorney-client relationship, Hoffenburg must first consent and give her authority to an attorney to act on her behalf.¹⁷ In this case, it is clear that Wais never had Hoffenburg’s authority to act on her behalf because he conceded in open court – over five years after the commencement of this action – that he had never had any contact whatsoever with Hoffenburg. RP 25.

As argued to the trial court, while it appears on its face that Kruger-Willis has been the party to engage in numerous, and perhaps at first blush, unnecessary, post-verdict filings, that really is not the case. It took Kruger-Willis multiple filings before it became evident by admission

¹⁶ A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. RPC 5.4(c).

¹⁷ A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order. RPC 1.2(f); see also RCW 2.44.030.

that Wais never had Hoffenburg's authority to act on her behalf, which is legally and ethically required in Washington. Like an onion, each "layer" of filing – and Hoffenburg's responses thereto – finally reveal that after SIX years of litigation – Wais never had Hoffenburg's authority to act on her behalf from the beginning of this action because he never had any contact with her. Had Wais been forthcoming with this information at the outset of the case, the parties could have concluded this matter at the initial stages of litigation six years ago. Instead, Wais proceeded in this matter on behalf of GEICO as if he had Hoffenburg's authority to act on her behalf through pre-trial proceedings; through an arbitration; through a trial; through post-verdict proceedings; through an appeal; through post-mandate proceedings; and now, through another appeal. Only when it came down to a dispute as to who was to be named on an \$11,490.00 check that was tendered to Hoffenburg in full satisfaction of court awarded costs and attorneys fees did it finally become evident by admission that Wais never had contact with Hoffenburg, thus, he never had the authority to act on her behalf. All of the foregoing actions by Wais were prejudicial to the administration of justice.

For the foregoing reasons, this Court should find that Wais, as the insurance-retained defense attorney, did not have Hoffenburg's authority to act on her behalf and it should reverse the trial court's denial of Kruger-Willis' motion under RCW 2.44.030. This Court should also deny Hoffenburg's motion for costs and fees under RAP 14 et. seq., associated

with this appeal.¹⁸

RESPECTFULLY submitted this 15th day of August, 2014.

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¹⁸ No briefing by Hoffenburg as to why she believes this Court should award costs and attorneys fees to her on appeal so Kruger-Willis is unable to respond to the motion.

CERTIFICATE OF SERVICE

I certify that on August 15, 2014, I caused a true and correct copy of this Amended Reply Brief of Appellant to be served on the following by U.S. First Class Mail, postage prepaid.

Counsel for Respondent:

**Paul L. Crowley
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524 Tacoma Avenue South
Tacoma, WA 98402**

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

/s/ Alana K. Bullis

Alana K. Bullis

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APPENDIX A



Search Results

Directions:

- ▶ If the case was filed in Superior or Appellate Court, there may be docket information available. Docket information is not available for Municipal & District Court Cases.
- ▶ Click on a highlighted name to get docket information for this case.
- ▶ The court of record must be contacted for verification and any further information.

There are 23 names that match your search criteria.

Name	Court	Case Number	Judgment Record	Court Information
1 Hofferbert, Heather DEFENDANT	Mason Co Superior Ct	08-2-00653-4		07-07-2008
2 Hofferbert, Heather Ann Defendant	Thurston County Dist	7Y5030907		11-26-2007
3 Hofferbert, Heather Ann Defendant	Mason District Court	C00603164		08-18-2006
4 Hofferbert, Heather Ann Defendant	Thurston County Dist	I00064730		05-15-2009
5 Hofferbert, Heather Ann Defendant	Puyallup Municipal	C00066434		05-21-2009
6 Hofferbert, Heather Ann Defendant	Pierce Co District	9P5952485		04-01-2009
7 Hofferbert, Heather Ann Defendant	Olympia Municipal Ct	2009043		05-26-2009
8 Hofferbert, Heather Ann Defendant	Mason District Court	I05455959		10-08-2007
9 Hofferbert, Heather Ann Defendant	Shelton Municipal Ct	46188C		02-22-2008
10 Hofferbert,	Thurston	7-M000477		11-29-2007

About Lists of Names

About Name List

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What is this website? It is an index of cases filed in the municipal, district, superior, and appellate courts of the state of Washington. This index can point you to the official or complete court record.

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How do I verify the information contained in the index? You must consult the

	Heather Ann Defendant	County Dist		
11	Hofferbert, Heather Ann Defendant	Shelton Municipal Ct	50077C	08-04-2010
12	Hofferbert, Heather Ann Defendant	Olympia Municipal Ct	CR0216408	11-08-2010
13	Hofferbert, Heather Ann Juvenile Respondent	Mason Co Superior Ct	02-8- 00236-1	11-05-2002
14	Hofferbert, Heather Ann DEFENDANT	Thurston Superior	09-1- 00581-1	03-30-2009
15	Hofferbert, Heather Ann PETITIONER	Mason Co Superior Ct	10-2- 00753-2	08-11-2010
16	Hofferbert, Heather Ann RESPONDENT	Mason Co Superior Ct	10-2- 00696-0	08-02-2010
17	Hofferbert, Heather Ann RESPONDENT	Mason Co Superior Ct	10-2- 00754-1	08-11-2010
18	Hofferbert, Heather Ann Defendant	Shelton Municipal Ct	2Z0587958	08-10-2012
19	Hofferbert, Heather Ann Defendant	Shelton Municipal Ct	2Z0587959	08-10-2012
20	Hofferbert, Heather Ann PETITIONER	Mason Co Superior Ct	12-3- 00364-2	11-07-2012
21	Hofferbert, Heather Ann Defendant	Mason District Court	C00603163	08-18-2006
22	Hofferbert, Heather Ann Defendant	Shelton Municipal Ct	45368C	04-19-2004
23	Hofferbert, Heather Ann Defendant	Thurston County Dist	C00016383	02-25-2005

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APPENDIX B

No. 42417-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG and JOHN DOE HOFFENBURG,

Respondent.

RESPONSE BRIEF OF RESPONDENT

MARY E. OWEN & ASSOCIATES
Morgan J. Wais, WSBA #36603
600 University Street, Suite 400
Seattle, WA 98101
(206) 292-9494
Attorney for Respondent

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ISSUES OF LAW

Whether the Trial Court, pursuant to CR 54(e), abused its discretion when it entered judgment on the jury's verdict more than 15 days after the jury rendered a verdict in favor of Defendant?

Whether the Trial Court, pursuant to RCW 4.84.250, properly awarded costs and reasonable attorney's fees to Defendant as the prevailing party where Plaintiff pleaded the case less than \$10,000?

STATEMENT OF THE CASE

This lawsuit arises out of a two vehicle accident that occurred on February 21, 2008, in Mason County, Washington. CP 46-48. While driving a vehicle, Defendant struck Plaintiff's lawfully parked and unoccupied 2003 Chevrolet Suburban, causing property damage to Plaintiff's vehicle. CP 46-48. Following the accident, Plaintiff's vehicle was fully repaired at the expense of Defendant's insurance carrier. CP 14. Following the repair of the vehicle, Plaintiff filed suit against Defendant seeking recovery for the diminished value of the repaired vehicle. CP 46-48.

The parties began the discovery process, and Plaintiff returned Defendant's Request for Statement of Damages, listing her damages as totaling \$6,353.00, thereby pleading the case less than \$10,000 and

implicating RCW 4.84.250. CP 14 & CP 5-7. The case proceeded to a mandatory arbitration, and an award was made in favor of Plaintiff for \$5,044.00. CP 41-42. Defendant filed a request for a trial de novo and a demand for a jury trial, paying the respective filing fees for each. CP 39. Defendant then provided Plaintiff with an Offer of Judgment for \$1,000.00, pursuant to CR 68 and RCW 4.84.250 through 4.84.300, which was not accepted by Plaintiff. CP 15. On April 28, 2011, following a three day trial, the jury rendered a zero dollar verdict in favor of the Defendant. CP 37.

On May 26, 2011, Defendant filed a Motion Seeking Costs and Reasonable attorney's fees, which was then held on June 6, 2011. CP 29-36 & RP 1-13. At that motion hearing, rather than awarding costs and reasonable attorney's fees, and upon Defendant's further motion, the Court entered judgment upon the jury's verdict in favor of Defendant. RP 11-12. Costs and reasonable attorney's fees were not awarded on June 6, 2011, and the matter was set over for further detail to be provided regarding the amount of Defendant's attorney's fees. RP 12.

On June 15, 2011, nine days after the judgment was entered, Defendant filed a Note for Motion and filed her Second Motion Seeking Costs and Reasonable Attorney's Fees. CP 13-20. At the second motion hearing, which was held on June 24, 2011, the Court granted Defendant's

motion and entered an Order Awarding Costs and Reasonable Attorney's Fees in the amount of \$11,490. CP 5-7 & RP 14-20. This amount included \$500.00 in costs, which represented the jury fee and the de novo fee, and \$10,990 in reasonable attorney's fees, which represented Defendant's counsel's hours spent on the case, 68.2, multiplied by a rate of \$175.00 per hour. CP 5-7 & RP 14-20.

Plaintiff then filed the Notice of Appeal and is the Appellant herein. Defendant, who was the prevailing party at the Trial Court, is the Respondent herein.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The applicable standard of review is concisely put in *North Coast Electric Co. v. Selig*, 136 Wn.App.636, 642-643, 151 P.3d 211 (2007), where the Division I stated the following:

“When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable.” Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo. Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion. A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion. (citing *Ethridge v. Hwang*, 105 Wn.App. 447, 459-460, 20 P.3d 958 (2001)).

II. DEFENDANT'S MOTION FOR COSTS AND REASONABLE ATTORNEY'S FEES WAS TIMELY MADE WITHIN 10 DAYS OF ENTRY OF JUDGMENT UPON THE JURY'S VERDICT.

The Trial Court did not abuse its discretion when it entered judgment on June 6, 2011, 39 days after the jury's defense verdict. CP 5-7. Since the jury's verdict was for Defendant in the amount of zero dollars, there was, in fact, no amount for which to enter a judgment absent a motion for costs and reasonable attorney's fees. CP 37. It was within the Trial Court's discretion to enter judgment at the June 6, 2011, hearing since CR 54(e) unambiguously allows the trial court to direct the entry of judgment. CR 54(e) states the following:

“[t]he attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, *or at any other time as the court may direct.*” (emphasis added)

Based upon this rule, the Trial Court directed entry of judgment at the June 6, 2011, motion hearing for costs and reasonable attorney's fees. CP 5-7. Consistent with CR 54(f)(2)(C), presentation of the judgment was made while opposing counsel was present and in open court. Thus, while it is true that judgment was entered more than 15 days after the jury's verdict for Defendant, it was, nevertheless, proper and within the Court's discretion to do.

Plaintiff argues that the judgment was not entered within 15 days of the jury's verdict while simultaneously arguing that the award for costs and fees was not timely made within 10 days of the *jury's verdict*. Plaintiff's argument confuses the requirement of CR 54(d)(2), which states that an award of costs and reasonable attorneys fees be made within 10 days of *entry of judgment*, with a *perceived* requirement that an award of costs and reasonable attorney's fees be made within 10 days of the *jury's verdict*. Yet, a jury's verdict is separate and distinctly different from a judgment upon a verdict. The civil rules make this difference clear where they specifically enumerate a procedure for entering a judgment after a jury's verdict in CR 54(e) and (f).

Moreover, even in the case cited by Plaintiff as authoritative, *Corey v. Pierce County*, 154 Wn.App. 752, 774, 225 P.3d 367 (2010), the Court stated “[w]e do not believe the mandate of liberal construction of the statutory attorney fees claim precludes the application of a temporal limitation, such as that in CR 54(d). *The timeliness requirement of CR 54(d) applies only after the underlying claim is reduced to judgment in court.*” (emphasis added) Indeed, CR 54(d) only provides a timeline for a motion for costs and reasonable attorney's fees relative to entry of judgment, not relative to a jury's verdict. So long as a judgment upon a verdict is entered at such “time as the court may direct,” a motion for costs

and reasonable attorneys fees need only be made within 10 days. CR 54(e).

In this case there was no need to enter judgment upon the jury's verdict but for the fact that Defendant subsequently sought to recover her costs and reasonable attorney's fees after the defense verdict. Since entering judgment on the jury's verdict is a procedural prerequisite to recovering costs and reasonable attorney's fees, the judgment was properly entered at the first motion hearing on June 6, 2011. CP 5-7. Contrary to Plaintiff's contention, the Trial Court had discretion to direct entry of judgment at the first motion hearing under CR 54(e). Nine days later, on June 15, 2011, Defendant noted the second motion for costs and reasonable attorney's fees, which then took place on June 27, 2011. CP 13-20. It is undisputed that once the judgment was entered, the motion for costs and reasonable attorney's fees was noted within 10 days, as required by CR 54(d)(1).

Since the Trial Court was within its discretion to enter judgment more than 15 days after the jury's verdict, and since the motion for costs and reasonable attorney's was noted within 10 days of entry of judgment, the Trial court properly awarded Defendant her costs and reasonable attorney's fees associated with being the prevailing party at trial.

III. DEFENDANT, AS THE PREVAILING PARTY AT TRIAL, HAS STANDING TO SEEK COSTS AND REASONABLE ATTORNEY'S FEES.

The issue of Defendant's standing to recover her costs and reasonable attorney's fees because she is indemnified by an insurance company was not briefed or argued to the Trial Court, and it is not properly before this Court on appeal. Although Plaintiff pointed out that Defendant was indemnified throughout the litigation, the parties did not argue about Defendant's standing, or claimed lack thereof, to recover costs and reasonable attorney's fees. RP 6-7. Thus, this Court should not consider this particular issue on appeal. Nevertheless, if this Court considers this particular argument on its merits, there is little merit to consider.

Plaintiff argues that Defendant lacked standing to move for costs and reasonable attorney's fees merely because Plaintiff was indemnified by an insurance company throughout the course of litigation. Plaintiff concedes that there is no precedent for this assertion, which is simply because it is a nonsensical argument. There is no statute, civil rule or case law which suggests that where a party is indemnified by an insurance company that the indemnified party then forfeits their right to recover their defense costs under Washington law. Plaintiff attempts comparison with *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 116

(1986), however, as the name of the case implies, an insurance company was, in fact, a party to that suit. It is simply inapplicable to the facts here. Here, Defendant, Heather Hoffenberg, as the named party in the underlying lawsuit, irrespective of her insurance status, has legal standing to recover her costs and reasonable attorney's fees.

In bolstering this argument, Plaintiff attempts to misdirect this Court with regard to who the Defendant, in fact, is. Plaintiff, in her briefing, deceptively refers to Defendant's insurer, GEICO, rather than referring to Defendant, Heather Hoffenberg, as the party to the lawsuit. Plaintiff, having filed and served the underlying lawsuit, ought to know that GEICO has never been a party to the lawsuit, and GEICO is not a party to this appeal. GEICO is merely the insurance company indemnifying Defendant in the lawsuit and the present appeal. Thus, Plaintiff is correct when she argues that GEICO was not an aggrieved party - GEICO is not party at all. That Plaintiff was indemnified by an insurance company was wholly immaterial to the case at trial, was wholly immaterial to the Trial Court's issuance of costs and attorneys fees, and it is wholly immaterial to this appeal.

IV. THE TRIAL COURT PROPERLY COMPUTED AND AWARDED COSTS AND REASONABLE ATTORNEY'S FEES FROM THE ONSET OF THE LITIGATION.

Defendant was properly awarded her costs and reasonable attorney's fees associated with defending this lawsuit because the case was "pleaded" as valued less than \$10,000 in Plaintiff's response for Request for Statement of Damages. Defendant was the prevailing party when she obtained a defense verdict at trial, thereby improving her position upon the mandatory arbitration award and her \$1,000 offer to settlement, which was made pursuant to CR 68 and RCW 4.84.250 et. seq.

Plaintiff argues that costs and reasonable attorneys fees should not have been awarded if they were incurred before the mandatory arbitration because MAR 7.3 only allows for costs and reasonable attorney's fees incurred after the de novo. Plaintiff correctly states the rule. However, this argument ignores that costs and reasonable attorneys fees were not awarded under MAR 7.3, but rather were awarded under RCW 4.84.250, et. seq. Since Plaintiff pleaded the case less than \$10,000, Defendant is entitled to costs and reasonable attorney's fees from the filing of the lawsuit and not simply following the mandatory arbitration.

RCW 4.84.250 is titled "Attorneys' fees as costs in damages actions of ten thousand dollars or less – Allowed to prevailing party." RCW 4.84.250 states the following:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

While RCW 4.84.250 assumes the prevailing party is the plaintiff, RCW 4.84.270 is titled "Attorneys' fees as costs in damage actions of ten thousand dollars or less – When defendant deemed prevailing party." RCW 4.84.270 reads as follows:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages were the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, *recovered nothing*, or if the recovery, exclusive of costs, is the same or *less than the amount offered in settlement by the defendant*, or the party resisting relief as set forth in RCW 4.84.280. (emphasis added)

In this case, Plaintiff "pleaded" her damages to be less than \$10,000 when she responded to the Request for Statement of Damages by writing "\$6,053.00 Diminished value; \$300.00 Diminished Value Report." CP 3-5. While RCW 4.28.360 does not allow a plaintiff to plead a specific amount in their Complaint, it does allow for a defendant to send a Request for Statement of Damages. The Request for Statement of

Damages has been unequivocally held to be a “pleading” within the meaning of RCW 4.84.250. *Pierson v. Hernandez*, 149 Wn.App. 297, 202 P.3d 1014 (2009). “The Washington Supreme Court has ruled that a request for damages pursuant to RCW 4.28.360 triggers the ‘pleading’ of damages applicable to RCW 4.84.250.” *Pierson* 149 Wn.App. at 303 (citing *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 789-790, 733 P.2d 960 (1987)). Since, in this case, the amount pleaded by Plaintiff response to the Statement of Damages was less than \$10,000, the reasonable attorney’s fees provisions of RCW 4.84.250 and 4.84.270 are implicated.

Defendant was the prevailing party as the jury rendered a verdict for Defendant. CP 3-7. Thus, under the plain language of RCW 4.84.250 and 4.84.270, Defendant is entitled to reasonable attorney’s fees. “The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (citing *State v. J.M.*, 144 Wn.2d, 472, 480, 28 P.3d 720 (2001)). Here, the statute is plain on its face, and Defendant was properly allowed awarded her reasonable attorney’s fees and not simply \$200.00 in statutory attorney’s fees contemplated by 4.84.080.

RCWs 4.84.250 and 4.84.270 explicitly allow for reasonable attorneys fees in cases such as this where the amount plead is less than \$10,000. Defendant is entitled to and deserves reasonable attorney's fees since Defendant filed a request for a trial de novo and faced a substantial financial risk in doing so. Indeed, had Plaintiff improved her position over the arbitration award, pursuant to MAR 7.3, she would have been able to recover her "reasonable attorney fees." Despite the large financial risk of proceeding to trial on a trial de novo, Defendant proceeded to trial and prevailed with a defense verdict. Had the Plaintiff received a jury award for even one dollar over mandatory arbitration award, Defendant would have had to pay "reasonable attorney fees" to Plaintiff, which, surely, would have been many times greater than the \$10,990 awarded to Defendant.

In addition to the reasonable attorney's fees, the Trial Court correctly awarded Defendant her statutory costs. CP 3-7. RCW 4.84.030 states "[i]n any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements;..." Additionally, RCW 4.84.060 states that "[i]n all cases where costs and disbursements are not allowed to the plaintiff, the defendant *shall* be entitled to have judgment in his favor for the same." (emphasis added) In this case, costs and disbursements were not allowed to Plaintiff, so under

the unambiguous language of the law, Defendant was entitled to an award in her favor “for the same.”

The specific recoverable costs are contained within RCW 4.84.010, which states “there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party’s expenses in the action...” The statute then goes on to enumerate which costs are recoverable, which, relevant herein, are as follows:

- (1) Filing fees; . . .
- (5) Reasonable expenses, exclusive of attorneys’ fees, incurred in obtaining reports and records, , which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
- (6) Statutory attorney and witness fees; and
- (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing; PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into the evidence or used for purposes of impeachment. (emphasis in original)

Defendant calculated her recoverable costs under RCW 4.84.010 as only being \$500.00 for the filing of the trial de novo, \$250.00, and the jury demand fee, \$250.00. While Defendant did incur substantial fees in obtaining expert reports and records, Defendant conceded that none of these documents were specifically admitted at trial, making them not

recoverable. Moreover, witnesses' statutory witness fees were paid by the Court, and Plaintiff's deposition testimony was not introduced into evidence at trial, thus making those costs not recoverable by Defendant. Accordingly, Defendant's recoverable costs are merely \$500.00 for the filing fees incurred by Defendant.

CONCLUSIONS

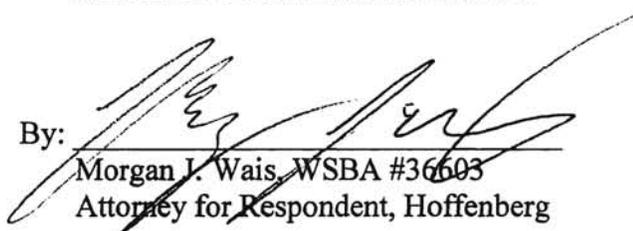
The decisions of the Trial Court should be affirmed by this Court. It was within the Trial Court's discretion to enter judgment more than 15 days after the jury's verdict. CR 54(e) specifically grants the Trial Court discretion to direct entry of judgment, and the facts under which it was done in this case do not constitute an abuse of that discretion. Defendant, as the prevailing party at trial, had standing to recover her costs and reasonable attorney's fees, regardless of whether she was indemnified by an insurance company – this fact is simply immaterial to this Court's analysis. Finally, the Trial Court did not abuse its discretion when it entered an order awarding Defendant her costs and reasonable attorney's fees. RCW 4.84.250 et. seq., allows for Defendant to recover her costs and reasonable attorney's fees as the prevailing party. The computation of time spent on the case and the hourly rate were very modest, and the costs were nominal as well. Thus, the Trial Court's order awarding Defendant

\$11,490, should be affirmed. Costs and reasonable attorney's fees associated with this appeal should also be awarded.

DATED this 29th day of February, 2012.

MARY E. OWEN & ASSOCIATES

By:



Morgan J. Wais, WSBA #36603
Attorney for Respondent, Hoffenberg

APPENDIX C



WSBA

Advisory Opinion: 928

Year Issued: 1985

RPC(s):

Subject: Formation of attorney-client relationship

[The lawyer was retained by an insurance company to represent an employee of the insured company. The employee was covered under the terms of the insurance policy but was no longer employed by the insured.] In reviewing your inquiry, the Committee understood the facts to be that the employee you had been requested to represent had had no contact with you, and that in fact no attorney-client relationship had ever been formed. Based upon that understanding of the facts, the Committee was of the opinion that you had no authority to act as lawyer for the employee, and therefore should not enter a general denial on his behalf.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

APPENDIX D



WSBA

Advisory Opinion: 928

Year Issued: 1985

RPC(s):

Subject: Formation of attorney-client relationship

[The lawyer was retained by an insurance company to represent an employee of the insured company. The employee was covered under the terms of the insurance policy but was no longer employed by the insured.] In reviewing your inquiry, the Committee understood the facts to be that the employee you had been requested to represent had had no contact with you, and that in fact no attorney-client relationship had ever been formed. Based upon that understanding of the facts, the Committee was of the opinion that you had no authority to act as lawyer for the employee, and therefore should not enter a general denial on his behalf.

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APPENDIX E

GEICO
geico.com

TEL: 1-800-841-3000

FAX: 1-800-437-8837

U-31-DP-1 (7-07)

Policy Number: 1885-67-84-07

GEICO GENERAL INSURANCE COMPANY
ONE GEICO PLAZA, WASHINGTON, DC 20078-0001

FAMILY AUTOMOBILE POLICY RENEWAL DECLARATIONS

This is a description of your coverage. Please keep for your records.

Item 1: Named Insured and Address

DEREK LEBEDA
133 MERIDIAN CT # 3
SHELTON WA 98584-4801

E-Mail Address: delebeda@comcast.net

Date Issued: 09-10-07

Policy Period From 10-26-07 to 04-26-08 12:01 a.m. Local time at the address of the named insured.

The insured vehicle(s) will be regularly garaged in the town and state shown in Item 1, except as noted in the Vehicle Segment.

Contract Type: A30WA

CONTRACT AMENDMENTS: ALL VEHICLES - A30WA

UNIT ENDORSEMENTS: A135 (VEH 1,2)

IMPORTANT MESSAGES

- Please review the reverse side of this page for coverage and discount information.
- The GEICO Property Agency can arrange for your homeowner's, renter's and condominium owner's insurance needs. Just call toll-free at 1-888-306-9500. Refinancing? Let us provide the new Homeowner's Policy you need.
- Active Duty, Guard, Reserve or Retired Military: Call 1-800-MILITARY to see if you qualify for the Military Discount.
- Reminder - Physical damage coverage will not cover loss for custom options on an owned auto, including equipment, furnishings or finishings including paint, if the existence of those options has not been previously reported to us. Please call us at 1-800-841-3000 if you have any questions or wish to purchase additional coverage for customized equipment not included above.

400A01188557840748032000553

GEICO GENERAL INSURANCE COMPANY

U-31-DP-20 (7-07)

Date Issued: 09-10-07 **T-6** **Policy Number: 1885-67-84-07**

VEHICLE		RATED LOCATION	CLASS
1 05 CHEV	2GCEC13T251336088	SHELTON WA 98584	C -X -27SMP -L
2 84 PONT	1G2AX87L3EL208253	SHELTON WA 98584	C -M - -S

COVERAGES <small>Coverage applies where a premium or 0.00 is shown for the vehicle.</small>	LIMITS OR DEDUCTIBLES	PREMIUMS		
		Vehicle 1	Vehicle 2	Vehicle
BODILY INJURY LIABILITY EACH PERSON/EACH OCCURRENCE	\$25,000/\$50,000	111.60	88.40	
PROPERTY DAMAGE LIABILITY	\$25,000	84.00	56.90	
BASIC PERSONAL INJURY PROTECTION	OPTION B	41.30	73.10	
UNDERINSURED MOTORIST EACH PERSON/EACH OCCURRENCE	\$25,000/\$50,000	25.90	25.90	
UNDERINSURED MOTORIST PROPERTY DAMAGE	INSURED REJECTS			
COMPREHENSIVE	\$500 DED	88.20		
COLLISION	\$500 DED	227.90		

SIX MONTH PREMIUM PER VEHICLE: \$ 578.90 \$ 244.30

If you elect to pay your premium in installments, you may be subject to an additional fee for each installment. The fee amount will be shown on your billing statements and is subject to change.

Premiums for these vehicles are based on the following Discounts and/or Surcharges:

- DISCOUNTS MULTI-CAR (VEH 1,2); ANTI-LOCK BRAKES (VEH 1);
- ANTI-THEFT DEVICE (VEH 1);
- PASSIVE RESTRAINT/AIR BAG (VEH 1)

Lienholder Vehicle

Lienholder Vehicle

Lienholder Vehicle

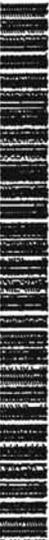
GEICO

Telephone: 1-800-841-3000

**Washington
Family
Automobile
Insurance
Policy**

Government Employees Insurance Company
GEICO General Insurance Company
GEICO Indemnity Company
GEICO Casualty Company

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Whenever, "he," "his," "him," or "himself" appears in this policy, you may read "her," "she," "hers," or "herself."

AGREEMENT

We, the Company named in the declarations attached to this policy, make this agreement with **you**, the policyholder. Relying on the information **you** have furnished and the declarations attached to this policy and if **you** pay **your** premium when due, we will do the following:

SECTION I Liability Coverages Your Protection Against Claims From Others Bodily Injury Liability and Property Damage Liability

DEFINITIONS

The words italicized in Section I of this policy are defined below.

1. **Auto business** means the business of selling, repairing, servicing, storing, transporting or parking of autos.
2. **Bodily injury** means bodily injury to a person, including resulting sickness, disease, or death.
3. **Farm auto** means a truck type vehicle with a load capacity of 2000 pounds or less, not used for commercial purposes other than farming.
4. **Insured** means a person or organization described under "persons insured."
5. **Non-owned auto** means an automobile or **trailer** not owned by or furnished for the regular use of either **you** or a **relative**, other than a **temporary substitute auto**. Except for a **temporary substitute auto**, an auto rented or leased for more than 30 days will be considered as furnished for regular use.
6. **Owned auto** means:
 - (a) A vehicle described in this policy for which a premium charge is shown for these coverages;
 - (b) A **Trailer** owned by **you**;
 - (c) A **Private passenger, farm** or **utility auto**, ownership of which **you** acquire during the policy period or for which **you** enter into a lease during the policy period for a term of six months or more, if:
 - (i) It replaces an **owned auto** as defined in (a) above; or
 - (ii) We insure all **private passenger, farm** and **utility autos** owned by **you** on the date of the acquisition, and **you** ask us to add it to the policy no more than 30 days later;
 - (d) **Temporary substitute auto**.
7. **Private passenger auto** means a four-wheel private passenger, station wagon, or jeep-type auto.
8. **Relative** means a person related to **you** who resides in **your** household. This includes **your** ward or foster child.
9. **Temporary substitute auto** means an automobile or **trailer**, not owned by **you**, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the **owned auto** or **trailer** when withdrawn from normal use because of its:
 - (a) Breakdown;
 - (b) Repair;
 - (c) Servicing;
 - (d) Loss; or
 - (e) Destruction.
10. **Trailer** means a trailer designed to be towed by a **private passenger auto**, if not being used for business or commercial purposes with a vehicle other than a **private passenger, farm** or **utility auto**.
11. **Utility auto** means a vehicle, other than a **farm auto**, with a G.V.W. of 10,000 pounds or less of the pick-up body, van or panel truck type not used for commercial purposes.
12. **War** means armed conflict between nations, whether or not declared, civil war, insurrection, rebellion, or revolution.
13. **You** and **your** mean the policyholder named in the declarations or his or her spouse if a resident of the same household.

LOSSES WE WILL PAY FOR YOU

Under Section I, we will pay damages which an **insured** becomes legally obligated to pay because of:

1. **Bodily injury** sustained by a person, and
2. Damage to or destruction of property.

The **bodily injury** or damage or destruction to property must arise out of the:

- (a) Ownership;
- (b) Maintenance; or
- (c) Use

of the **owned auto** or a **non-owned auto**.

We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claim or suit.

ADDITIONAL PAYMENTS WE WILL MAKE UNDER THE LIABILITY COVERAGES

1. All investigative and legal costs incurred by us.
2. All court costs charged to an **insured** in a covered lawsuit.
3. Interest calculated on that part of a judgment that is within our limit of liability and accruing:
 - (a) Before the judgment, where owed by law, and until we pay, offer or deposit in court the amount due under this coverage;
 - (b) After the judgment, and until we pay, offer or deposit in court, the amount due under this coverage.
4. Premiums for appeal bonds in a suit we appeal, or premiums for bonds to release attachments; but the face amount of these bonds may not exceed the applicable limit of our liability.
5. Premiums for bail bonds paid by an **insured** due to traffic law violations arising out of the use of an **owned auto** or **non-owned auto**, not to exceed \$250 per bail bond.
6. We will upon request by an **insured**, provide reimbursement for the following items:
 - (a) Costs incurred by any **insured** for first aid to others at the time of an accident involving an **owned auto** or **non-owned auto**.
 - (b) Loss of earnings up to \$50 a day, but not other income, if we request an **insured** to attend hearings and trials.
 - (c) All reasonable costs incurred by an **insured** at our request.

EXCLUSIONS

When Section I Does Not Apply

We will not defend any suit for damage if one or more of the exclusions listed below applies.

1. Section I does not apply to any vehicle used to carry passengers or goods for hire. However, a vehicle used in an ordinary car pool on a ride sharing or cost sharing basis is covered.
2. **Bodily injury** or property damage caused intentionally by or at the direction of an **insured** is not covered.
3. We do not cover **bodily injury** or property damage that is insured under a nuclear liability policy.
4. **Bodily injury** or property damage arising from the operation of farm machinery is not covered.
5. **Bodily injury** to an employee of an **insured** arising out of and in the course of employment by an **insured** is not covered.

However, **bodily injury** of a domestic employee of the **insured** is covered unless benefits are payable or are required to be provided under a workers' compensation law.

6. We do not cover **bodily injury** to a fellow employee of an **insured** if the fellow employee's **bodily injury** arises from the use of an auto while in the course of employment and if workers' compensation or other similar coverage is available. We will defend **you** if a suit is brought by a fellow employee against **you** alleging use, ownership or maintenance of an auto by **you**.
7. We do not cover an **owned auto** while used by a person (other than **you** or a **relative**) when he is employed or otherwise engaged in the **auto business**.
8. A **non-owned auto** while maintained or used by any person is not covered while such person is employed or otherwise engaged in 1) any **auto business**; 2) any other business or occupation of any **insured**, except a **private passenger auto** used by **you** or **your** chauffeur or domestic servant while engaged in such other business.
However, coverage does apply to a **non-owned private passenger auto** used by **you**, **your** chauffeur or a domestic servant, while engaged in the business of an **insured**.
9. We do not cover damage to:
 - (a) Property owned, operated or transported by an **insured**; or
 - (b) Property rented to or in charge of an **insured** other than a residence or private garage.
10. We do not cover an auto acquired by **you** during the policy term, if **you** have purchased other automobile liability insurance for it.

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- 11. We do not cover:
 - (a) The United States of America or any of its Agencies;
 - (b) Any person, including **you**, if protection is afforded under the provisions of the Federal Tort Claims Act.
- 12. **Bodily injury** or property damage that results from nuclear exposure or explosion including resulting fire, radiation or contamination is not covered.
- 13. **Bodily injury** or property damage that results from bio-chemical attack or exposure to bio-chemical agents is not covered.
- 14. We do not cover bodily injury or property damage that results from the operation of a **non-owned auto** or **temporary substitute auto** that is designed for use principally off public roads that is not registered for use on public roads.
- 15. We do not cover liability assumed under any contract or agreement.
- 16. We do not cover **bodily injury** or property damage caused by an auto driven in or preparing for any racing, speed, or demolition contest or stunting activity of any nature, whether or not prearranged or organized.
- 17. Regardless of any other provision of this policy, there is no coverage for punitive or exemplary damages.

PERSONS INSURED

Who Is Covered

Section I applies to the following as **insureds** with regard to an **owned auto**:

- 1. **You and your relatives**;
- 2. Any other person using the auto with **your** permission. The actual use must be within the scope of that permission;
- 3. Any other person or organization for his or its liability because of acts or omissions of an **insured** under 1 or 2 above.

Section I applies to the following with regard to a **non-owned auto**:

- 1. (a) **You**;
- (b) **Your relatives** when using a **private passenger, utility, or farm auto, or trailer**.
Such use by **you** or **your relatives** must be with the permission, or reasonably believed to be with the permission, of the owner and within the scope of that permission;
- 2. A person or organization, not owning or hiring the auto, regarding his or its liability because of acts or omissions of an **insured** under 1 above.
The limits of liability stated in the declarations are our maximum obligations regardless of the number of **insureds** involved in the occurrence.

FINANCIAL RESPONSIBILITY LAWS

When this policy is certified as proof of financial responsibility for the future under the provisions of a motor vehicle financial responsibility law, this liability insurance will comply with the provisions of that law. The **insured** agrees to reimburse us for payments made by us which we would not have had to make except for this agreement.

OUT OF STATE INSURANCE

When the policy applies to the operation of a motor vehicle outside of **your** state, we agree to increase **your** coverages to the extent required of out-of state motorists by local law. This additional coverage will be reduced to the extent that **you** are protected by another insurance policy. No person can be paid more than once for any item of loss.

LIMITS OF LIABILITY

Regardless of the number of autos or **trailers** to which this policy applies:

- 1. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of our liability for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one person as the result of one occurrence.
- 2. The limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of our liability for all such damages, including damages for care and loss of services, because of **bodily injury** sustained by two or more persons as the result of any one occurrence.
- 3. The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of our liability for all damages because of injury to or destruction of the property of one or more persons or organizations, including the loss of use of the property as the result of any one occurrence.
- 4. For accidents which occur in Alaska, all court costs charged to an **insured** in a covered lawsuit, including attorney fee payments shall not exceed the amount that could be awarded in accordance with the percentage schedule contested cases as specified in Alaska Rule of Civil Procedure 82(b) (1) in a case in which a judgment equal to the liability policy limit or limits applicable to the loss rendered.

If a judgment is rendered against **you** in excess of **your** liability policy limits, you will be responsible for attorney fees awarded in accordance with Alaska Rule of Civil Procedure 82(b) (1) which exceed that which would be allowable under the schedule for contested cases if the judgment rendered was within **your** policy limit.

CONDITIONS

The following conditions apply to Section I:

1. NOTICE

As soon as possible after an occurrence written notice must be given us or our authorized agent stating:

- (a) The identity of the **insured**;
- (b) The time, place and details of the occurrence;
- (c) The names and addresses of the injured, and of any witnesses; and
- (d) The names of the owners and the description and location of any damaged property.

If a claim or suit is brought against an **insured**, he must promptly send us each demand, notice, summons or other process received.

2. TWO OR MORE AUTOS

When this policy covers two or more autos, the limit of coverage applies separately to each. An auto and an attached **trailer** are considered to be one auto.

3. ASSISTANCE AND COOPERATION OF THE **INSURED**

The **insured** will cooperate and assist us, if requested:

- (a) In the investigation of the occurrence;
- (b) In making settlements;
- (c) In the conduct of suits;
- (d) In enforcing any right of contribution or indemnity against any legally responsible person or organization because of **bodily injury** or property damage; and
- (e) At trials and hearings;
- (f) In securing and giving evidence; and
- (g) By obtaining the attendance of witnesses.

Only at his own cost will the **insured** make a payment, assume any obligation, or incur any cost other than for first aid to others.

4. ACTION AGAINST US

We cannot be sued:

- (a) Unless the **insured** has fully complied with all the policy's terms and conditions, and
- (b) Until the amount of the **insured's** obligation to pay has been finally determined, either
 - (i) By a final judgment against the **insured** after actual trial; or
 - (ii) By written agreement of the **insured**, the claimant and us.

A person or organization or the legal representative of either, who secures a judgment or written agreement, may then sue to recover up to the policy limits.

No person or organization, including the **insured**, has a right under this policy to make us a defendant in an action to determine the **insured's** liability.

Bankruptcy or insolvency of the **insured** or his estate will not relieve us of our obligations.

5. SUBROGATION

When payment is made under this policy, we will be subrogated to all the **insured's** rights of recovery against others. After the **insured** has been fully compensated for his loss, we will have the right to recover up to the amount of our payment from the remaining proceeds of the settlement or judgment.

This means we have the right to sue for or otherwise recover the loss from anyone else who may be held responsible. The **insured** will do nothing after loss to prejudice these rights.

SECTION II

Auto Medical Payments

Protection For You and Your Passengers For Medical Payments

DEFINITIONS

The definitions of terms shown under Section I apply to this coverage. In addition, under this coverage, **occupying** means in or upon or entering into or alighting from.

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PAYMENTS WE WILL MAKE

Under this coverage, we will pay all reasonable expenses for necessary:

- (a) Medical;
- (b) Surgical;
- (c) X-ray and
- (d) Dental services;
- (e) Prosthetic devices;
- (f) Ambulance;
- (g) Hospital;
- (h) Professional nursing; and
- (i) Funeral services

actually incurred by an **insured** within three years from the date of the accident.

This coverage applies to:

1. **You** and each **relative** who sustains **bodily injury** caused by accident:
 - (a) While **occupying** the **owned auto**; or
 - (b) While **occupying** a **non-owned auto** if **you** or **your relative** reasonably believe **you** have the owner's permission to use the auto and the use is within the scope of that permission; or
 - (c) When struck as a pedestrian by an auto or **trailer**.
2. Any other person who sustains **bodily injury** caused by accident while **occupying** the **owned auto** while being used by **you**, a resident of **your** household, or other persons with **your** permission.

EXCLUSIONS

When Section II Does Not Apply

1. There is no coverage for **bodily injury** sustained by any occupant of an **owned auto** used to carry passengers or goods for hire. However, a vehicle used in an ordinary car pool on a ride sharing or cost sharing basis is covered.
2. There is no coverage for an **insured** while **occupying** a vehicle located for use as a residence or premises.
3. **You** and **your relatives** are not covered for **bodily injury** sustained while **occupying** or when struck by:
 - (a) A farm-type tractor or other equipment designed for use principally off public roads, while not upon public roads; or
 - (b) A vehicle operated on rails or crawler-treads.
4. There is no coverage for persons employed in the **auto business**, if the accident arises out of that business and if benefits are required to be provided under a workers' compensation law.
5. There is no coverage for **bodily injury** sustained due to **war**.
6. The United States of America or any of its Agencies are not covered as an **insured**, a third party beneficiary, or otherwise.
7. There is no coverage for **bodily injury** that results from nuclear exposure or explosion including resulting fire, radiation or contamination.
8. There is no coverage for **bodily injury** that results from bio-chemical attack or exposure to bio-chemical agents.
9. We do not cover **bodily injury** or property damage caused by an auto driven in or preparing for any racing, speed, or demolition contest or stunting activity of any nature, whether or not proarranged or organized.

LIMITS OF LIABILITY

The limit of liability for medical payments stated in the declarations as applying to "each person" is the limit we will pay for all costs incurred by or on behalf of each person who sustains **bodily injury** in one accident. This applies regardless of the number of persons insured or the number of autos or **trailers** to which this policy applies.

CONDITIONS

The following conditions apply to this coverage:

1. **NOTICE**
As soon as possible after an accident, written notice must be given us or our authorized agent stating:
 - (a) The identity of the **insured**;
 - (b) The time, place and details of the accident; and
 - (c) The names and addresses of the injured, and of any witnesses.

2. TWO OR MORE AUTOS /

If this policy covers two or more autos, the limit of coverage applies separately to each. An auto and an attached **trailer** are considered to be one auto.

3. ACTION AGAINST US

We cannot be sued unless the **insured** has fully complied with all the policy terms.

4. MEDICAL REPORTS-PROOF AND PAYMENT OF CLAIMS

As soon as possible, the injured person or his representative will furnish us with written proof of claim, under oath if required. After each request from us, he will give us written authority to obtain medical reports and copies of records. The injured person will submit to an examination by doctors chosen by us and at our expense as we may reasonably require.

We may pay either the injured person, the doctor or other persons or organizations rendering medical services. These payments are made without regard to fault or legal liability of the **insured**.

5. SUBROGATION

When we make a payment under this coverage we will have the right to bring suit or other action against any person or organization legally liable for the **bodily injury** to recover our payment. After the **insured** has been fully compensated for his loss, we will have the right to recover up to the amount of our payment from the remaining proceeds of the settlement or judgment.

SECTION III

Physical Damage Coverages

Your Protection For Loss or Damage To Your Car

DEFINITIONS

The definitions of the terms **auto business, farm auto, private passenger auto, relative, temporary substitute auto, utility auto, you, yours,** and **war** under Section I apply to Section III also.

Under this Section, the following special definitions apply:

1. **Collision** means **loss** caused by upset of the covered auto or its collision with another object, including an attached vehicle.

Losses caused by the following are comprehensive **losses**:

- | | |
|----------------------|--------------------------------------|
| (a) Missiles; | (j) Hail; |
| (b) Falling objects; | (k) Water; |
| (c) Fire; | (l) Flood; |
| (d) Lightning; | (m) Malicious mischief; |
| (e) Theft; | (n) Vandalism; |
| (f) Larceny; | (o) Riot; |
| (g) Explosion; | (p) Civil commotion; or |
| (h) Earthquake; | (q) Colliding with a bird or animal. |
| (i) Windstorm; | |

2. **Insured** means:

- (a) Regarding the **owned auto**:
 - (i) **You and your relatives**;
 - (ii) A person or organization maintaining, using, or having custody of the auto with **your** permission, if his use is within the scope of that permission.
 - (b) Regarding a **non-owned auto, you and your relatives**, using the auto, if the actual operation or use is with the permission or reasonably believed to be with the permission of the owner and within the scope of that permission.
3. **Loss** means direct and accidental loss of or damage to:
 - (a) The auto, including its equipment; or
 - (b) Other insured property.
 4. **Non-owned auto** means a **private passenger, farm, or utility auto or trailer** not owned by or furnished for the regular use of either **you or your relatives**, except a **temporary substitute auto**. **You or your relative** must be using the auto or **trailer** within the scope of permission given by its owner. An auto rented or leased for more than 30 days will be considered as furnished for regular use.

5. **Owned auto** means:

- (a) Any vehicle described in this policy for which a specific premium charge indicates there is coverage;

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- (b) A **private passenger, farm or utility auto** or a **trailer**, ownership of which is acquired by **you** during the policy period or for which **you** enter into a lease during the policy period for a term of six months or more; if
 - (i) It replaces an **owned auto** as described in (a) above, or
 - (ii) We insure all **private passenger, farm, utility autos** and **trailers** owned or leased by **you** on the date of such acquisition and **you** request us to add it to the policy within 30 days afterward;

(c) A **temporary substitute auto**.

- 6. **Trailer** means a trailer designed for use with a **private passenger auto** and not used as a home, office, store, display or passenger trailer.
- 7. **Actual cash value** is the replacement cost of the auto or property, adjusted if appropriate, for **depreciation or betterment** and condition.
- 8. **Depreciation** means a decrease or **loss** in value to the auto or property because of use, disuse, physical wear and tear, age, outdatodness, or other causes.
- 9. **Betterment** is improvement of the auto or property to a value greater than its pre-loss condition.
- 10. **Custom parts or equipment** means paint, equipment, devices, accessories, enhancements, and changes, other than those which are original manufacturer installed, which:
 - (a) Are permanently installed or attached; or
 - (b) Alter the appearance or performance of a vehicle.

This includes any electronic equipment, antennas, and other devices used exclusively to send or receive audio, visual, or data signals, or to play back recorded media, other than those which are original manufacturer installed, that are permanently installed in the owned auto or a newly acquired vehicle using bolts or brackets, including slide-out-brackets.

LOSSES WE WILL PAY FOR YOU

Comprehensive (Excluding Collision)

- 1. We will pay for each **loss**, less the applicable deductible, caused other than by **collision** to the **owned or non-owned auto**. This includes glass breakage.
 No deductible will apply to **loss** caused by fire, lightning, smoke, or damage sustained while the vehicle is being transported on any conveyance.
 At the option of the **insured**, breakage of glass caused by **collision** may be paid under the collision coverage, if included in the policy.
- 2. We will pay, up to \$200 per occurrence, less any deductible shown in the declarations, for **loss** to personal effects due to:
 - (a) Fire;
 - (b) Lightning;
 - (c) Flood;
 - (d) Falling objects;
 - (e) Earthquake;
 - (f) Explosion; or
 - (g) Theft of the entire automobile.

The property must be owned by **you** or a **relative**, and must be in or upon an **owned auto**.

No deductible will apply due to **loss** by fire or lightning.

- 3. **Losses** arising out of a single occurrence shall be subject to no more than one deductible.

Collision

- 1. We will pay for **collision loss** to the **owned or non-owned auto** for the amount of each **loss** less the applicable deductible.
- 2. We will pay up to \$200 per occurrence, less the applicable deductible, for **loss** to personal effects due to a **collision**. The property must be owned by **you** or a **relative**, and must be in or upon an **owned auto**.
- 3. **Losses** arising out of a single occurrence shall be subject to no more than one deductible.

ADDITIONAL PAYMENTS WE WILL MAKE UNDER THE PHYSICAL DAMAGE COVERAGES

- 1. We will reimburse the **insured** for transportation expenses incurred during the period beginning 48 hours after a theft of the entire auto covered by comprehensive coverage under this policy has been reported to us and the police. Reimbursement ends when the auto is returned to use or we pay for the **loss**.

Reimbursement will not exceed \$25.00 per day nor \$750.00 per **loss**.

EXCLUSIONS

When the Physical Damage Coverages Do Not Apply

1. An auto used to carry passengers or goods for hire is not covered. However, a vehicle used in an ordinary car pool on a ride sharing or cost sharing basis is covered.
2. **Loss** due to **war** is not covered.
3. We do not cover **loss** to a **non-owned auto** when used by the **insured** in the **auto business**.
4. There is no coverage for **loss** caused by and limited to wear and tear, freezing, mechanical or electrical breakdown or failure, unless that damage results from a covered theft.
5. Tires, when they alone are damaged by **collision**, are not covered.
6. **Loss** due to radioactivity is not covered.
7. **Loss** to any tape, wire, record disc, or other medium for use with a device designed for the recording and/or reproduction of sound is not covered.
8. We do not cover **loss** to any radar or laser detector.
9. We do not cover **trailers** when used for business or commercial purposes with vehicles other than **private passenger, farm** or **utility autos**.
10. There is no coverage for **loss** that results from nuclear exposure or explosion including resulting fire, radiation or contamination.
11. There is no coverage for **loss** that results from bio-chemical attack or exposure to bio-chemical agents.
12. We do not cover **loss** for **custom parts or equipment** unless the existence of those **custom parts or equipment** has been previously reported to us and an endorsement to the policy has been added.
13. There is no coverage for any liability assumed under any contract.
14. There is no coverage for any **loss** from:
 - (a) The acquisition of a stolen vehicle;
 - (b) Any governmental, legal, or other action to return a vehicle to its legal, equitable, or beneficial owner, or anyone claiming an ownership interest in the vehicle;
 - (c) Any confiscation, seizure, or impoundment of a vehicle by governmental authorities; or
 - (d) The sale of an **owned auto**.
15. There is no coverage for the destruction, impoundment, confiscation, or seizure of a vehicle by governmental or civil authorities due to its use by **you**, a **relative** or permissive user of the vehicle in illegal activity.
16. There is no coverage for any **loss** caused by participation in or preparing for any racing, speed, or demolition contest or stunting activity of any nature, whether or not prearranged or organized.

LIMITS OF LIABILITY

The limit of our liability for **loss**:

1. Is the **actual cash value** of the property at the time of the **loss**;
2. Will not exceed the cost to repair or replace the property, or any of its parts, including parts from non-original equipment manufacturers, with others of like kind and quality and will not include compensation for any diminution in the property's value that is claimed to result from the **loss**;
3. To personal effects arising out of one occurrence is \$200;
4. To a **trailer** not owned by **you** is \$500;
5. For **custom parts or equipment** is limited to the **actual cash value** of the **custom parts or equipment**, not to exceed the **actual cash value** of the vehicle.
6. Deductions for **betterment** and **depreciation** are permitted only for parts normally subject to repair and replacement during the useful life of the insured motor vehicle. Deductions for **betterment** and **depreciation** shall be limited to the lesser of an amount equal to the proportion that the expired life of the part to be repaired or replaced bears to the normal useful life of that part, or the amount which the resale value of the vehicle is increased by the repair or replacement.
7. For glass repair or replacement, will not exceed the prevailing competitive price. Although **you** have the right to choose any glass repair facility or location, the limit of liability for loss to the window glass is the cost to repair or replace such glass but will not exceed the prevailing competitive price. This is the price we can secure from a competent and conveniently located glass repair facility. At **your** request, we will identify a glass repair facility that will perform the repairs at the prevailing competitive price.

Actual cash value of property will be determined at the time of the **loss** and will include an adjustment for **depreciation/betterment** and for the physical condition of the property.

CONDITIONS

The following conditions apply only to the Physical Damage Coverages:

1. NOTICE

As soon as possible after a **loss**, written notice must be given to us or our authorized agent stating:

- (a) The identity of the **insured**;
- (b) A description of the auto or **trailer**;
- (c) The time, place and details of the **loss**; and
- (d) The names and addresses of any witnesses.

In case of theft, the **insured** must promptly notify the police.

2. TWO OR MORE AUTOS

If this policy covers two or more autos or **trailers**, the limit of coverage and any deductibles apply separately to each.

3. ASSISTANCE AND COOPERATION OF THE **INSURED**

The **insured** will cooperate and assist us, if requested:

- (a) In the investigation of the **loss**;
- (b) In making settlements;
- (c) In the conduct of suits;
- (d) In enforcing any right of subrogation against any legally responsible person or organization;
- (e) At trials and hearings;
- (f) In securing and giving evidence; and
- (g) By obtaining the attendance of witnesses.

4. ACTION AGAINST US

We cannot be sued unless the policy terms have been complied with and until 30 days after proof of loss is filed and the amount of **loss** is determined.

If we retain salvage, we have no duty to preserve or otherwise retain the salvage for any purpose, including as evidence for any civil or criminal proceeding. If **you** ask us immediately after a loss to preserve the salvage for inspection, we will do so for a period not to exceed 30 days. **You** may purchase salvage from us if you wish.

5. **INSURED'S** DUTIES IN EVENT OF **LOSS**

In the event of **loss** the **insured** will:

- (a) Protect the auto, whether or not the **loss** is covered by this policy. Further **loss** due to the **insured's** failure to protect the auto will not be covered. Reasonable expenses incurred for this protection will be paid by us.
- (b) File with us within 91 days after **loss**, his sworn proof of loss including all information we may reasonably require.
- (c) At our request, the **insured** will exhibit the damaged property.

6. APPRAISAL

If we and the **insured** do not agree on the amount of **loss**, either may, within 60 days after proof of loss is filed, demand an appraisal of the **loss**. In that event, we and the **insured** will each select a competent appraiser. The appraisers will select a competent and disinterested umpire. The appraisers will state separately the **actual cash value** and the amount of the **loss**. If they fail to agree, they will submit the dispute to the umpire. An award in writing of any two will determine the amount of **loss**. We and the **insured** will each pay his chosen appraiser and will bear equally the other expenses of the appraisal and umpire.

Neither we nor the **insured** waive any of our rights under this policy by agreeing to an appraisal.

7. PAYMENT OF **LOSS**

We may at our option:

- (a) Pay for the **loss**; or
- (b) Repair or replace the damaged or stolen property.

At any time before the **loss** is paid or the property replaced, we may return any stolen property to **you** or to the address shown in the declarations at our expense with payment for covered damage. We may take all or part of the property at the agreed or appraised value, but there will be no abandonment to us. We may settle claims for **loss** either with the **insured** or the owner of the property.

8. NO BENEFIT TO BAILEE

This insurance does not apply directly or indirectly to the benefit of a carrier or other bailee for hire liable for the **loss** of the auto.

9. SUBROGATION

When we make a payment under this coverage we will be subrogated to all the insured's rights of recovery against others. After the **insured** has been fully compensated for his **loss**, we will have the right to recover up to the amount of our payment from the remaining proceeds of the settlement or judgment.

This means we will have the right to sue for or otherwise recover the **loss** from anyone else who may be held responsible. The **insured** will do nothing after a **loss** to prejudice these rights. The **insured** will help us to enforce these rights.

SECTION IV

Underinsured Motorists Coverage

Protection For You and Your Passengers For Injuries Caused By Underinsured and Hit and Run Motorists

DEFINITIONS

The definitions of terms for Section I apply to Section IV, except for the following special definitions:

1. **Accident** means an occurrence that is unexpected and unintended from the standpoint of the **insured**.
2. **Hit-and-run vehicle** is one whose owner or operator cannot be identified and which makes physical contact with the **insured** or the vehicle which the **insured** is **occupying** at the time of the **accident**, resulting in **bodily injury** or **property damage** to an **insured**.
3. **Insured** means:
 - (a) **You**;
 - (b) A **relative**;
 - (c) Any other person **occupying an owned auto**; or
 - (d) Any person who is entitled to recover because of **bodily injury** or **property damage** sustained by an **insured** under (a), (b), and (c) above.

If there is more than one **insured**, our limits of liability will not be increased.

4. **Insured Auto** means:
 - (a) An auto described in the declarations; and
 - (b) Covered by the bodily injury and property damage liability coverages of this policy;
 - (c) A **temporarily substituted auto**; or
 - (d) An auto operated by **you**.
5. **Phantom vehicle** means a motor vehicle which causes **bodily injury** or **property damage** to an **insured** and has no physical contact with the **insured** or the vehicle which the **insured** is **occupying** at the time of the accident.
6. **Property damage** means damage to or destruction of property.
7. **Occupying** means:
 - (a) In;
 - (b) Upon;
 - (c) Entering into; or
 - (d) Alighting from.
8. **Underinsured Motor Vehicle** means a land motor vehicle or **trailer**:
 - (a) Which has no bodily injury and property damage liability bond or policy in effect at the time of the **accident**;
 - (b) Which has a liability bond or insurance that applies at the time of the **accident** but the limits of that insurance are less than the amount the **insured** is legally entitled to recover for damages;
 - (c) Whose insurer denies coverage;
 - (d) Whose insurer is or becomes insolvent;
 - (e) A **hit-and-run vehicle**; or
 - (f) A **phantom vehicle**.

If there is an accident involving a **phantom vehicle** the facts of the accident must be proven. We will accept competent evidence. We will not accept the testimony of the **insured** or that of any person having a claim under this coverage resulting from the accident.

The term **Underinsured Motor Vehicle** does not include a vehicle or equipment:

- (a) Owned by or furnished or available for the regular use of **you** or a **relative**.
- (b) Operated on rails or crawler-treads.
- (c) Located for use as a residence or premises.
- (d) To which SECTION I-LIABILITY COVERAGES -of this policy applies. This exception to the definition of **underinsured motor vehicle** does not apply to **you** or any **relative** if **you** or any **relative** sustain damages while **occupying**, or when struck by a vehicle for which coverage under Section I of this policy applies.

9. **Bodily injury** means bodily injury, sickness, or disease, including death, sustained by **you, your relatives** or any other person **occupying** an **insured auto** with **your** consent.

LOSSES WE WILL PAY

We will pay damages an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** due to:

1. **Bodily injury** sustained by that **insured** and caused by an **accident**; and
2. **Property damage** caused by an **accident** if entry is made in the Declarations to this policy that both bodily injury and property damage Underinsured Motorists Coverage applies.

The liability of the owner or operator for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle**.

The amount of the **insured's** recovery for damages will be determined by agreement between the **insured** or his representative and us.

If an **insured** reaches a tentative agreement to settle his claim against any person or organization legally responsible for his injuries, that **insured** or his legal representative should notify us of the tentative settlement and give us a reasonable opportunity to protect our recovery rights.

EXCLUSIONS

When this coverage Does Not Apply

1. There is no coverage for **bodily injury** or **property damage** sustained by an **insured** while operating or **occupying** a motorcycle or a motor-driven cycle which is not insured under the Liability Coverage of this policy.
2. This coverage will not benefit any workers' compensation insurer, self-insurer or an insurer under a similar disability benefits law.
3. We do not cover the United States of America or any of its Agencies as an **insured**, a third party beneficiary or otherwise.
4. We do not cover any person while **occupying** a vehicle described in the declarations on which Underinsured Motorists coverage is not carried.
5. There is no coverage for **bodily injury** or **property damage** sustained by an **insured** while operating or **occupying** a motor vehicle owned by or available for the regular use of **you** or any family member and which is not **insured** under the Liability coverage of this policy.
6. This coverage does not apply to the first \$100 (\$300 if the damage is caused by a hit-and-run driver or **phantom vehicle**) of the total amount of all **property damage**.
7. Regardless of any other provision of this policy, there is no coverage for punitive or exemplary damages assessed against an underinsured motorist.
8. **Bodily injury** or **property damage** that results from nuclear exposure or explosion including resulting fire, radiation or contamination is not covered.
9. **Bodily injury** or **property damage** that results from bio-chemical attack or exposure to bio-chemical agents is not covered.
10. This coverage does not apply to any liability assumed under any contract or agreement.
11. This coverage does not apply to damage caused by an **insured's** participation in or preparation for any racing, speed or demolition contest or stunting activity of any nature, whether or not prearranged or organized.

LIMITS OF LIABILITY

1. The limits for "each person" is the most we will pay as damages for **bodily injury**, including those for care and loss of services, to one person in one **accident**.
2. Subject to the limit for "each person," the limit for each **accident** is the most we will pay as damage for **bodily injury**, including those for care and loss of services, to two or more persons in one **accident**.
3. The limit for **property damage** is the most we will pay for damages to property in one **accident**. This limit is subject to the provision of Exclusion 6.
4. The maximum limits apply for each auto for which a premium is shown in the Policy declarations.
5. We will pay no more than these maximums regardless of the number of:
 - (a) Autos or **trailers** to which this policy applies;
 - (b) **Insureds**;
 - (c) Claims;
 - (d) Claimants or policies; or
 - (e) Vehicles involved in the **accident**.

6. If separate policies with us are in effect for **you** or any person in **your** household, they may not be combined to increase the limit of our liability for a loss. If this policy and any other policy providing Underinsured Motorists Coverage apply to the same **loss**, the maximum limit of liability under all policies will be the highest limit of liability that applies under any one policy.
7. Any amounts otherwise payable for damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury** or **property damage** shall be reduced by all sums:
 - (a) Paid under SECTION I - LIABILITY COVERAGES - of this policy;
 - (b) Paid under SECTION II - AUTO MEDICAL PAYMENTS COVERAGE - of this policy; or
 - (c) Paid under Personal Injury Protection Amendment, if any, to this policy.The total damages will be reduced by any amount paid by or for all persons or organizations liable for the injury.
8. We will pay, up to the limits selected, any amount of damages for **bodily injury** which the named insured is legally entitled to recover from the owner or operator of the other vehicle to the extent that those damages exceed the limits of **bodily injury** carried by the owner or the operator.
9. When payment is made under this coverage, no payment will be made for **loss** paid to an **insured** under SECTION III - PHYSICAL DAMAGE COVERAGES-of this policy.

If a claim is made under this coverage and under the liability coverages section of this policy, the amount payable under the bodily injury and property damage coverages will be reduced by any amounts payable to the same claimant under this coverage.
10. For **accidents** which occur in Alaska, all court costs charged to an **insured** in a covered lawsuit, including attorney fee payments shall not exceed the amount that could be awarded in accordance with the percentage schedule contested cases as specified in Alaska Rule of Civil Procedure 82(b) (1) in a case in which a judgment equal to the liability policy limit or limits applicable to the loss rendered.

ARBITRATION: RESOLVING A DISAGREEMENT

1. If **you** and we do not agree whether **you** are legally entitled to recover damages under this coverage based upon the liability facts of the **accident** or to the proper amount of such damages, the dispute may be resolved:
 - (a) In a binding, voluntary arbitration proceeding as described in paragraph 2 below, or
 - (b) By civil lawsuit brought by **you** in a court of competent jurisdiction.
2. Unless we mutually agree otherwise, a voluntary arbitration shall be composed of a single arbitrator selected by mutual agreement. Arbitration services vendors may be consulted to facilitate the arbitration. If agreement cannot be reached on selection of an arbitrator, paragraph 1 (b) of this section shall apply. The cost of the arbitrator shall be paid by us. All other expenses of arbitration, including fees for attorneys and expert witnesses, shall be paid by the party who incurred them.
3. Any arbitration will be limited to issues in actual dispute but will not include disputes involving the existence or policy limits of Underinsured Motorists Coverage. The decision of the arbitrator shall be binding except that we will not pay any amount in excess of the applicable policy limits of this coverage.

TRUST AGREEMENT

When we make a payment under the coverage:

1. We will be entitled to repayment out of any settlement or judgment the **insured** recovers from any person or organization legally responsible for the **bodily injury** or **property damage**. Our right applies only after the **insured** has been fully compensated for his loss.
2. To the extent of our payment, the **insured** will hold in trust for our benefit all his rights of recovery against any person or organization responsible for damages. He will do whatever is necessary to secure all rights of recovery. He will do nothing after the loss to prejudice these rights.
3. The **insured** will execute and give us all needed documents to secure his and our rights.
4. If the payment was caused by an insolvent insurer, our right of reimbursement shall not include any rights against the insured of that insolvent insurer for any amounts that would have been paid by the insolvent insurer. We have the right to proceed directly against the insolvent insurer or its receiver. In pursuing these rights, we shall have any rights which the insured of the insolvent insurer might otherwise have had if the insured of the insolvent insurer had personally made the payment.

CONDITIONS

1. NOTICE

As soon as possible after an **accident**, notice should be given to us or our authorized agent stating:

- (a) The identity of the **insured**;
- (b) The time, place and details of the accident;

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- (c) The names and addresses of the injured; and
- (d) The names and addresses of any witnesses.

If the **insured** or his legal representative files suit before we settle under this coverage, he should immediately give us a copy of the suit papers.

2. ADDITIONAL DUTIES

If the **accident** involves a **hit-and-run vehicle** or **phantom vehicle**, the **insured** or someone on his behalf must:

- (a) Notify the proper law enforcement agency within 72 hours for **accidents** involving a **phantom vehicle**,
- (b) Promptly notify the police in all **accidents** with a **hit-and-run vehicle**;
- (c) Claim a cause for action for damages against an unknown person; and
- (d) Make available for our inspection, if requested, the auto occupied by the **insured** at the time of the **accident**.

3. ASSISTANCE AND COOPERATION OF THE **INSURED**

After we receive notice of a claim, we require the **insured** to take any reasonable and necessary action to preserve his recovery rights against any person or organization who may be legally responsible. If reasonable and necessary, the **insured** should make that person or organization a defendant in any action against us.

4. ACTION AGAINST US

We cannot be sued unless the **insured** or his legal representative has fully complied with all the policy terms.

5. PROOF OF CLAIM - MEDICAL REPORTS

As soon as possible, the **insured** or other person making claim shall give us written proof of claim. The proof will be under oath if we ask. The proof will include details:

- (a) Of the type and extent of injuries;
- (b) The type of treatment; and
- (c) Other facts which may affect the amount payable.

The injured person shall submit to examination by doctors of our choice. Such examinations will be at our expense and as often as we may reasonably ask. If the **insured** becomes incapacitated or dies, his legal representative must, if we ask, authorize us to obtain medical reports and copies of records.

6. PAYMENT OF LOSS

Any amount due is payable:

- (a) To the **insured**; or
- (b) To his authorized representative; or
- (c) To a parent or guardian if the **insured** is a minor; otherwise
- (d) To a person authorized by law to receive the payment

**SECTION V
General Conditions**

These Conditions Apply to All Coverages in This Policy

1. TERRITORY

This policy applies only to accidents, occurrences or **losses** during the policy period within the United States of America, its territories or possessions, or Canada or when the auto is being transported between ports thereof.

2. PREMIUM

When you dispose of, acquire ownership of, or replace a **private passenger, farm** or **utility auto**, any necessary premium adjustment will be made as of the date of the change and in accordance with our manuals.

If the classification, sub-classification or territory of any insured auto or operator changes, we will make any needed premium adjustments as of the date of the change and in accordance with our manuals. This paragraph applies to:

- (a) Section I - Liability Coverages;
- (b) Section II - Auto Medical Payments; and
- (c) Section III - Physical Damage Coverages.

3. CHANGES

The terms and provisions of this policy cannot be waived or changed, except by an endorsement issued to form a part of this policy.

We may revise this policy during its term to provide more coverage without an increase in premium. If we do so, **your** policy will automatically include the broader coverage when effective in **your** state.

The premium for each auto is based on the information we have in **your** file. **You** agree:

- (a) That we may adjust **your** policy premiums during the policy term if any of this information on which the premiums are based is incorrect, incomplete or changed.
- (b) That **you** will cooperate with us in determining if this information is correct and complete.
- (c) That **you** will notify us of any changes in this information.

Any calculation or recalculation of **your** premium or changes in **your** coverage will be based on the rules, rates and forms on file, if required, for our use in **your** state.

4. ASSIGNMENT

Your rights and duties under this policy may not be assigned without our written consent.

If **you** die, this policy will cover **your** surviving spouse if covered under the policy prior to your death. Until the expiration of the policy term, we will also cover:

- (a) The executor or administrator of **your** estate, but only while operating an **owned auto** and while acting within the scope of his duties; and
- (b) Any person having proper temporary custody of and operating the **owned auto**, as an **insured**, until the appointment and qualification of the executor or administrator of **your** estate.

5. CANCELLATION BY THE **INSURED**

You may cancel this policy by providing notice to us stating when, after the notice, cancellation will be effective. If **you** cancel, the return premium will be computed pro-rata.

We will not refund any unearned premium amounting to \$2.00 or less.

6. CANCELLATION BY US

We may cancel this policy by mailing to **you**, at the address shown in this policy, written notice stating when the cancellation will be effective. The notice will state the reason for cancellation.

We will mail this notice:

- (a) At least 10 days in advance if the proposed cancellation is for non-payment of premium or any of its installments when due, or within the first 30 days after the contract has been in effect;
- (b) At least 20 days in advance in all other cases.

The mailing or delivery of the above notice will be sufficient proof of notice. The policy will cease to be in effect as of the date and hour stated in the notice.

When we cancel, earned premium will be computed pro-rata. Payment or tender of unearned premium is not a condition of cancellation.

Any unearned premium will be refunded to **you** as soon as possible. It will be sent no later than 30 days after the date of our notice of cancellation.

We will not refund any unearned premium amounting to \$2.00 or less.

7. CANCELLATION BY US IS LIMITED

After this policy has been in effect for 60 days or, if the policy is a renewal, effective immediately, we will not cancel unless:

- (a) **You** do not pay the initial premium on other than a renewal policy or any additional premiums for this policy to us or our agent; or
- (b) **You** fail to pay any premium installment when due to us or our agent; or
- (c) **You** or any customary operator has had his driver's license suspended or revoked during the policy period, or if a renewal, during the policy period or the 180 days immediately prior to the renewal date.

We have the right to modify any physical damage coverages under SECTION III by including a deductible not to exceed \$100.

Our failure to cancel for any of the reasons above will not obligate us to renew the policy.

8. RENEWAL

We will not refuse to renew this policy unless written notice of our refusal to renew is mailed to **you**, at the address shown in this policy, at least 20 days prior to the expiration date. The mailing or delivery of this notice by us will be sufficient proof of notice. This policy will expire without notice if any of following conditions exist:

- (a) **You** do not pay any premium as we require to renew this policy.
- (b) **You** have informed us or our agent that **you** wish the policy to be canceled or not renewed.
- (c) **You** do not accept our offer to renew.

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9. OTHER INSURANCE

If the **insured** has other insurance against a loss covered by any Section of this policy, we will not owe more than our pro-rata share of the total coverage available.

Any insurance we provide for a vehicle **you** do not own shall be excess over any other collectible insurance.

10. DIVIDEND PROVISION

You are entitled to share in a distribution of the surplus of the company as determined by its Board of Directors from time to time.

11. DECLARATIONS

By accepting this policy, **you** agree that:

- (a) The statements in **your** application and in the declarations are **your** agreements and representations;
- (b) This policy is issued in reliance upon the truth of these representations; and
- (c) This policy, along with the application and declaration sheet, embodies all agreements relating to this insurance. The terms of this policy cannot be changed orally.

12. FRAUD AND MISREPRESENTATION

Coverage is not provided to any person who intentionally conceals or misrepresents any material fact or circumstance relating to this insurance:

- (a) At the time application is made; or
- (b) At any time during the policy period; or
- (c) In connection with the presentation or settlement of a claim.

13. EXAMINATION UNDER OATH

The **insured** or any other person seeking coverage under this policy must submit to examination under oath by any person named by us when and as often as we may require.

14. TERMS OF POLICY CONFORMED TO STATUTES

Any terms of this policy in conflict with the statutes of the State of Washington are amended to conform to those statutes.

15. DISPOSAL OF VEHICLE

If **you** relinquish possession of a leased vehicle or if **you** sell or relinquish ownership of an owned auto, any coverage provided by this policy for that vehicle will terminate on the date and at the time **you** do so.

16. POLICY PERIOD

Unless otherwise cancelled, this policy will expire as shown in the declarations. But, it may be continued by our offer to renew and your acceptance prior to the expiration date. Each period will begin and expire at 12:01AM local time at **your** address in the declarations.

17. CHOICE OF LAW

The policy and any amendment(s) and endorsements(s) are to be interpreted pursuant to the laws of the state of Washington.

SECTION VI - AMENDMENTS AND ENDORSEMENTS
SPECIAL ENDORSEMENT - UNITED STATES GOVERNMENT EMPLOYEES

- A. Under the Property Damage coverage of Section I, we provide coverage to United States Government employees, civilian or military, using:
1. Motor vehicles owned or leased by the United States Government or any of its Agencies, or
 2. Rented motor vehicles used for United States Government business, when such use is with the permission of the United States Government. Subject to the limits described in paragraph B. below, we will pay sums **you** are legally obligated to pay for damage to these vehicles.
- B. The following limits apply to this coverage:
1. A \$100 deductible applies to each occurrence.
 2. For vehicles described in A.1 above, our liability shall not exceed the lesser of the following:
 - (a) The **actual cash value** of the property at the time of the occurrence; or
 - (b) The cost to repair or replace the property, or any of its parts with other of like kind and quality; or
 - (c) Two months basic pay of the **insured**; or
 - (d) The limit of Property Damage liability coverage stated in the declarations.
 3. For vehicles described in A.2 above, our liability shall not exceed the lesser of the following:
 - (a) The **actual cash value** of the property at the time of the occurrence; or
 - (b) The cost to repair or replace the property, or any of its parts with other of like kind and quality; or
 - (c) The limit of Property Damage liability coverage stated in the declarations.

This insurance is excess over other valid and collectible insurance.



J. C. Stewart
Secretary



O.M. Nicely
President

APPENDIX F

1 of 1 DOCUMENT

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Article: Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel

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LEXISNEXIS SUMMARY:

... A standard liability insurance policy provides that the insurer will pay up to coverage limits all sums that the insured becomes legally obligated to pay as damages for injuries to a third party caused by an "accident" or "occurrence." ... The tripartite relationship between insurer, insured, and insurance defense counsel is unique. ... The problems posed by the dual client doctrine rest on the premise that insurance defense counsel cannot loyally represent the insured in any situation posing an actual or potential conflict of interest with the insurer. ... When the usually harmonious tripartite relationship is disrupted by the appearance of a conflict of interest between insurer and insured, defense counsel are left to walk an ethical tightrope. ... The tripartite relationship between insurer, insured, and defense counsel makes potential conflicts of interest inevitable. ... The insurer must therefore specifically reference the policy defenses which may ultimately be asserted, and inform the insured of the potential conflict of interest its reservation creates. ... When appointed counsel learns of information suggesting a possible coverage defense during the course of an insured's representation, an obvious conflict of interest arises. ... The tripartite relationship between insurer, insured, and insurance defense counsel creates problems that "would tax Socrates, and no decision or authority ... furnishes a completely satisfactory answer." ...

TEXT:

[*265]

I. INTRODUCTION

A standard liability insurance policy provides that the insurer will pay up to coverage limits all sums that the insured becomes legally obligated to pay as damages for injuries to a third party caused by an [*266] "accident" or "occurrence." Policy exclusions expressly limit the insurer's promised coverage. ⁿ¹ A standard liability insurance policy further obligates the insurer to provide its insured with a defense. Most policies promise that the insurer will defend "any suit against an insured alleging damage within the scope of the policy even if such suit is groundless, false, or fraudulent." ⁿ² Generally, a policy also reserves to the insurer the right to settle, and reserves broad control over the litigation to the company. ⁿ³ For these reasons, liability insurance is, essentially, "litigation insurance." ⁿ⁴

To protect its insured's rights and interests when suit is filed, the insurer hires defense counsel from a panel of firms with which the company regularly deals. ⁿ⁵ The result is the creation of a tripartite relationship between the insurer, the insured, and appointed defense counsel. "The three parties may be viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose" during the pendency of the litigation. ⁿ⁶ **[*267]**

So long as an insurer's interests are harmonious and aligned with those of its insured, there is no inconsistency between the company's duty to defend and its right to control the litigation. But what of the situation where an insurer defends under a reservation of rights? What if a defense attorney's activities generate information supporting a possible coverage defense? What are the parties' respective obligations when plaintiffs' claimed damages exceed coverage? This Article examines conflicts of interest arising out of the unique tripartite relationship characterizing insurance defense. ⁿ⁷ That examination necessarily includes a review of the sources of conflicts, and a look at judicial and legislative actions and reactions. The avoidance and mitigation of potential conflicts of interest are also discussed.

II. AN OVERVIEW OF THE PROBLEM

Conflicts of interest flow not from an insurer's duty to indemnify but, rather, from its duty to defend. ⁿ⁸ Insurers owe their insureds a defense if the allegations of the subject lawsuit are even potentially within the scope of the policy. ⁿ⁹ Generally, whether a defense is owed may be determined by reviewing the petition or complaint. ⁿ¹⁰ An insurer must defend a claim against its insured "when any theory of the complaint gives rise to the possibility that the insurer would be liable for its costs." ⁿ¹¹ The petition or complaint must be liberally interpreted for purposes of determining whether coverage is excluded. ⁿ¹² If just one of several pleaded theories potentially triggers coverage, the insurer is obligated to defend the entire suit, even if other bases for recovery are specifically excluded under the policy. ⁿ¹³

The duty to defend is broad, and in some jurisdictions its determination may require more than a simple review of pleadings:

[The insurer] must look beyond the effect of the pleadings and consider any facts brought to its attention or any facts which it could reasonably discover when determining whether it has a duty to defend ... The possibility of coverage may be remote, but if it exists the company owes the insured a defense. The possibility of coverage must be determined by a good faith analysis of all information known to the insured or all information reasonably ascertainable by inquiry and investigation. ⁿ¹⁴

[*269] Any doubts about coverage must be resolved in the insured's favor. ⁿ¹⁵ An insurer that breaches its duty to defend is bound by a settlement or judgment rendered against its insured. ⁿ¹⁶

Because of its financial interest in the effective resolution of a claim, the insurer has a contractual right to control its insured's defense. ⁿ¹⁷ The right to control the defense of litigation is part of the insurer's business, and it is certainly one of the services an insured bargains for when purchasing liability insurance. ⁿ¹⁸ Policy provisions giving an insurer the right to control the defense of litigation amount to an insured's advance consent to the insurer's employment of its chosen defense attorney. ⁿ¹⁹ By retaining the ability to select counsel of their choice, insurers are better able to economically and effectively defend claims, ⁿ²⁰ participate in strategic decisions, and seize settlement opportunities. ⁿ²¹ **[*270]**

The tripartite relationship between insurer, insured, and insurance defense counsel is unique. ⁿ²² In no other area of the law are parties routinely represented by counsel selected and paid by a third party whose interests may differ from those of the individual or entity the attorney was hired to defend. ⁿ²³ The potential for conflict is inherent in the

tripartite relationship. The source of most conflicts of interest, both actual and perceived, is the "dual client doctrine." The dual client doctrine reflects a widespread recognition that insurance defense counsel are deemed to have two clients in any given case: the insurer and the insured. ⁿ²⁴

The problems posed by the dual client doctrine rest on the premise that insurance defense counsel cannot loyally represent the insured in any situation posing an actual or potential conflict of interest with the insurer. ⁿ²⁵ Insurance defense counsel are generally specialists doing a substantial volume of business with several carriers. ⁿ²⁶ The close economic and personal relationships that develop between defense attorneys and insurers arguably can lead to a reduced emphasis on insureds' interests in particular cases. ⁿ²⁷ This problem is exacerbated by the fact that while a defense attorney generally has an on-going [*271] relationship with an insurer - fueled by a desire for future business - the attorney's relationship with the insured is usually limited to the defense of a single case.

The dual client doctrine spawns numerous costly and time-consuming distractions for insurers, insureds, and attorneys. ⁿ²⁸ As explained by the Vice Chairman and Loss Prevention Counsel of the Attorneys' Liability Assurance Society, Inc. ("ALAS"), one of the largest and most sophisticated legal malpractice insurers:

These distractions include: 1) Insureds not being candid with defense counsel; 2) Defense counsel must at all times be alert to potential conflicts between insured and insurer; 3) Significant conflicts must be disclosed to and discussed with the insured and the insurer; 4) If a conflict develops, defense counsel must obtain consent of both "clients" in order to proceed; 5) An analysis must be made as to whether a given conflict of interest is so serious as to be nonconsentable; 6) If the conflict is nonconsentable, defense counsel must resign; 7) If the insured is entitled to separate counsel in place of, or in addition to, the original appointed defense counsel, who is responsible for that expense?; 8) In any event, if separate or independent counsel represents the insured, who controls the defense?; 9) In view of the "joint confidences" or "co-client" doctrine (i.e., there is no attorney-client privilege or obligation of confidentiality between and among two or more clients - the insured and the insurer - and their common lawyer, defense counsel), is defense counsel obligated or permitted to disclose to one of the clients information that is unfavorable to the other?; and 10) Defense counsel is, at all times, concerned about potential malpractice liability. ⁿ²⁹

When the usually harmonious tripartite relationship is disrupted by the appearance of a conflict of interest between insurer and insured, defense counsel are left to walk an ethical tightrope. A defense attorney's misstep can result in malpractice liability, discipline for a breach of ethics rules, a loss of coverage defenses for the insurer, or some unpleasant combination of the three. ⁿ³⁰ [*272]

III. CONFLICTS OF INTEREST

The tripartite relationship between insurer, insured, and defense counsel makes potential conflicts of interest inevitable. Insureds are threatened by conflicts because of the effect on their defense. Conflicts of interest may strip insurers of coverage defenses and expose them to the threat of extracontractual damages. From defense counsel's perspective, with potential conflicts of interest come potential malpractice claims. The fundamental malpractice danger posed by conflicts of interest is that the insured (the client) will allege that defense counsel protected the insurer's interest at the insured's expense, and to the insured's ultimate detriment. What follows is an examination of the most common potential conflicts of interest attributable to the tripartite relationship.

A. Reservation of Rights

An insurer often undertakes its insured's defense with coverage questions unanswered, or with coverage issues unresolved. Under such circumstances, the possibility exists that the insured will contend that by assuming the defense,

the insurer is estopped to deny coverage, or has waived its right to contest coverage. ⁿ³¹ To foreclose estoppel or waiver arguments, insurers routinely send reservation of rights letters via certified mail. A reservation of rights letter is an insurer's unilateral declaration that it reserves the right to deny coverage, despite its initial decision to defend. One purpose of a reservation of rights letter is to enable the insured to make intelligent decisions relative to protecting the insured's own interests in the face of possible coverage denials and conflicts of interest. The insurer must therefore specifically reference the policy defenses which may ultimately be asserted, and inform the insured of the potential conflict of interest its reservation creates. ⁿ³² Reservation of rights letters which are not specific are usually ineffective. A reservation of rights letter does not evidence an insured's consent to the insurer's conditional representation. ⁿ³³

An insurer's reservation of rights presents a classic conflict of interest. There always exists the possibility that a liability insurer which reserves its rights has a diminished interest in its insured's defense, since it might later prevail on the coverage issue. ⁿ³⁴ Defense counsel can often steer a case toward a coverage result favorable to the insurer. For example, a defense attorney may elicit deposition testimony supporting a coverage defense. If these arguments are credited, a conflict can be avoided only if (1) appointed defense counsel withdraws, or (2) the insured is allowed to select his own independent counsel at the insurer's expense. It is the latter solution that has caused innumerable problems for the insurance industry.

In 1984, a California appellate court stunned the industry when it suggested that an insurer's reservation of rights always poses a conflict of interest, potentially requiring the insured's engagement of independent counsel at the insurer's expense. In *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, ⁿ³⁵ the plaintiff sued several of the defendant's insureds on a variety of contract and tort theories, seeking \$ 750,000 in compensatory damages and \$ 6,500,000 in punitives. ⁿ³⁶ The insurer's associate counsel, Willis McAllister, hired the firm of Goebel & Monaghan to represent Cumis' insureds, simultaneously telling the firm that the carrier was reserving its right to later deny coverage, and that its policies did not cover punitive damages. McAllister never asked Goebel & Monaghan for a coverage opinion, and the firm offered no coverage advice to Cumis or its insureds. McAllister wrote each of Cumis' insureds, reserving the company's right to disclaim coverage and denying any coverage for punitive damages. ⁿ³⁷

The Credit Union hired the firm of Saxon, Alt & Brewer ("Saxon") as co-counsel to protect the defendants' interests. Saxon presented Cumis with two invoices for fees and costs, which McAllister was persuaded to pay. ⁿ³⁸ McAllister declined to pay further Saxon invoices, having conferred with his home office and with Goebel & Monaghan, all concluding that there was no conflict of interest. ⁿ³⁹ At a later settlement conference, the plaintiff offered to settle within policy limits. Cumis authorized Goebel & Monaghan to make a settlement offer at [*274] the conference, but below the plaintiff's demand. Goebel & Monaghan did not communicate with the Credit Union before or during the settlement conference, instead informing the Credit Union about the conference afterward. ⁿ⁴⁰ The trial court concluded that Cumis was obligated to pay the Credit Union's past and future expenses related to Saxon's engagement.

On appeal, Cumis argued that it could not be required to pay for its insured's independent counsel. The Cumis appellate court affirmed the trial court, stating:

We conclude ... lawyers hired by [an] insurer [have] 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. Moreover, in the absence of such consent, where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible noncoverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured. The insurer may not compel the insured to surrender control of the litigation ... ⁿ⁴¹

Although both the insurer and insured shared a common interest in winning the third-party action, their remaining

interests were so divergent "as to create an actual, ethical conflict of interest" warranting independent counsel. ⁿ⁴²

The court in *Cumis* reasoned that the insurer's desire to establish in the third-party suit that the insured's liability rested on intentional conduct (thus being excluded from coverage) and the insured's desire to base liability on its negligent conduct (thereby triggering coverage) represented opposing poles of interest. ⁿ⁴³ While recognizing that coverage issues would not be actually litigated in the third-party action, the court believed that this would not spare appointed insurance defense counsel from the force of these opposing interests, given the dual representation. ⁿ⁴⁴ The appellate court accepted the trial court's reasoning that the carrier was required to pay for independent counsel because defense counsel would be tempted to develop the facts to help his real client, the insurer, as opposed to the insured, for whom he would likely never work again. ⁿ⁴⁵ Given the close-knit nature of insurance defense practice, a defense attorney who did not first protect an insurer's interest might well lose business. ⁿ⁴⁶

Cumis led to the widespread use of so-called "*Cumis* counsel." Insureds who found themselves being defended under a reservation of [*275] rights in California almost always engaged independent counsel. *Cumis* had "extremely adverse economic consequences" in California and other states following California's lead, driving up litigation costs. ⁿ⁴⁷ The *Cumis* economic burden was the product of several elements. First, unscrupulous attorneys were able to masquerade as necessary *Cumis* counsel by manufacturing phony conflicts of interest, thereby defrauding insurers. ⁿ⁴⁸ Second, *Cumis* counsel are often able to charge insurers fees well in excess of those insurers negotiate with their regular panel counsel. Finally, independent counsel often lack the experience and skill of the insurer's regular counsel. ⁿ⁴⁹ As a result, pretrial matters may be handled less efficiently and the probability of a favorable outcome reduced. ⁿ⁵⁰

California narrowed the broad holding of *Cumis* through a series of subsequent decisions. ⁿ⁵¹ Not every reservation of rights creates a conflict of interest requiring the engagement of independent counsel. ⁿ⁵² The necessity of independent counsel now depends on the nature of the coverage question as it relates to the underlying case. *Cumis* counsel is not required if the issue on which coverage hinges is in [*276] dependent of the issues in the third-party action. As explained by the court in *Blanchard v. State Farm Fire and Casualty Co.*, ⁿ⁵³ "[a] conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel first retained by the insurer for the defense of the underlying claim." ⁿ⁵⁴

Not all courts accepted the *Cumis* view that appointed counsel cannot be trusted to serve the interests of those they are hired to defend. In *Siebert Oxidermo, Inc. v. Shields*, ⁿ⁵⁵ an Indiana court flatly rejected an insured's argument that its appointed counsel had an economic interest in failure, thus supporting the insurer's coverage defense.

We consider the argument impertinent, if not scandalous. Without considering the respected reputation of the attorney involved, we point out that on a daily basis defense attorneys employed by insurance carriers ... are called upon to deal with matters in litigation where the interests of the policyholder and the carrier do not fully coincide. Under such circumstances the attorney's duty is, of course, to the insured whom he has been employed to represent. In response the defense bar has exhibited no inability to fully comply with both the letter and spirit of ... the Code of Professional Responsibility. If it were otherwise, we suspect the desirability of requiring carriers to supply defense counsel would have long since disappeared as a term of the policy. ⁿ⁵⁶

The Supreme Court of Missouri faced a slightly different conflict in *In re Allstate Insurance Co.* ⁿ⁵⁷ Allstate employed full-time salaried attorneys to defend cases in which coverage was uncontested and claimed damages fell within policy limits. The informants argued that a liability insurer could not assign its own in-house attorneys to defend its insureds without creating conflicts of interest. ⁿ⁵⁸ Noting that both in-house and appointed counsel were bound by ethics rules requiring withdrawal if a conflict appeared, the court in *Allstate* disagreed. The court reasoned that there was "no basis for a conclusion that employed lawyers have less regard for the Rules of Professional Conduct than private practitioners do." ⁿ⁵⁹

One way to resolve the conflict posed by a defense under a reservation of rights is to impose an "enhanced" duty of good faith on the reserving insurer. ⁿ⁶⁰ This approach was first taken by the Washington [*277] Supreme Court in *Tank v. State Farm Fire & Casualty Co.* ⁿ⁶¹ The Tank court explained:

We have stated that the duty of good faith of an insurer requires fair dealing and equal consideration for the insured's interests... The same standard of fair dealing and equal consideration is unquestionably applicable to a reservation-of-rights defense. We find, however, that the potential conflicts of interest between insurer and insured inherent in this type of defense mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith. ⁿ⁶²

Insurers can meet Tank's enhanced obligation of good faith by (1) thoroughly investigating the plaintiff's claim; (2) retaining competent defense counsel who, like the insurer, must understand that the insured is the sole client; (3) fully informing the insured of all coverage questions or issues and related developments, and of the progress of the lawsuit; and (4) refraining from any action that demonstrates a greater concern for the insurer's monetary interests than for the insured's financial risk. ⁿ⁶³ Failure to satisfy this enhanced obligation may expose the insurer and defense counsel to liability. ⁿ⁶⁴

In *L & S Roofing Supply Co. v. St. Paul Fire & Marine Insurance Co.*, ⁿ⁶⁵ the Alabama Supreme Court followed the reasoning of the court in Tank. In *L & S Roofing*, the court concluded that the Tank standard and specified criteria provided an adequate means for safeguarding insureds' interests without questioning the integrity or loyalty of insurance defense counsel. ⁿ⁶⁶ [*278]

Ultimately, how potential conflicts of interest should be resolved when an insurer reserves its rights is a matter of perspective. ⁿ⁶⁷ Those who trust appointed counsel to afford insureds undivided loyalty, and to vigorously defend them, see no conflict in a reservation of rights defense. On the other hand, those who presume insurance defense attorneys will inevitably be influenced by the insurers with whom they have business relationships view the broad right to independent counsel once granted by Cumis as the only viable solution.

B. Claimed Damages Exceed Coverage

Cases in which claimed damages exceed coverage provide the potential for conflicts. The situation is especially serious if defense counsel believes that the jury verdict, and not just the amount stated in an ad damnum clause or prayer for relief, may exceed coverage. Conflicts arise when solid potential liability defenses exist, but defense counsel knows that the case can be settled within policy limits. One conflict, of course, stems from the insured's entitlement to defense counsel who will advance only the insured's interests in such a situation. ⁿ⁶⁸ At the same time, the insurer has a powerful economic incentive to litigate aggressively in the hope of obtaining a low verdict. This situation poses genuine practical problems for defense counsel; after all, insurers do not hire them simply to give away money. Woe be it to defense counsel who are unwilling to try tough cases.

The attorney assigned a case with a potential excess judgment must at a minimum inform both the insured and insurer of any settlement offer so that they may take steps necessary to protect their interests. At least one court has suggested that counsel do nothing more than inform both parties. The court in *Hartford Accident & Indemnity Co. v. Foster* ⁿ⁶⁹ cautioned that the defense attorney should limit his role to responding to "questions pertaining to the law and facts of the case." ⁿ⁷⁰ Defense counsel should be careful not to violate the "absolute, nondelegable responsibility not to urge, recommend or suggest any course of action to the carrier which violates his conflict of interest obligation." ⁿ⁷¹

A defense attorney who fails to settle a case within policy limits despite the opportunity to do so may be personally liable for any excess judgment. In *Mutuelles Unies v. Kroll & Linstrom*, ⁿ⁷² a defense firm was slapped with a

\$ 2,183,381 malpractice verdict when the plaintiff in the underlying action demanded \$ 1,000,000 to settle, but trial counsel refused to offer more than \$ 900,000. ⁿ⁷³ The malpractice victor was the liability insurer, which recovered the difference between the plaintiffs' lowest settlement figure and the jury verdict in the third-party action.

C. Defense Costs Reduce Available Coverage

Liability coverage is sometimes provided under what is known variably as a "defense within limits," "wasting," or "ultimate net loss" policy. These insurance policies provide that defense costs, such as attorneys' fees, are paid out of policy limits. In other words, defense costs erode or reduce available coverage. An insured is potentially prejudiced every time her appointed counsel acts, since every dollar the attorney earns in fees reduces the available coverage. In such cases, insureds must always be timely informed of defense expenditures and the amount of remaining coverage.

D. Representation of Multiple Parties

As is generally true, the representation of multiple parties presents serious potential conflicts. Two or more insureds may have adverse interests. This is particularly true in automobile liability cases, in which a passenger frequently sues both the driver and the owner. ⁿ⁷⁴ It may be in the driver's best interests to be viewed as the owner's agent, while the owner's interest might be best served by arguing that the driver was operating the vehicle without permission. ⁿ⁷⁵ Under such circumstances, independent counsel paid by the insurer is required. ⁿ⁷⁶ The same situation sometimes arises in products liability actions in which multiple manufacturers or distributors may be insured by the same carrier. For example, the manufacturer of a piece of industrial equipment and the manufacturer of a component part in that machine both may have the same insurer. Because the machine manufacturer may allege that the component part was defective, and might thus allege its manufacturer's comparative fault, the parties' interests are necessarily adverse.

An unusual situation involving multiple parties was litigated in *State Farm Mutual Automobile Insurance Co. v. Armstrong Extinguisher Service, Inc.* ⁿ⁷⁷ The defendant and third-party plaintiff in the underlying state court action sued Armstrong and its employee, Michael Larson, alleging Larson's contributory fault and Armstrong's vicarious liability in connection with an automobile accident. Larson was one of the drivers involved in the crash. Armstrong's insurer hired one of its regular defense attorneys, Curt Ireland, to represent both Armstrong and Larson; however, State Farm defended under a reservation of rights. ⁿ⁷⁸ In depositions, a conflict was discovered that required Ireland to cease representing both Armstrong and Larson. Ireland withdrew as Larson's counsel, but continued to represent Armstrong. ⁿ⁷⁹

The carrier then filed a declaratory judgment action in federal court, seeking a determination that Armstrong's policy afforded no coverage. Both Armstrong and Larson were named as defendants. The attorney who prosecuted the declaratory judgment action for State Farm was none other than Ireland, who was still defending Armstrong. ⁿ⁸⁰ While admitting State Farm's right to seek a declaratory judgment, ⁿ⁸¹ attorneys defending Armstrong and Larson in that action moved to disqualify Ireland, alleging his conflict of interest. Ireland opposed the motion on three grounds. First, both defendants were sent reservation of rights letters at the outset of the state court litigation. ⁿ⁸² Second, the defendants were fully advised of the coverage issue, and were also fully advised of their right to retain independent counsel. ⁿ⁸³ Third, the coverage dispute was but a separate contractual question for judicial determination which did not compromise his loyalty to Armstrong. ⁿ⁸⁴

The court in *Armstrong Extinguisher* made short work of Ireland's arguments.

State Farm has not given equal consideration to Larson's and Armstrong's interests in this case. Mr. Ireland as counsel for Armstrong, and at one time Larson, owes a duty of loyalty to his clients and cannot under the South Dakota Rules of

Professional Conduct represent parties with conflicting interests without the consent of all parties after full disclosure of the facts... At the very least, Mr. Ireland's representation of the insurance company in the declaratory judgment action and Armstrong in the underlying litigation creates an appearance of impropriety. ⁿ⁸⁵

Ireland's decision to simultaneously represent Armstrong and actively work against it created a classic conflict of interest. The court re [*281] moved Ireland from the declaratory judgment action and required State Farm to obtain new counsel. ⁿ⁸⁶

E. Counsel's Defense Activities Generate Information Suggesting a Possible Coverage Defense

Even with informed consent, dual representation creates disclosure and communication problems for insurance defense counsel. ⁿ⁸⁷ Confidential communications pose the thorniest problems for defense attorneys. ⁿ⁸⁸ When appointed counsel learns of information suggesting a possible coverage defense during the course of an insured's representation, an obvious conflict of interest arises. It does not matter whether defense counsel generates the information through independent activities or efforts, or whether the insured shares the information in confidence; in both scenarios defense counsel are generally barred from disclosing the information to the insurer.

In *Parsons v. Continental National American Group*, ⁿ⁸⁹ the insurer, CNA, appointed counsel to defend its insureds, the Smitheys, in connection with their son's alleged assault on three neighbors. The defense attorney's activities led him to believe that the boy's attack of the neighbors was an intentional act and he so informed CNA. The CNA claims representative then sent the Smitheys a reservation of rights letter, stating that the act involved might have been intentional and that their policy specifically excluded liability for bodily injury caused by an intentional act. ⁿ⁹⁰ The case ultimately went to trial and the plaintiffs obtained a \$ 50,000 directed verdict against the insured's son, which was in excess of the \$ 25,000 policy limits. Judgment was then entered in the verdict amount. ⁿ⁹¹

The plaintiffs garnished CNA, which responded by offering to settle for its \$ 25,000 policy limits. The plaintiffs declined CNA's offer. CNA successfully defended the garnishment action by asserting its intentional acts exclusion. The same attorney that defended the Smitheys at trial represented CNA in the garnishment action. ⁿ⁹²

The plaintiffs contended that CNA was estopped to deny coverage and waived the intentional acts exclusion because the company exploited the fiduciary relationship between defense counsel and the [*282] Smithey's son. ⁿ⁹³ The court agreed. First noting that the defense attorney obtained privileged and confidential information about the boy by virtue of the attorney-client relationship, ⁿ⁹⁴ the court held:

When an attorney ... uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy in the garnishment proceeding we hold that such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy. ⁿ⁹⁵

CNA was ultimately held liable for the full amount of the excess judgment. ⁿ⁹⁶

Parsons illustrates attorneys' need to ascertain how to handle confidential information material to both clients, but known only to one. Attorneys who fail to understand their fiduciary obligations unnecessarily expose themselves to malpractice liability. Depending on the jurisdiction, both insured and insurer are potential malpractice plaintiffs.

F. Punitive Damages Are Claimed

Depending on the jurisdiction and the facts of the particular case, a plaintiff who pursues a punitive damage claim

may create a conflict of interest. Liability insurers which are not obligated to indemnify their insureds for punitive damage awards ⁿ⁹⁷ may be thought to have no in [*283] terest in defending against such claims. ⁿ⁹⁸ Insureds, on the other hand, have a vital interest in avoiding punitive damages. Defense counsel must inform both the insurer and the insured of punitive damage exposure so that they may protect their respective interests.

G. The Insurer Attempts to Limit Discovery to Reduce Expenses

Occasionally an insurer will attempt to restrict defense counsel's discovery activities in an effort to reduce litigation costs. Counsel may be instructed not to propound written discovery, or might be told to forego certain depositions. Such restrictions create potential conflicts of interest if they inhibit an attorney's ability to adequately defend a case, or interfere with the attorney's independent professional judgment. The potential for conflict is aggravated if potential damages exceed coverage, giving the insured a legitimate concern in the litigation result.

Ethics rules generally prevent an attorney from representing a client (the insured) if that representation may be materially limited by the lawyer's responsibilities to another client (the insurer). For example, the Model Rules of Professional Conduct provide in Rule 5.4(c) that a lawyer shall not permit one who employs or pays another to represent a client to "direct or regulate the lawyer's professional judgment in rendering such legal services." ⁿ⁹⁹ A defense attorney may have to conduct discovery regardless of an insurer's stated unwillingness to pay. An insured may have to be informed of imposed discovery limitations, or written consent to counsel's continued representation may be required, in order to avoid conflicts.

IV. ETHICS RULES GOVERNING INSURANCE DEFENSECOUNSEL

Although the tripartite relationship is unique to insurance defense, appointed counsel are subject to the same ethics rules that govern their colleagues in other practice areas. Most states have now adopted the American Bar Association's Model Rules of Professional Conduct. ⁿ¹⁰⁰ Several of these rules are directly applicable to insurance defense practice. [*284]

A. Model Rule 1.7

Model Rule 1.7 is the primary rule pertaining to conflicts of interest. ⁿ¹⁰¹ Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. ⁿ¹⁰²

Rule 1.7(b) applies to situations in which an insurer limits discovery in an effort to reduce litigation costs. Section (b)(2) apparently requires defense counsel who anticipate future conflicts of interest to obtain their dual clients' consent to representation. ⁿ¹⁰³ The rule additionally contemplates dual representation only after both clients have been fully informed about possible benefits and disadvantages.

Comment 10 to Rule 1.7 is also relevant to the tripartite relationship. ⁿ¹⁰⁴ The comment states:

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 1.8(f). For example, when an insurer and its insured have 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. ⁿ¹⁰⁵

An insured's execution of the insurance contract may amount to consent to the insurer's payment of legal fees and expenses, so long as defense counsel's loyalty is not compromised. [***285**]

B. Model Rules 1.8(f) and 5.4(c)

Model Rules 1.8(f) and 5.4(c) directly apply to insurance defense practice. ⁿ¹⁰⁶ The applicability of Rule 1.8(f) is made clear by comment 10 to Rule 1.7. Rule 1.8 addresses conflicts of interest and prohibited transactions. Paragraph (f) provides:

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 lawyer-client relationship; and
- (3) Information relating to representation of a client is protected as required by rule 1.6. ⁿ¹⁰⁷

Compliance with Rule 1.8(f)(2) may require defense counsel to disagree with the insurer in the control of the litigation. For example, a defense attorney may have to disregard the insurer's instructions with respect to strategic decisions. ⁿ¹⁰⁸

Rule 5.4 addresses a lawyer's professional independence. Paragraph (c) states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." ⁿ¹⁰⁹ As noted previously, Rule 5.4(c) comes into play if an insurer attempts to restrict defense counsel's activities in an attempt to hold down defense costs.

C. Fraud and Confidentiality: Model Rules 1.2, 1.16, and 1.6

Insurance fraud is a disturbingly common problem. It is not unheard of for insureds to set fire to buildings they own, report nonexistent losses, or conspire with named plaintiffs. Model Rule 1.2(d) clearly forbids defense counsel from assisting or supporting an insured who is attempting to defraud an insurer. According to Model Rule 1.2(d), "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" ⁿ¹¹⁰

Another of the Model Rules related to fraud is 1.16(a)(1). Model Rule 1.16(a)(1) requires defense counsel's resignation from an insured's representation in the face of fraud. The rule provides that an attorney "shall not represent a client or, where representation has [*286] commenced, shall withdraw" if representation "will result in violation of the rules of professional conduct or other law" n111

Model Rule 1.6 addresses a defense counsel's obligation to maintain confidentiality. In the case of an insured's fraud and defense counsel's mandatory rejection of or withdrawal from representation in accordance with Rule 1.2, the text of Rule 1.6 further requires that counsel not reveal the fraud to the insurer. n112 The "lip-sealing nature" n113 of Rule 1.6's text aside, comment 16 of the Rule provides:

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like. n114

Apparently, then, Rule 1.6 authorizes indirect or discreet disclosure of an insured's fraud by way of a "noisy withdrawal." n115 Some scholars have described such a withdrawal as waving "the red flag." n116

V. ATTEMPTED SOLUTIONS TO THE DUAL CLIENT DILEMMA

The dual client doctrine (and thus the tripartite relationship) has long been a concern of lawyers and insurers alike. In 1969, the National Conference of Lawyers and Liability Insurers adopted Guiding Principles for liability insurers. n117 The American Bar Association House of Delegates formally approved the Guiding Principles in 1972. n118 The Guiding Principles read as follows:

I. General Statement

Under a policy providing liability insurance, the company has a direct financial interest in any claim present against its insured which the company may be obligated to defend or pay, and in any suit on such claim, whether or not the company is named as a party. The company has the right to have counsel of its own choice to defend this interest. So long as no conflict of interests exists, that counsel also represents the insured. If and when representation of the company by its attorney conflicts with the interest of the insured, [*287] the company and its attorney are under a duty to inform the insured of such conflict and to invite him to retain his own counsel at his own expense.

II. Claim or Suit in Excess of Limits

In any claim where there is a probability that the damage will exceed the limits of the policy and the company has retained counsel to defend the claim, or in any suit in which the prayer of the complaint exceeds the limit of the policy, or in which there is an unlimited or indefinite prayer for damages and a probability that the verdict may exceed the coverage limit, the company or its attorney should timely inform the insured of the danger of exposure in excess of the limit of the policy. The insured should be invited to retain additional counsel at his own expense to advise him with respect to that exposure. So long as the financial interest of the company in the outcome of the litigation continues, the company retains the exclusive right to control and conduct the defense of the case, in good faith, subject to the right of the insured or such additional attorney to participate.

III. Settlement Negotiations in Claims or Suits With Excess Exposure

In any claim where there is a probability that the damage will exceed the limit of the policy and the company has retained counsel to defend the claim, or in any suit in which it appears probable that an amount in excess of the limit of the policy is involved, the company or its attorney should inform the insured or any additional attorney retained by the insured at his own expense of significant settlement negotiations, whether within or beyond the limits of the policy. Upon request, the insured, or such additional attorney, shall be entitled to be informed of all settlement negotiations. The company shall, upon request, make available to the insured or such additional attorney all pertinent factual information the company and its attorney may have for evaluation by the insured or such additional attorney.

IV. Conflicts of Interest Generally - Duties of Attorney

In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflicting interest. In any such suit, the company or its attorney should invite the insured to retain his own counsel at his own expense to represent his separate interest.

V. Continuation by Attorney Even Though There is a Conflict of Interests

Where there is a question of coverage or other conflict of interest, the company and the attorney selected by the company to defend the claim or suit should not thereafter continue to defend the insured in the matter in question unless, after a full explanation for the coverage question, the insured acquiesces in the continuation of such defense.

If the insured acquiesces in the continuation of the defense in the pending matter following a reservation of rights by the company or under an agreement that the rights of the company and the insured as to the coverage question are not waived or prejudiced, the company retains the exclusive right to control and conduct the defense of the case in good faith, subject to the right of the insured or the additional attorney acting at the expense of the insured to participate.

If the insured refuses to permit the insurance company and the attorney selected by the company to defend the claim or suit to continue the defense of the pending matter while reserving the rights of the company and of the insured as to the coverage question, or if the full protection of the separate interests of the insured and the company requires inconsistent contentions which [*288] cannot be presented in a common defense of the pending matter, the insurance company or the insured should seek other procedures to resolve the coverage question.

If facts or information indicating to the attorney a lack of coverage for the insured should first come to the attention of the attorney after the trial for the lawsuit has begun, the attorney should at the earliest opportunity inform and advise the insured and the company of the possible conflicting interests of the insured and the company. The attorney should further seek to provide both the insured and the company with time and the opportunity to consider the possible conflict of interests and to take appropriate steps to protect their individual interests.

VI. Duty of Attorney Not to Disclose Certain Facts and Information

Where the attorney selected by the company to defend a claim or suit becomes aware of facts or information, imparted to him by the insured under circumstances indicating the insured's belief that such disclosure would not be revealed to the insurance company but would be treated as a confidential communication to the attorney, which indicate to the attorney a lack of coverage, then as to such matters, disclosures made directly to the attorney, should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question.

VII. Counterclaims

In any suit where the company or the attorney selected by the company to defend the suit becomes aware that the

insured may have a claim for damages against another party to the lawsuit, which is likely to be prejudiced or barred unless it is asserted as a counterclaim in the pending action, the insured should be advised that the pending suit may affect or impair such claim, that the insurance policy does not provide coverage for any legal services or advice as to such claim, and that the insured may wish to consult an attorney of his choice with respect to it.

VIII. Suit Involving More Than One Insured in The Same Company

If the same company insures two or more parties to a lawsuit, whose interests are diverse, the complete factual investigation made by the company should be made available to each insured or his attorney with the exception that any statement given by one insured or his employees shall not voluntarily be given to any other party to the litigation whose interest may be adverse to such insured or to any attorney representing such other party.

The company should employ separate attorneys not associated with one another to defend each insured against whom any suit is brought, if the interest of one such insured is diverse from or in conflict with that of any other insured; and all insured should be informed by the company of the fact that it insures the liability of the others and the method being employed to handle the litigation.

IX. Withdrawal

In any case where the company or the attorney selected by the company to defend the suit decides to withdraw from the defense of the action brought against the insured, the insured should be fully advised of such decision and the reasons therefor; and every reasonable effort should be made to avoid prejudice to or impairment of the rights of the insured.

X. Uninsured Motorist Coverage

The company should employ separate attorneys not associated with one another to defend the company against a claim by the insured under the Uninsured Motorist Coverage, and to defend the insured in any suit brought against the insured arising out of the same accident. If the controversy regarding the Uninsured Motorist Coverage has been disposed of before a law [*289] suit has been commenced against the insured, the same attorney who defended the company for the first instance could represent the insured in the later lawsuit.

Any statement made by the insured to the company with respect to the defense of any claim made against him arising out of the same accident should not be used against the insured in order to defeat the insured's claim under the Uninsured Motorist Coverage. ⁿ¹¹⁹

The ABA rescinded the Guiding Principles in August 1980, under pressure from the Antitrust Division of the Justice Department. ⁿ¹²⁰

The Guiding Principles are now widely disregarded, having been contradicted by subsequent case law, ethics opinions, and the widespread adoption of the Model Rules of Professional Conduct. ⁿ¹²¹ *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, ⁿ¹²² in which the California Court of Appeal held that the insured was entitled to separate counsel at the insurer's expense, eviscerated Principles I, II, III, IV and V. The Guiding Principles were otherwise flawed. For example, Principle VI provided that "when the attorney ... becomes aware of facts or information ... which indicate to the attorney a lack of coverage ... the attorney [should not] discuss with the insured the legal significance of the disclosure or the nature of the coverage question." ⁿ¹²³ No responsible ethics authority would suggest that insurance defense counsel should not discuss with the insured material coverage issues. ⁿ¹²⁴ Today, Principle VI would certainly run afoul of the Model Rules of Professional Conduct. Rule 1.4(b) requires a lawyer to "explain a matter of the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ⁿ¹²⁵ In summary, the Guiding Principles are outdated and do not offer reliable guidance.

California, again at the forefront of insurance litigation, has attempted to legislate a solution to some of the

problems arising out of the tripartite relationship. ⁿ¹²⁶ Section 2860 of the California Civil Code provides:

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section. **[*290]**

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligations to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selected independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract. ⁿ¹²⁷

The California statute was central to the court's decision in *Blanchard v. State Farm Fire and Casualty Co.*, ⁿ¹²⁸ among the latest cases reining in *Cumis*.

Florida has also attempted to legislate a solution, albeit limited in scope. ⁿ¹²⁹ The Florida statute provides that in order to deny coverage, **[*291]** a liability insurer must first send a reservation of rights letter within thirty days after it knew or should have known of a coverage defense. ⁿ¹³⁰ Then, within a limited period, the insurer must either refuse a defense, obtain a nonwaiver agreement, or retain independent counsel mutually agreeable to the parties. ⁿ¹³¹ The parties may agree on reasonable fees to be paid independent counsel; if they are unable to agree, fees will be set by the

court. ⁿ¹³²

VI. PROPOSED RESOLUTION OF CONFLICTS

Conflicts arising out of the tripartite relationship pose genuine problems for insurance defense practitioners. The last several years have seen a dramatic increase in legal malpractice suits; ⁿ¹³³ the dual client doctrine makes insurance defense counsel particularly susceptible to malpractice claims. Insurers face the constant threat of bad faith litigation and the accompanying potential for extracontractual damages. Across the table, insureds denied loyal and competent representation are threatened with financial ruin.

Various scholars and commentators have suggested reforms. While some have suggested revising the basic liability insurance contract, most suggestions for reshaping the insurer-insured relationship to minimize conflicts have been rejected as unworkable. There is no provision that can be written into an insurance policy that can alter defense counsel's ethical obligations or eliminate the conflicts that arise when coverage is disputed. ⁿ¹³⁴ Ronald E. Mallen, a preeminent legal malpractice scholar, has suggested that insurers market defense counsel. ⁿ¹³⁵ Essentially, an insured should be given recommendations regarding several defense attorneys approved by the insurer "rather than an assignment as a fait accompli." ⁿ¹³⁶ The insurer's fundamental objective is demonstration to its insured that representation by appointed defense counsel is desirable. ALAS's Robert E. O'Malley pro **[*292]** poses a set of "Guiding Principles II." ⁿ¹³⁷ The "Guiding Principles II" are advocated as a means of providing insureds with loyal and competent **[*293]** **[*294]** representation, protecting liability insurers' legitimate interests, and eliminating the expense and other negatives associated with the engagement of independent counsel for insureds. ⁿ¹³⁸ The "Guiding Principles II" count as advantages their grounding in existing ethics rules, and the fact that they neither contemplate nor require changes in policy language or accepted industry practice. Finally, defense expense coverage and indemnification coverage might be separated, and provided by different insurers. ⁿ¹³⁹ Although the creation of defense expense insurance might present a variety of potential problems or disadvantages, ⁿ¹⁴⁰ it would eliminate most conflicts of interest and might reduce potential bad faith actions against insurers. ⁿ¹⁴¹

Regardless of option, "the key to reform is a level playing field with bright lines." ⁿ¹⁴² Whether bright lines can, in fact, be drawn is an open question; the eternal triangle of insurance defense is an area of constant legal flux. Realizing that practical advice often complements theoretical discussion, and wary of hard and fast rules or solutions, the following discussion represents a modest attempt to craft some broad professional guidelines. The goal, of course, is avoiding or mitigating conflicts of interest in practice.

First, defense counsel must treat the insured as the client. Recognizing the insured as the attorney's sole client is consistent with recent judicial decisions. ⁿ¹⁴³ Appointed counsel's continuing business relationship with the insurer must not be allowed to interfere with the **[*295]** duties of confidentiality, disclosure, honesty, and loyalty owed the insured. Perhaps the best practice is for defense counsel to write both the insurer and insured when first engaged to explain or delineate ethical duties under state law, including the nature or circumstances of expected communications, the insured's right to select independent counsel at its expense, and the conduct of settlement negotiations. The insured should also be informed of the insurer's right to control the defense. If the insurer does not do so in its initial letter to its insured, defense counsel may also need to inform the insured about coverage limits, whether the coverage limits are declining, and the insured's duty to cooperate. Most insurers expect an acknowledgment letter following a defense assignment, and they are also sensitive to coverage issues and conflicts of interest. Carriers involve separate coverage counsel as warranted. Including in an insurer's acknowledgment letter the sort of information outlined above, and similarly communicating with the insured, should pose little business difficulty for defense counsel.

At the same time, treating the insured as the client does not relieve a defense attorney of certain obligations to the insurer. Basically, defense counsel must strive to fulfill all of the insurer's claims-handling requirements. ⁿ¹⁴⁴ Counsel must satisfy all reporting requirements, timely inform the insurer of case developments, consult with claims representatives regarding matters such as defense expenditures and the engagement of expert witnesses, and involve the

insurer in all settlement matters. Defense counsel's reports should detail the case's procedural status, highlight important factual developments, outline defense strategy, analyze liability and damage potential, and indicate settlement possibilities. ⁿ¹⁴⁵

Second, defense counsel must ascertain how to deal with confidential information under applicable state law. As a general rule, a defense attorney should never share with the insurer confidential information communicated by the insured. If defense counsel learns of information suggesting coverage defenses, such information must be kept confidential. Under no circumstances should appointed counsel attempt to uncover or develop coverage defenses. Depending on the facts and the jurisdiction, counsel may have to withdraw.

Third, defense counsel should exercise great caution if asked to represent multiple insureds. At the outset, a defense attorney representing two or more insureds should analyze potential conflicts, disclose potential conflicts to each insured, and obtain valid waivers. Counsel must closely monitor potential conflicts as the case progresses, because conflicts may develop to the point of requiring withdrawal. Any attorney attempting multiple representation must objectively determine that no client's interests will be impaired.

Finally, an insured should be consulted with respect to settlement even when the proposed settlement is entirely within policy limits and the policy reserves to the carrier exclusive control over settlement decisions. ⁿ¹⁴⁶ This advice is particularly applicable to cases in which the defendant is a professional. ⁿ¹⁴⁷ For example in *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, ⁿ¹⁴⁸ the Illinois Supreme Court held that defense counsel were obligated to disclose to the insured the insurer's intent to settle a malpractice case without his consent, and contrary to his express instructions. ⁿ¹⁴⁹ The attorneys' duty to make such disclosure stemmed from their attorney-client relationship with the insured, regardless of the insurer's broad contractual authority to settle without its insured's consent. ⁿ¹⁵⁰ In *Arana v. Koerner*, ⁿ¹⁵¹ the Missouri Court of Appeals observed that defense counsel breached their duty of "good faith and fidelity" to an insured by ignoring his instructions to litigate, rather than settle, a malpractice suit. ⁿ¹⁵²

At a minimum, defense counsel must inform insureds of their insurers' intent to settle. The insureds may then assert whatever common law rights they may have.

VII. CONCLUSION

Insurance defense counsel are presented with a variety of ethical dilemmas attributable to the unique tripartite relationship they share with insurers and their insureds. Appointed counsel may encounter conflicts of interest when they are first assigned the defense, during discovery, while shaping litigation strategy, and in settlement negotiations. ⁿ¹⁵³ When a conflict appears and the usually harmonious relationship between insurer and insured is disrupted, an "elaborate minuet" ensues. ⁿ¹⁵⁴ As Robert E. O'Malley of the ALAS explains: **[*297]**

This dance is nerve-racking for defense counsel and often severely prejudicial to the insured. The identification of a conflict, its disclosure, the ensuing discussions, and (in some cases) the resignation of the original defense counsel have the effect of notifying the insurer that facts may exist that are prejudicial to the insured. For example, there may be a coverage defense that the insurer would not have become aware of without defense counsel's tacit notice. When the conflict of interest issue arises and defense counsel resigns, the insurer is alerted to the need for further investigation. Often, without any additional disclosure by defense counsel, the insurer will discover the facts that are prejudicial to the insured. ⁿ¹⁵⁵

When the dance ends, defense counsel may find themselves subject to malpractice claims by both insureds and insurers. ⁿ¹⁵⁶

The avoidance of conflicts of interest depends on early recognition. If a defense is provided under a reservation of

rights, counsel must determine if the issue on which coverage hinges is within counsel's control when defending the underlying claim. Might a potential conflict be avoided by full disclosure and the insured's consent to representation? The resolution of conflicts depends on the facts of the particular case and, in many instances, on the law of the forum state. Certain principles transcend jurisdictional boundaries: defense counsel must serve insureds loyally and with the fidelity afforded all other clients; client confidences must be respected, communication obligations having been established in advance; the representation of multiple insureds should be carefully scrutinized; and insureds and insurers must be involved in settlement.

The tripartite relationship between insurer, insured, and insurance defense counsel creates problems that "would tax Socrates, and no decision or authority ... furnishes a completely satisfactory answer."ⁿ¹⁵⁷ The best one can hope for is a greater understanding of this dynamic area of law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Counsel Right to Counsel
General Overview
Insurance Law
Claims & Contracts
Reservation of Rights
Independent Counsel
Legal Ethics
Client Relations
Conflicts of Interest

FOOTNOTES:

n1. Michael J. Brady & Heather A. McKee, *Ethics in Insurance Defense Context: Isn't Cumis Counsel Unnecessary?*, 58 *Def. Couns. J.* 230, 231 (1991). An insurer disputing coverage bears the ultimate burden of proving that the subject loss resulted from a cause falling within a policy exclusion. *First Am. Nat'l Bank v. Fidelity & Deposit Co.*, 5 F.3d 982, 984 (6th Cir. 1993); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F. Supp. 1136, 1143 (D.N.J. 1993); *American Star Ins. Co. v. Grice*, 854 P.2d 622, 625-26 (Wash. 1993).

n2. Robert H. Jerry, II, *Understanding Insurance Law* 561 (1987). The existence of a duty to defend initially turns upon those facts known to the insurer at the inception of the litigation. See *Saylin v. California Ins. Guar. Ass'n*, 224 Cal. Rptr. 493, 497 (Ct. App. 1986). The duty to defend arises upon tender of the defense to the insurer. *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1157 (Cal. 1993). As a rule, an insurer's duty to defend is continuing; that is, the insurer's duty continues throughout the course of the litigation against its insured. *Lambert v. Commonwealth Land Title Ins. Co.*, 811 P.2d 737, 739 (Cal. 1991); *Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 854 P.2d 851, 855 (Nev. 1993). If it becomes clear in the course of the litigation that no coverage exists under any plausible set of facts, and if the insurer has reserved its rights, or obtained a non-waiver agreement, the insurer may withdraw its defense provided its withdrawal will not prejudice the insured's interests. An insurer's reservation of rights and the possible effects thereof are discussed in the text accompanying *infra* notes 31-67. An insurer may also be relieved of its duty to defend by a declaratory judgment. See *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 860 P.2d 734, 737 (N.M. 1993). This Article does not address insurers' pursuit of declaratory judgment actions.

n3. Thomas V. Murray & Diane M. Bringus, *Insurance Defense Counsel - Conflicts of Interest*, *Fed'n Ins. & Corp. Couns. Q.* 283, 283 (1991).

n4. See *International Paper Co. v. Continental Cas. Co.*, 320 N.E.2d 619, 621 (N.Y. 1974).

n5. Insurance defense counsel are generally selected based on recognized experience and skill in the liability categories the insurer writes. See Ronald E. Mallen, *A New Definition of Insurance Defense Counsel*, 53 *Ins. Couns. J.* 108, 109 (1986).

n6. *American Mut. Liab. Ins. Co. v. Superior Court*, 113 *Cal. Rptr.* 561, 571 (Ct. App. 1974).

n7. In this context, and as used in this Article, a "conflict of interest between [insured and insurer] occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." *Spindle v. Chubb/Pacific Indem. Group*, 152 *Cal. Rptr.* 776, 780-81 (Ct. App. 1979). Some courts have defined conflicts of interest more specifically. See, e.g., *Cunniff v. Westfield, Inc.*, 829 *F. Supp.* 55 (E.D.N.Y. 1993). The Cunniff court observed that, under New York law, a conflict requiring independent counsel arises when "the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable." *Id.* at 57 (quoting *Public Serv. Mut. Ins. Co. v. Goldfarb*, 425 *N.E.2d* 810, 815 n.* (N.Y. 1981)).

n8. Sharon K. Hall, Note, *Confusion Over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 *Drake L. Rev.* 731, 732 (1992).

n9. *Enserch Corp. v. Shand Morahan & Co.*, 952 *F.2d* 1485, 1492 (5th Cir. 1992)(applying Texas law); *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co.*, 832 *F.2d* 1037, 1042 (7th Cir. 1987)(applying Illinois law); *E.B. & A.C. Whiting Co. v. Hartford Fire Ins. Co.*, 838 *F. Supp.* 863, 866-67 (D. Vt. 1993); *Harleysville Mut. Ins. Co. v. Sussex County*, 831 *F. Supp.* 1111, 1130 (D. Del. 1993)(applying New Jersey law); *Kootenai County v. Western Cas. & Sur. Co.*, 750 *P.2d* 87, 89 (Idaho 1988); *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 *S.W.2d* 273, 279 (Ky. 1991); *Mutual Serv. Cas. Ins. Co. v. Luetmer*, 474 *N.W.2d* 365, 368 (Minn. Ct. App. 1991); *Biborosch v. Transamerica Ins. Co.*, 603 *A.2d* 1050, 1052 (Pa. Super. Ct.), appeal denied, 615 *A.2d* 1310 (Pa. 1992).

n10. See *Lime Tree Village Community Club Ass'n, Inc. v. State Farm Gen. Ins. Co.*, 980 *F.2d* 1402, 1405 (11th Cir. 1993)(looking at allegations in complaint to determine duty to defend under Florida law); *Selective Ins. Co. v. J.B. Mouton & Sons, Inc.*, 954 *F.2d* 1075, 1077 (5th Cir. 1992)(comparing allegations in complaint with policy terms to determine duty to defend under Louisiana law); *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 *F.2d* 235, 239 (4th Cir. 1990)(applying North Carolina law); *First Nat'l Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 770 *F. Supp.* 513, 515 (D.N.D. 1991), *aff'd*, 971 *F.2d* 142 (8th Cir. 1992); *Apcon Corp. v. Dana Trucking, Inc.*, 623 *N.E.2d* 806, 809 (Ill. App. Ct. 1993), appeal denied, 631 *N.E.2d* 705 (Ill. 1994); *Continental Cas. Co. v. Gilbane Bldg. Co.*, 461 *N.E.2d* 209, 212 (Mass. 1984)(observing that duty to defend is decided by matching complaint with policy provisions); *State Farm Fire & Cas. Co. v. Paget*, 860 *P.2d* 864, 866 (Or. Ct. App. 1993); *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 *S.W.2d* 84, 87 (Tex. Ct. App. 1993)(looking at policy language and allegations of complaint to determine duty to defend); *Professional Office Bldgs., Inc. v. Royal Indem. Co.*, 427 *N.W.2d* 427, 430 (Wis. Ct. App. 1988); *First Wyoming Bank, N.A. v. Continental Ins. Co.*, 860 *P.2d* 1094, 1097 (Wyo. 1993).

n11. *Illinois Mun. League Risk Mgt. Ass'n v. Seibert*, 585 *N.E.2d* 1130, 1134 (Ill. App. Ct. 1992). Cf. *Gerrity Co. v. CIGNA Prop. & Cas. Ins. Co.*, 860 *P.2d* 606, 607 (Colo. Ct. App. 1993)(looking to complaint's factual allegations, and not legal claims, to determine insurer's duty to defend).

n12. *In re Complaint of Stone Petroleum Corp.*, 961 *F.2d* 90, 91 (5th Cir. 1992).

n13. *Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203, 205 (5th Cir. 1991)(applying Louisiana law); *Tews Funeral Home Inc. v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1042 (1987); *Overthrust Constructors, Inc. v. Home Ins. Co.*, 676 F. Supp. 1086, 1091 (D. Utah 1987)(applying Utah law); *LaJolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 23 Cal. Rptr. 2d 656, 659 (Ct. App. 1993), cert. granted, 866 P.2d 1311 (Cal. Jan. 27, 1994)(No. S036170)(quoting *Devin v. United Servs. Auto. Ass'n*, 8 Cal. Rptr. 2d 263, 273 (Ct. App. 1992)); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992).

n14. *Patron's Mut. Ins. Ass'n v. Harmon*, 732 P.2d 741, 744 (Kan. 1987). See *Aetna Cas. & Sur. Co. v. Dannenfeldt*, 778 F. Supp. 484, 499 (D. Ariz. 1991); *American Motorists Ins. Co. v. Allied-Sysco Food Servs., Inc.*, 24 Cal. Rptr. 2d 106, 112 (Ct. App. 1993)("The existence of a potential for liability is determined from the facts learned by the insurer, either as pleaded in the complaint or from extrinsic sources."); *Spivey v. Safeco Ins. Co.*, 865 P.2d 182, 188 (Kan. 1993)("An insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend."); *SL Indus., Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266, 1272 (N.J. 1992)(stating that facts outside complaint may trigger duty to defend if known to insurer); *Fitzpatrick v. American Honda Motor Co.*, 575 N.E.2d 90, 93 (N.Y. 1991).

n15. *Lime Tree Village Community Club Ass'n, Inc. v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405 (11th Cir. 1993); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 833 F. Supp. 1239, 1248 (W.D. Mich. 1993); *Nationwide Mut. Ins. Co. v. Worthey*, 861 S.W.2d 307, 310 (Ark. 1993); *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 796 (Cal. 1993); *Biborosch v. Transamerica Ins. Co.*, 603 A.2d 1050, 1052 (Pa. Super. Ct.), appeal denied, 615 A.2d 1310 (Pa. 1992); *Elliott v. Donahue*, 485 N.W.2d 403, 407 (Wis. 1992). See also *S.G. v. St. Paul Fire & Marine Ins. Co.*, 460 N.W.2d 639, 642 (Minn. Ct. App. 1990)(stating that when construing insurance contract, all doubts must be resolved in the insured's favor); *American Economy Ins. Co. v. Hughes*, 854 P.2d 500, 501 (Or. Ct. App. 1993)(construing exclusions narrowly).

n16. See *MIC Prop. & Cas. Ins. Corp. v. International Ins. Co.*, 990 F.2d 573, 576-77 (10th Cir. 1993)(applying Oklahoma law); *Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F.2d 1124, 1127 (5th Cir. 1993)(applying Texas law); *Manzanita Park, Inc. v. Insurance Co. of N. Am.*, 857 F.2d 549, 553 (9th Cir. 1988)(discussing Arizona law and collateral estoppel); *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 388-89 (Mo. Ct. App. 1990); *Ames v. Continental Cas. Co.*, 340 S.E.2d 479, 485 (N.C. Ct. App. 1986).

n17. See *Illinois Masonic Med. Ctr. v. Turegum Ins. Co.*, 522 N.E.2d 611, 613 (Ill. App. Ct. 1988); *Parker v. Agricultural Ins. Co.*, 440 N.Y.S.2d 964, 967 (Sup. Ct. 1981)("The purpose of such right is to allow insurers to protect their financial interest in the outcome of litigation"). See also *Aberle v. Karn*, 316 N.W.2d 779, 782 (N.D. 1982)(insurers' right to control defense "justified by a substantial public interest in orderly and proper disposition" of claims).

n18. *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1157 (Cal. 1993)("The insured's desire to secure ... the insurer's ... defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability."); *Houston Gen. Ins. Co. v. Superior Court*, 166 Cal. Rptr. 904, 910 (Ct. App. 1980)(Smith, A.J., dissenting).

n19. *Brady & McKee*, supra note 1, at 231.

n20. Insurers are usually best able to select competent defense counsel with whom they have negotiated favorable hourly rates.

n21. " Insureds share their insurers' interest in reducing total claims costs. Without prudent claims administration, insurance might be unaffordable ... Inevitably, increased costs of insurers result in increased costs to insureds." John K. Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 *Utah L. Rev.* 457, 460.

n22. Bruce L. Gelman, Note, *The Insurance Company or the Insured: Where Does Defense Counsel's Loyalty Really Lie?*, 70 *U. Det. Mercy L. Rev.* 215, 215 (1992).

n23. See *id.* at 215.

n24. Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured and Defense Counsel: The Eternal Triangle Reformed*, 66 *Tulane L. Rev.* 511, 511 (1991). The existence of an attorney-client relationship between an insurer and the attorney it hires to defend its insured has been recognized by numerous courts. See, e.g., *Central Nat'l Ins. Co. v. Medical Protective Co.*, 107 F.R.D. 393, 394-95 (E.D. Mo. 1985); *Mitchum v. Hudgens*, 533 So. 2d 194, 198 (Ala. 1988); *Chi of Alaska, Inc. v. Employers Reins. Corp.*, 844 P.2d 1113, 1116 (Alaska 1993); *Bogard v. Employers Cas. Co.*, 210 Cal. Rptr. 578, 582 (Ct. App. 1985); *Pennsylvania Ins. Guar. Ass'n v. Sikes*, 590 S.2d 1051, 1052 (Fla. Dist. Ct. App. 1991); *Nandorf v. CNA Ins. Cos.*, 479 N.E.2d 988, 991 (Ill. App. Ct. 1985); *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 268 (Miss. 1988); *Lieberman v. Employers Ins.*, 419 A.2d 417, 423-25 (N.J. 1980). But see *Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991) ("It is clear beyond cavil that ... the attorney owes his allegiance not to the insurance company that retained him, but to the insured..."); *In re A.H. Robins Co.*, 880 F.2d 694, 751 (4th Cir.), cert. denied, 493 U.S. 959 (1989) ("It is universally declared that [insurance defense] counsel represents the insured and not the insurer."); *National Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 1 Cal. Rptr. 2d 570, 575 (Ct. App. 1991) (insurer had no contractual right to actually control defense, so it had no attorney-client relationship with defense counsel); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 297-99 (Mich. 1991) (no attorney-client relationship between insurer and defense counsel). For a confused analysis of the dual client doctrine in connection with claims of privilege, see *Catino v. Travelers Ins. Co.*, 136 F.R.D. 534, 537 (D. Mass. 1991).

n25. See O'Malley, *supra* note 24, at 514.

n26. Morris, *supra* note 21, at 463.

n27. As the Eighth Circuit Court of Appeals observed in *United States Fidelity & Guaranty Co. v. Louis A. Roser Co.*, 585 F.2d 932 (8th Cir. 1978):

Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client - the one who is paying his fee and from whom he hopes to receive future business - the insurance company.

Id. at 938 n.5. See also *Rose v. Royal Ins. Co.*, 3 Cal. Rptr. 2d 483, 487 (Ct. App. 1991) ("Where an insurer is called upon to defend its insured, the attorney retained by the insurer may have a compelling interest in perfecting the insurer's position, whether or not it coincides

with what is best for the insured.").

In most cases this concern is unfounded. As a rule, the insurer and its insured share a common interest in minimizing or defeating a third-party claim. See *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494, 498 (Ct. App. 1984); *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 658 (Md. 1994).

n28. See O'Malley, *supra* note 24, at 515.

n29. See *id.* at 515-16.

n30. See Debra A. Winiarski, *Walking the Fine Line: A Defense Counsel's Perspective*, 28 *Tort & Ins. L.J.* 596, 597 (1993).

n31. See Jerry, *supra* note 2, at 605.

n32. See *Royal Ins. Co. v. Process Design Assocs.*, 582 N.E.2d 1234, 1239 (Ill. App. Ct. 1991). See also *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1197-1201 (5th Cir. 1986) (discussing effective reservation of rights letter); *Knox-Tenn Rental Co. v. Home Ins. Co.*, 833 F. Supp. 665, 667-69 (E.D. Tenn. 1992), *aff'd*, 2 F.3d 678 (6th Cir. 1993) (holding reservation of rights was not clearly and fairly communicated to insured, and was therefore ineffective).

n33. See Jerry, *supra* note 2, at 606.

n34. "A reservation of rights may chill a zealous defense based on the insurer's assessment of the liability and it presents a possible conflict of interest because the insurer may be more concerned with developing facts showing non-coverage than facts defeating liability." *Missouri ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307, 308 (Mo. Ct. App. 1993). See also *Rockwell Int'l Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153, 158 (Ct. App. 1994) (observing that the insured's goal of coverage flies in the face of the insurer's desire to avoid its duty to indemnify under a reservation of rights).

n35. 208 Cal. Rptr. 494 (Ct. App. 1984).

n36. The plaintiff alleged wrongful discharge, breach of the covenant of good faith and fair dealing, wrongful interference with and inducing breach of contract, breach of contract, and intentional infliction of emotional distress. *Id.* at 496.

n37. *Id.*

n38. *Id.* at 497.

n39. *Id.*

n40. *Id.*

n41. *Id.* at 506 (citations omitted).

n42. *Id.*

n43. *Id.* at 498.

n44. *Id.*

n45. *Id.* at 497-98.

n46. See *id.* at 498.

n47. Brady & McKee, *supra* note 1, at 232-33.

n48. For example, a group of California attorneys known as "The Alliance" may have defrauded insurers out of as much as \$ 200,000,000

by exploiting bogus conflicts of interest. *Id.* at 233.

n49. *Id.*

n50. These problems may be resolved by holding the insured to a duty of good faith and fair dealing. As the California Court of Appeal observed:

In our view, the duty of good faith imposed upon an insured includes the obligation to act reasonably in selecting as independent counsel an experienced attorney qualified to present a meaningful defense and willing to engage in ethical billing practices susceptible to review at a standard stricter than that of the marketplace. Conduct arguably acceptable in the ordinary attorney-client relationship where the latter pays the former from his own pocket is not necessarily appropriate in the tripartite context when independent counsel undertakes to represent the insured at the expense of the insurer.

Center Found. v. Chicago Ins. Co., 278 Cal. Rptr. 13, 21 (Ct. App. 1991). The Alaska Supreme Court held in *Chi of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993), that the insurer was obligated to pay only the "reasonable cost of defense" provided by independent counsel. *Id.* at 1121. While the insured had a unilateral right to select independent counsel, it also had a duty to "select an attorney who is, by experience and training, reasonably thought to be competent to conduct the defense" *Id.* at 1125. The Chi of Alaska court believed that this approach balanced both parties' interests.

n51. See, e.g., *Foremost Ins. Co. v. Wilks*, 253 Cal. Rptr. 596, 601-603 (Ct. App. 1988)(concluding mere punitive damage claim does not create conflict of interest); *Native Sun Inv. Group v. Ticor Title Ins. Co.*, 235 Cal. Rptr. 34, 39-40 (Ct. App. 1987)(resolution of underlying case would not control outcome of coverage dispute; thus, *Cumis* counsel not required); *McGee v. Superior Court*, 221 Cal. Rptr. 421, 424 (Ct. App. 1985)(reservation of rights based on a collateral issue that would not be developed at trial, so independent counsel not required).

n52. *Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. Rptr. 2d 884, 887 (Ct. App. 1991).

n53. *Id.*

n54. *Id.* at 887. See also *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1359 (9th Cir. 1992)(applying California law).

n55. 430 N.E.2d 401 (Ind. Ct. App. 1982), *aff'd*, 446 N.E.2d 332 (Ind. 1983).

n56. *Id.* at 403.

n57. 722 S.W.2d 947 (Mo. 1987).

n58. See id. at 951.

n59. Id. at 953.

n60. "A duty to act in good faith is part of every insurance contract." *Kansas Bankers Sur. Co. v. Lynass*, 920 F.2d 546, 548 (8th Cir. 1990). It is widely-recognized that insurers owe their insureds a duty of good faith and fair dealing sounding in tort. See, e.g., *Lissmann v. Hartford Fire Ins. Co.*, 848 F.2d 50, 53 (4th Cir. 1988); *Hamed v. General Accident Ins. Co.*, 842 F.2d 170, 172 (7th Cir. 1988); *Broadhead v. Hartford Cas. Ins. Co.*, 773 F. Supp. 882, 905 (S.D. Miss. 1991), aff'd, 979 F.2d 209 (5th Cir. 1992); *Turner Ins. Agency v. Continental Cas. Ins. Co.*, 541 So. 2d 471, 472 (Ala. 1989); *Rawlings v. Apodaca*, 726 P.2d 565, 571-72 (Ariz. 1986); *Globe Indem. Co. v. Superior Court*, 8 Cal. Rptr. 2d 251, 255 (Ct. App. 1992); *Southern Gen. Ins. Co. v. Holt*, 416 S.E.2d 274, 276 (Ga. 1992); *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1016 (Idaho 1986); *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518-19 (Ind. 1993); *North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W.2d 824, 828-29 (Iowa 1991); *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 556 (Mo. Ct. App. 1990); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 48-49, 464 N.W.2d 769, 772 (1991); *Motorists Mut. Ins. Co. v. Said*, 590 N.E.2d 1228, 1232 (Ohio 1992); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 236, 237-38 (Okla. 1993); *Georgetown Realty, Inc. v. Home Ins. Co.*, 831 P.2d 7 (Or. 1992); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 306 S.E.2d 616, 618-19 (S.C. 1983); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 858 (Wyo. 1990). Plaintiffs may recover for an insurer's bad faith even when the event giving rise to a loss is not covered by the policy. See, e.g., *First Tex. Sav. Ass'n v. Reliance Ins. Co.*, 950 F.2d 1171, 1178-79 (5th Cir. 1992) (interpreting Texas unfair insurance practices statute); *Safeco Ins. Co. v. Butler*, 823 P.2d 499 (Wash. 1992).

n61. 715 P.2d 1133 (Wash. 1986).

n62. Id. at 1137.

n63. See id.

n64. Id.

n65. 521 So. 2d 1298 (Ala. 1987).

n66. See id. at 1304.

n67. See Jerry, *supra* note 2, at 607.

n68. See *Parsons v. Continental Nat'l Am. Group*, 550 P.2d 94, 98 (Ariz. 1976)(defense counsel owes insured undeviating and single allegiance); *Purdy v. Pacific Auto. Ins. Co.*, 203 Cal. Rptr. 524, 533 (Ct. App. 1984)(defense counsel's primary duty is to further the insured's best interests).

n69. 528 So. 2d 255 (Miss. 1988).

n70. *Id.* at 273.

n71. *Id.*

n72. 957 F.2d 707 (9th Cir. 1992).

n73. See *id.* at 710-11.

n74. See, e.g., *Murphy v. Urso*, 430 N.E.2d 1079 (Ill. 1981).

n75. See *id.* at 1083-84.

n76. See *Illinois Mun. League Risk Mgt. Ass'n v. Seibert*, 585 N.E.2d 1130, 1136 (Ill. App. Ct. 1992).

n77. 791 F. Supp. 799 (D.S.D. 1992).

n78. *Id.* at 800.

n79. *Id.*

n80. *See id.*

n81. *See id.* at 801.

n82. *Id.* at 800.

n83. *Id.*

n84. *Id.*

n85. *Id.* at 801.

n86. *Id.* at 802.

n87. Hall, *supra* note 8, at 753.

n88. *See* Eric M. Holmes, A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net, 26 *Willamette L. Rev.* 1, 63-64 (1989).

n89. 550 P.2d 94 (Ariz. 1976).

n90. *Id.* at 96.

n91. *Id.* at 96-97.

n92. *Id.* at 97.

n93. *Id.*

n94. *Id.*

n95. *Id.* at 99.

n96. *Id.* at 99-100.

n97. The question of insurance coverage for punitive damages plagues courts, insurers, and insureds. Many liability insurance policies do not expressly exclude punitive damages from coverage. Standard policy language providing that an insurer will pay "all sums which the insured shall become legally obligated to pay as damages" is frequently held to be so broad as to include punitive damages. See, e.g., *Insurance Reserve Fund v. Prince*, 403 S.E.2d 643, 648 (S.C. 1991). In some states, insurance policies covering bodily injury, personal injury, and property damage do not cover punitive damages unless other policy language provides for the payment of punitive damages. See, e.g., *Union L.P. Gas Sys., Inc. v. International Surplus Lines Ins. Co.*, 869 F.2d 1109, 1110-11 (8th Cir. 1989); *Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 42-43 (Mo. Ct. App. 1991). There is a split among jurisdictions as to the insurability of punitive damages. Some states prohibit the insurability of punitive damages as a matter of public policy, fearing that the goals of punishment and deterrence would be undermined by insurance, or that the financial burden resulting from punitive damage awards would ultimately rest with other, blameless insureds. See, e.g., *Allen v. Simmons*, 533 A.2d 541, 543-44 (R.I. 1987). Jurisdictions which allow punitive damage insurance usually have a much lower threshold for awarding punitive damages, imposing only a gross negligence or similar standard. See *Continental Cas. Co. v. Fibreboard Corp.*, 762 F. Supp. 1368, 1371 (N.D. Cal. 1991), *aff'd*, 953 F.2d 1386 (9th Cir.), *vacated*, 113 S. Ct. 399 (1992). For a thoughtful discussion of the insurability of punitive damages, including policy and theoretical bases, see Jerry, *supra* note 2, at 349-54.

n98. See, e.g., *Emons Indus., Inc. v. Liberty Mut. Ins. Co.*, 749 F. Supp. 1289, 1298 (S.D.N.Y. 1990).

n99. Model Rules of Professional Conduct Rule 5.4(c)(1983).

n100. Currently, 37 states and the District of Columbia have adopted the Model Rules of Professional Conduct with some amendments. Brooke Wunnicke, *The Eternal Triangle Revisited: The Insurance Defense Lawyer and Conflicts of Interest*, *For the Defense*, Nov. 1993, at 20, 20. This Article does not discuss the Model Code of Professional Responsibility which remains in effect in the states that have not adopted some version of the Model Rules. In the remaining Model Code states, "the provisions of the Disciplinary Rules and Ethical Considerations are not substantively different from the Model Rules" discussed in the following text. O'Malley, *supra* note 24, at 516 n.27.

n101. See O'Malley, *supra* note 24, at 518; Winiarski, *supra* note 30, at 597.

n102. Model Rules of Professional Conduct, Rule 1.7 (1983).

n103. Murray and Bringus, *supra* note 3, at 284-85.

n104. See O'Malley, *supra* note 24, at 519.

n105. Model Rules of Professional Conduct, Rule 1.7 cmt. 10 (1983).

n106. See O'Malley, *supra* note 24, at 519.

n107. Model Rules of Professional Conduct, Rule 1.8(f)(1983).

n108. See Mallen, *supra* note 5, at 110.

n109. Model Rules of Professional Conduct, Rule 5.4(c)(1983).

n110. *Id.* Rule 1.2(d).

n111. *Id.* Rule 1.16(a)(1)(emphasis added). See, e.g., *Montanez v. Irizarry-Rodriguez*, 641 A.2d 1079 (N.J. Super. Ct. App. Div. 1994).

n112. See Model Rules of Professional Conduct, Rule 1.6 (1983).

n113. O'Malley, *supra* note 24, at 517.

n114. Model Rules of Professional Conduct, Rule 1.6 cmt. 16 (1983).

n115. Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 *Emory L.J.* 271, 307 (1984); O'Malley, *supra* note 24, at 517.

n116. See, e.g., Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 *Or. L. Rev.* 455, 484 (1984).

n117. See National Conference of Lawyers and Liab. Insurers, Am. Bar Ass'n, *Guiding Principles*, in *Fed'n Ins. Couns. Q.* Summer 1970, at 93, 93 [hereinafter *Guiding Principles*].

n118. O'Malley, *supra* note 24, at 513.

n119. *Guiding Principles*, *supra* note 117, at 95-99.

n120. See O'Malley, *supra* note 24, at 513.

n121. See *id.*

n122. 208 Cal. Rptr. 494 (Ct. App. 1984).

n123. Guiding Principles, *supra* note 117, at 97-98.

n124. O'Malley, *supra*, note 24, at 514.

n125. Model Rules of Professional Conduct, Rule 1.4(b)(1983).

n126. See Cal. Civ. Code 2860 (West 1993).

n127. *Id.*

n128. 2 Cal. Rptr. 2d 884, 887 (Ct. App. 1991).

n129. See Fla. Stat. Ann. 627.426(2)(West 1984).

n130. *Id.* at (2)(a).

n131. *Id.* at (2)(b).

n132. *Id.*

n133. Almost 40% of law firms responding to a survey indicated that legal malpractice claims were made against them between 1990 and 1992. For those firms with 41 or more attorneys, nearly 60% had legal malpractice claims filed against them. David A. Schaefer, *Avoiding Malpractice Claims: Help Yourself Because Juries Won't*, 60 Def. Couns. J. 584, 584 (1993). Conflicts of interest may affect attorneys' malpractice exposure in two ways. First, conflicts may form the basis of a malpractice action. Second, even if the gravamen of the plaintiff's

complaint is unrelated, a conflict of interest may taint the case and complicate the defense. See Robert E. O'Malley et al., *Selected Conflicts of Interest Issues, Loss Prevention Program (Attorneys' Liab. Assurance Soc'y, Inc., Bermuda)*, June 14, 1991, at 42 (materials on file with the author).

n134. See Mallen, *supra* note 5, at 120.

n135. See *id.* at 122-23.

n136. See *id.* at 124 (emphasis added).

n137. The Guiding Principles II have at their heart simplification of the dual client doctrine. They are:

1. An environment that facilitates the detection and punishment of insurance fraud is a fundamental objective.
2. As a general proposition, an insurance company is a client of its designated defense counsel vis-a-vis the entire world of nonclients.
3. When a lawyer is assigned by the insurer to represent an insured, that lawyer must consult with and obtain the consent of the insured as specified in Model Rules 1.7(b) and 1.8(f). Such consultation with the insured shall include (i) an explanation of the insurer's periodic reporting requirements, (ii) a discussion of the extent to which the insurance policy permits the insurer to settle within policy limits without the consent of the insured, and (iii) defense counsel's limited responsibility as described in principles 7 and 8 below.
4. The insured has the option to refuse consent and retain counsel of the insured's choice at the insured's expense. In that event, these principles as such are no longer applicable. It should, however, be recognized by the insured and defense counsel that much of the conduct prescribed for the insured and defense counsel in these principles is also mandated by applicable law, legal ethics codes, and the insurance policy's provisions.
5. Assuming the insured agrees to be represented by the insurer's designated defense counsel, for all purposes as to that particular matter the insured is the only client of that lawyer.
6. From the outset of any such matter referred to in principle 5 above, whether or not there is any conflict or potential conflict between insured and insurer, and regardless of whether or when any such conflict or potential conflict is later identified, the insurance company is not for any purpose a client of defense counsel.
7. In the situations referred to in principles 5 and 6 above, the defense counsel's duty as lawyer for the insured is restricted to:
 - a. defending the liability claim competently;
 - b. exercising independent professional judgment on behalf of the insured as required by Model Rules 1.8(f) and 5.4(c);
 - c. advising the insured regarding the insured's contractual (and, if necessary, extra-contractual) rights and obligations under the policy (e.g., if the policy so provides, the insurer's right to settle within policy limits without the insured's consent); and
 - d. within the limitations of defense counsel's general ethical obligations (see principle 11, below), conducting the liability defense so as to place the insured in the most favorable posture with respect to any actual or potential coverage dispute, or other dispute between insured and insurer.
8. Except as is otherwise implicit in principle 7 above, defense counsel shall not represent or advise or otherwise be involved with either the insured or the insurer with respect to any coverage dispute or any other dispute between the insured and the insurer.
9. As the lawyer for the insured for the limited purposes described in principle 7 above, defense counsel has no fiduciary duty to the insurer and has no duty to the insurer based on any concept of a lawyer-client relationship, as to that particular matter.
10. Apart from defense counsel's general ethical obligations (see principle 11 below), defense counsel's obligation to the insurer is

based solely on defense counsel's role as agent for the insured. The obligation is no greater and no less than that of the insured under the provisions of the insurance policy and generally applicable law.

11. As a matter of legal ethics, defense counsel has the same obligations to the insurer and to the plaintiff that would be owed in any matter to any third party who is not a client. These obligations include:

- a. not lying;
- b. not assisting a crime or fraud by the insured;
- c. resigning if the insured is engaged in a crime or fraud;
- d. not asserting a nonmeritorious claim; and
- e. taking remedial action if the insured intends to commit, or has committed, perjury.

12. If defense counsel has resigned pursuant to Model Rule 1.16(a)(1) because the insured is attempting to perpetrate a crime or fraud, defense counsel, pursuant to comments [15] and [16] under Model Rule 1.6, shall give the insurer notice of defense counsel's withdrawal, and following the resignation shall also "withdraw or disaffirm any opinion, document, affirmation, or the like" previously submitted by defense counsel to the insurer or to the court that contains a material misrepresentation, omission or similar material falsehood.

13. Except for the indirect disclosure that is inherent in the resignation and document withdrawal scenario described in principle 12 above, defense counsel may not inform the insurer of the insured's crime or fraud. In general, defense counsel may not inform the insurer of anything adverse to the insured vis-a-vis the insured's relationship with the insurer, not even the potential (but unspecified) conflict of interest. Under these principles, any dispute or potential dispute between the insured and the insurer does not create a conflict of interest problem for defense counsel because defense counsel's only client is the insured. On the other hand, nothing contained in these principles prohibits defense counsel from disclosing to the insurer negative information about the insured that bears materially on the defense of the case, such as the credibility and impeachability of the insured and the degree of culpability of the insured.

14. The nondisclosure rules contained in principle 13 above are subject to any contrary explicit provisions of the ethics code in effect in any given jurisdiction.

15. The insured, having originally consented to be represented by the designated defense counsel within the framework of these principles, has no right at any time thereafter to demand representation by a separate or additional counsel at the expense of the insurer, except in the rare case where changed circumstances (not covered by these principles) later created a serious conflict of interest on the part of defense counsel that under general principles of legal ethics is not waivable by the insured.

16. In any case where defense counsel has withdrawn from the representation of the insured, or otherwise for any reason ceases to represent the insured, the insurer continues to have the right to designate a successor defense counsel (who shall be subject to these principles) to the same extent as that right existed under the policy with respect to designation of the original defense counsel.

17. The insured may at any time and for any reason retain separate counsel at his or her own expense to advise the insured as to any and all aspects of the matter. In such an event, the designated defense counsel shall, in good faith, consult with the insured's special counsel with a view to achieving mutual agreement as to what strategy and tactics are in the best interests of the insured.

18. Notwithstanding the presence of separate counsel for the insured as described in principal 17 above, the defense counsel and the insurer shall continue to control the defense to the extent contractually provided in the insurance policy.

19. In the case of any dispute or potential dispute between insured and insurer, the insurer may be represented by its officers and employees in addition to counsel of its choice (other than defense counsel). In such a case, the insured and defense counsel shall provide information to the insurer in accordance with any contractual obligations flowing from the insurance policy and in accordance with their obligations under the generally applicable law.

O'Malley, *supra* note 24, at 521-25.

n138. See *id.* at 520.

n139. See Alan I. Widiss, *Abrogating the Right and Duty of Liability Insurers to Defend Their Insureds: The Case for Separating the Obligation to Indemnify from the Defense of Insureds*, 51 *Ohio State L.J.* 917, 939 (1990).

n140. Potential disadvantages include higher total premiums, increased defense costs, complexity introduced by the involvement of an additional insurer, loss of the liability insurer's expertise, fostering opportunities for the insured and counsel to structure the third-party litigation so as to bring any judgment within the scope of the coverage, and disputes between the insured and the indemnification carrier with respect to litigation management or settlement. See *id.* at 940-42.

n141. *Id.* at 942-45.

n142. O'Malley, *supra* note 24, at 520.

n143. See, e.g., *Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991); *In re A.H. Robins Co.*, 880 F.2d 694, 751 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 297-99 (Mich. 1991).

n144. See Winiarski, *supra* note 30, at 599.

n145. See *id.* at 600.

n146. If an insured must ultimately pay a settlement as part of its deductible, the insured must consent to settlement. See *St. Paul Fire & Marine Ins. Co. v. Edge Memorial Hosp.*, 584 So. 2d 1316 (Ala. 1991).

n147. "Some states have created what might be called a 'professional liability' exception to the general rule granting the carrier exclusive control over settlement decisions." Murray & Bringus, *supra* note 3, at 288.

n148. 497 N.E.2d 47 (Ill. 1980).

n149. See *id.* at 49.

n150. *Id.* The Rogers holding has been roundly criticized. See, e.g., *Mitchum v. Hudgens*, 533 So. 2d 194, 196-97 (Ala. 1988).

n151. 735 S.W.2d 729 (Mo. Ct. App. 1987).

n152. *Id.* at 733. But cf. *In re Allstate Ins. Co.*, 722 S.W.2d 947, 952 (Mo. 1987) ("The insurer may accept a settlement offer even though the insured wants to go to trial to establish freedom from fault.").

n153. *Hall*, *supra* note 8, at 762.

n154. *O'Malley*, *supra* note 24, at 516.

n155. *Id.* at 516.

n156. Many jurisdictions permit liability insurers to maintain malpractice actions against defense counsel. See *Glenn v. Fleming*, 781 P.2d 1107 (Kan. Ct. App. 1989); *Friesens v. Larson*, 438 N.W.2d 444 (Minn. Ct. App.), *rev'd on other grounds*, 443 N.W.2d 830 (Minn. 1989); *Nationwide Mut. Ins. Co. v. Winslow*, 382 S.E.2d 872 (N.C. Ct. App. 1989). Some states allow insurers to pursue defense counsel under an equitable subrogation theory in the absence of an attorney-client relationship. See, e.g., *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 297-99 (Mich. 1991).

n157. *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 273 (Miss. 1988).

FILED APPEALS
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

No. 45593-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

SUPPLEMENT TO APPENDIX TO REPLY BRIEF OF APPELLANT

ALANA BULLIS, PS
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1911 Nelson Street
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Attorney for Appellant



WSBA

Advisory Opinion: 195

Year Issued: 1999

RPC(s): RPC 1.6, 1.7, FO 183, 1.8(f), 5.4(c), 1.16

Subject: Disclosure of Client Confidential Information in Detailed Billing Statements To Persons Other Than the Client

- Consent of the Client to Insurer's Review of Billing Statements by Outside Auditor

- Ethical Compliance with "Billing Guidelines" of a Person Other Than the Client

Issue 1:

May an attorney whose professional services are paid by a person other than the client, disclose to the person paying the bill, or to third parties such as an insurer's outside auditing service, information relating to the representation of the client in detailed, narrative billing statements which describe the professional services rendered?

Answer 1:

An attorney cannot disclose to an insurer, without the client's informed consent, confidential information protected by RPC 1.6, except for disclosures that are impliedly authorized to carry out the representation. The exception for disclosures that are impliedly authorized is to be narrowly construed, and does not allow the attorney's disclosure, without specific client consent, of confidential client information to a third party hired by the insurance company.

Issue 2:

May an attorney ethically comply with a requirement of a person other than the client who pays the attorney's billings, to seek or obtain the client's informed consent to the attorney disclosing information relating to the representation of the client in billing statements to be submitted to an outside audit service?

Answer 2:

No. Such a requirement would put the attorney in an ethical dilemma, precluding the attorney from representing the client under RPC 1.7(a)(2) and (b)(1).

Issue 3:

May an attorney whose professional services are paid by a person other than the client, ethically comply with detailed, narrative billing guidelines of the person paying the billing?

Answer 3:

An attorney whose professional services are paid by a person other than the client can

ethically comply with "Billing Guidelines" of the person paying the billing, provided the billing guidelines do not: (1) require disclosure of information relating to the representation of the client, without the client's informed consent; (2) interfere with the attorney's independent professional judgment or with the attorney-client relationship; or (3) direct or regulate the attorney's independent professional judgment in rendering legal services to the client.

BACKGROUND FACTS

Historically, insurance defense attorneys have sent their bills to the insurance company for payment. These bills are quite detailed and typically include the name of the client, information about the nature of the legal services performed, information about specific research conducted by the attorney, and information which would tend to disclose strategic decisions made with regard to the case. In some instances, legal bills include information which would be embarrassing to the client.

Many insurers have issued "Billing Guidelines" to defense counsel. Recently, some insurers have begun a process of retaining independent auditing firms to review bills submitted by their defense lawyers. Some insurers have requested that lawyers directly send their bills to the outside auditing service, either by hard copy or computer disk.

One such national auditing service company that reviews the bills of Washington defense lawyers, enters into contracts with insurance companies on a fixed-price basis in annual increments, generally one year, subject to renewal. Although it maintains records of cost savings, its fee does not change during the annual increment and its employees are salaried and not paid any incentive bonus or contingency for cost savings to the customer. About one half of its employees are attorneys and its contract with each of its insurance company customers contains a "confidentiality" provision, agreeing to treat confidential information of the insured according to the same fiduciary standards that the law imposes on the insurer.

The outside auditing service reviews and makes recommendations for payment or nonpayment of defense counsel's billings based on compliance or noncompliance with certain "Billing Procedures" and "Billing Guidelines" which have been adopted by the particular insurance company in coordination with the planned outsourcing of billing reviews to be performed by the audit company.

Payment for professional services is based on "adequate descriptions" contained in the billing statement. "Adequate descriptions" often require the identity of all participants in, and the purpose of, a conference, letter, call or meeting; the specific issue involved; and specific information about the nature of what has been discussed, reviewed or decided which may require disclosure of specific tactical and strategic information about the defense of litigation irrespective of whether the information is otherwise privileged, embarrassing to the client, or may involve matters of dispute between the client and the insurer ultimately responsible for paying the attorney's fees. None of the activities of the auditing service involves the direct investigation or defense of the claim.

"Inadequate description" of communications with the clients (insureds) and their personal

attorneys, has been the basis for denial of payment by an auditing service where defense counsel, in "reservation of rights" cases (as well as in cases not involving reservation of rights), did not specifically explain what was discussed in the conversations, which led to the insured's personal attorney writing letters objecting to the auditing service's recommendation that the insurer not pay for those activities. That auditing service, in "reservation of rights" cases, applies the same "adequate description" standards and requirements as it does in cases not involving coverage questions, deferring to the insurance carrier for resolution, any issue involving "inadequate description."

As a result of informal opinion #1758 (release of information to third party impermissible absent informed consent of client), one inquirer seeks guidance as to whether assigned defense counsel can ethically obtain informed consent of the insured client to produce copies of the lawyer's bill to a third-party auditor.

DISCUSSION

Issue 1

The relationship between the insurance company, the insured and defense counsel is a tripartite relationship wherein the insurer, pursuant to an insurance contract, pays the costs of defense including the lawyer's fee. However, in Washington it is clear that legally and ethically the client of the lawyer is the insured. *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986); *Van Dyke v. White*, 55 Wn.2d 601, 349 P.2d (1960).

RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ...

Formal Opinion 183, *Disclosure of Information Relating to the Representation of a Client by a Legal Service Office to the Legal Service Corporation or Other Third Party* (1990), noted that a legal service office could not disclose to the federally funded national corporation which provided financial support to the local legal service office, or to other third parties, information which would disclose or lead to disclosure of confidential client information, without the informed consent of the client pursuant to RPC 1.6. In prohibiting disclosure of confidential client information, FO 183 recognized that the rule of confidentiality in the ethics rules is considerably broader than communications falling within the attorney-client privilege.

RPC 1.6(a) and FO 183 are instructive. Except for disclosures that are impliedly authorized to carry out the representation, appointed defense counsel cannot disclose to an insurer confidential information provided by the client without the client's consent, such as information that might be prejudicial to the client's right to coverage. Nor can the lawyer disclose information that might be embarrassing to the client such as the insured's insolvency or inability to pay the policy deductible.

The exception for disclosures that are impliedly authorized is to be narrowly construed, and

does not allow disclosure of confidential client information to a third party hired by the insurance company without specific client consent. In some circumstances, absent consent of the client, even the identity of the client, the fact of the representation and the nature of the case may involve extremely sensitive information prohibiting disclosure of confidential information to an outside auditor, such as pre-litigation representation and confidential settlement of a threatened lawsuit.

Issue 2

RPC 1.7(a)(2) provides:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RPC 1.7(b) provides in relevant part:

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and
- (2) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

RPC 1.8(f) provides:

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

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

Where confidential client information is not revealed in billings of defense counsel, conveying the insurer's request that the insured consent to billings being reviewed by an outside audit service would not interfere with the attorney's independent professional judgment or with the attorney-client relationship, proscribed in RPC 1.7(a)(2) and (b), and RPC 1.8(f).

Conversely, a requirement that defense counsel seek or obtain the informed consent of the insured to disclose confidential client information in billings to be submitted to the insurer or its outside auditing service, would invoke the prohibitions in RPC 1.7(a)(2) and (b), and

RPC 1.8(f), and place defense counsel in an impossible situation, requiring withdrawal from the representation. This is because it is almost inconceivable that it would ever be in the client's best interests to disclose information relating to the representation to a third party.

The issue is not, "what does it matter", or "does the client care." Rather, the question must be, "under what circumstances, if any, would independent counsel for the client recommend that the client consent to disclosure of confidential client information to third persons?" If there is the slightest risk of embarrassment to the client or waiver of privileged information, independent counsel would have an affirmative duty to recommend against disclosure.

Silence in the face of an affirmative duty to recommend against disclosure would be as egregious as a recommendation to consent to disclosure. Defense counsel who was required to seek or to obtain the insured's consent to disclosure would proceed to do so only by advancing counsel's own self-interests or the interests of a third party, the insurer, in contravention of RPC 1.7(a)(2) and (b), and RPC 1.8(f). Thus, a "requirement" to seek or obtain the client's consent to disclosure would put defense counsel in an ethical dilemma requiring withdrawal from the representation.

Issue 3

While "Billing Guidelines" are normally a matter of contract between an attorney and client, the billing guidelines at issue are not those of the client, but rather are those of the person paying the bill for the client. Because the person paying the lawyer's bills is not the client, the billing guidelines at issue here are not merely a matter of contract between attorney and client, but rather touch directly upon the relationship between attorney and client and therefore trigger special ethical responsibilities of the lawyer.

The Rules of Professional Conduct address any scenario, civil or criminal, litigation or non-litigation, where an attorney is paid by a person other than the client, such as a family member, friend or insurer. The RPC apply equally and consistently regardless of the scenario.

RPC 1.6(a) prevents disclosure of information relating to the representation of the client to persons other than the client without the client's informed consent.

RPC 1.7(a)(2) and (b) prohibit a lawyer from representing a client if there is a significant risk that the representation of that client will be materially limited by the lawyer's responsibilities to a third person or by the lawyer's own interests, unless the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, and each affected client provides informed consent, confirmed in writing.

RPC 1.8(f) prohibits acceptance of compensation for representing a client from one other than the client unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and information relating to representation of the client is protected as required by rule 1.6.

RPC 5.4(c) requires that a lawyer shall not permit a person who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

A billing guideline of a person other than the client that compels or requires disclosure of information relating to the representation of the client in detailed, narrative descriptions of legal services rendered, absent client informed consent, requires conduct in violation of RPC 1.6(a) and 1.8(f).

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, endeavors to direct or regulate the lawyer's professional judgment in violation of RPC 5.4(c).

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, operates as a disincentive to performance of those services in violation of RPC 5.4(c).

Absent client informed consent, an attorney cannot disclose information relating to the representation of the client or produce case files or other materials containing such information, to an insurer or its outside auditor pursuant to billing guidelines that allow an insurer to require production of a lawyer's case files to support billing entries for services performed for the client.

An attorney may ethically comply with the billing guidelines of a person other than the client who pays the lawyer's bill, where the billing guidelines do not endeavor to direct or regulate the lawyer's independent professional judgment and permit defense counsel to provide a degree of detail and narrative description in billings that meets the test for nondisclosure of confidential information.

However, because the lawyer is being paid pursuant to billing guidelines of a person other than the client, the lawyer 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.

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 RPC 1.16, and notify the client of the basis for the withdrawal.

[amended 2009]

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the

Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.