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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-03

Issued February 27, 2002

¶ 1 Issue: What are the ethical obligations of an insurance defense lawyer with respect to insurance company guidelines and flat-fee arrangements?

¶ 2 Opinion: An insurance defense lawyer's agreement to abide by insurance company guidelines or to perform insurance defense work for a flat fee is not per se unethical. The ethical implications of insurance company guidelines must be evaluated on a case by case basis. An insurance defense lawyer must not permit compliance with guidelines and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured. If compliance with the guidelines will be inconsistent with the lawyer's professional obligations, and if the insurer is unwilling to modify the guidelines, the lawyer must not undertake the representation. Flat-fee arrangements for insurance defense cases are unethical if they would induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interests. Obligations of lawyers under the Utah Rules of Professional Conduct, including the duty zealously to represent the insured, cannot be diminished or modified by agreement.

Insurance Company Guidelines

¶ 3 *Opinion Request Concerning Insurers' Guidelines*. The Ethics Advisory Opinion Committee has received a request for an ethics advisory opinion concerning insurance company guidelines for counsel who are employed to defend litigation brought by a third party against an insured. The requestors state that insurance companies doing business in Utah have incorporated in their defense-counsel retainer agreements certain billing protocols or guidelines governing attorneys' procedures and payments that raise ethical issues.

¶ 4 *Prior Opinions*. Although issues pertaining to insurance company guidelines have been the subject of considerable discussion elsewhere, (fn1) they have not been addressed directly by this Committee. (fn2) When ethical concerns about insurance company guidelines have been raised in ethics opinions from other jurisdictions, the opinions are generally consistent with the summary set forth in ABA Opinion No. 01-421:01-06A

A lawyer must not permit compliance with "guidelines" and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured.

Although most of the ethics opinions on insurance company guidelines take a general approach, a few—while acknowledging that certain guidelines may be appropriate—have taken issue with particular guidelines. For purposes of illustration, portions of selected ethics opinions from other jurisdictions are set forth in Appendix A. We do not intend to imply agreement with the conclusions of these opinions. Rather, we wish to describe more fully the kinds of concerns that have been raised elsewhere, many of which are raised directly in the request before us.

¶ 5 *Montana Supreme Court Decision.* The Montana Supreme Court has issued an opinion that addresses these topics, but only after having determined that the insured is the sole client of the defense lawyer. Under that structure, the court noted that defense counsel (a) does not have a "blank check" to escalate litigation costs, (b) should consult with the insurer, (c) must charge reasonable fees, and (c) can be held accountable for its work. The Montana court then held that "defense counsel in Montana who submit to the requirement of prior approval [obtaining consent of the insurer prior to taking certain actions] violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds." (fn3)

¶ 6 *The Insurer-Defense Attorney Relationship.* We do not decide whether, under Utah law, the insurer may or may not be a co-client of defense counsel. This is a legal question about which the Committee is not authorized to issue an opinion. (fn5) but the Utah Supreme Court has not determined whether a lawyer employed to represent an insured party in the defense of litigation also represents the insurer. We recognize not only that the Utah Supreme Court has not addressed this matter but that, even if it is assumed that the insurer is not a client, there are significant legal issues pertaining to the relationship between defense counsel and insurer. (fn7) As noted in the Scope comment to the Utah Rules of Professional Conduct:

[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a clientlawyer relationship

exists. Most of the duties flowing from the clientlawyer relationship attach only after the client has requested that the lawyer render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a clientlawyer relationship shall be established. Whether a clientlawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

¶ 7 *Our authority does not extend to the determination of legal question.* (fn8) Issuance of an opinion on the matters before us does not require that there be a determination of the legal question of whether a lawyer employed as defense counsel represents both insured and insurer. Accordingly, in this opinion, we address the lawyer's ethical obligations in the event both the insurer and the insured are clients. We also address the lawyer's ethical obligations in the event only the insured is a client. In the absence of controlling law to the contrary, who the lawyer represents may be determined at the outset by agreement of the insured, the insurer and the lawyer.

¶ 8 *Insurance Company Guidelines.* The requestors did not provide the Committee with copies of particular guidelines. Instead, they inquired generally about the ethical implications of guidelines, stating that certain tasks will only be paid at specified rates (e.g., written discovery will only be paid at paralegal rates) and that unless preapproval from an adjuster is obtained for certain tasks, defense counsel will not be paid (e.g., pleadings and motions, written discovery, retention of experts, legal research, travel, trial preparation, jury instructions, posttrial motions, appeals). (fn9)

¶ 9 The extensive scholarly literature on insurance company guidelines reveals a number of points that are relevant background for our consideration of ethical issues with respect to insurance company guidelines:

Insurance company guidelines are not identical.

Insurance companies may not use the same guidelines for every type of insurance defense.

Considerations of freedom of contract, cost control in the interest of policyholders (including avoidance of unreasonable defense costs), and improving coordination and communications with defense counsel are important motivating factors for insurance companies in promulgating guidelines.

Insurance company guidelines are similar in some respects to litigation management guidelines established by numerous corporate or governmental entities seeking to control litigation costs.

There may be a degree of unobvious flexibility in insurance company guidelines, in that insurance companies may permit variance from written guidelines or may reconsider and reverse an initial decision against a particular action upon receiving a satisfactory justification from the defense attorney.

Insurance company guidelines may include provisions that are unobjectionable from virtually any standpoint, such as:

(a) defining the financial relationship between the insurer and defense counsel (including hourly rates or other fees and permitted charges for expenses);

(b) coordinating the roles of defense counsel and employees of the insurer;

(c) establishing communications procedures between defense counsel and the insurer;

(d) stating the insurer's objectives, both strategic and financial, with respect to litigation defense;

(e) outlining standard procedures the insurer prefers to follow in handling lawsuits;

(f) identifying which lawyers and nonlawyers will be responsible for the matter;

(g) requiring analysis of the case as a whole and of the need for particular services; and

(h) billing procedures, including frequency of billing and billing format, such as requirements that billings include sufficient information to permit an evaluation of the reasonableness of fees and costs.

On the other hand, many believe that insurance company guidelines may in practice result in an inadequate defense of the insured by requiring or inducing defense lawyers to curtail services for the insured improperly.

¶ 10 *The Insurer-Insured Relationship.* The insurer and the insured have significant rights and obligations pertaining to the defense of litigation brought against the insured by a third party. For example, in *Ellis v. Gilbert*, (fn10) the Utah Supreme Court stated:

The bare facts of life may as well be faced and reckoned with. If we look behind the facade it is to be seen that where there is insurance, the company actually takes over, employs counsel, investigates the case, interviews the witnesses, controls offers of settlement, and in fact, handles the entire matter.

In *Peterson v. Western Casualty and Surety Co.*, (fn11) while addressing the standard for showing diligence by

insurer relying on alleged breach of cooperation clause by the insured, the Utah court noted that an insurance policy providing for interest on judgment "seems to be a recognition of the fact that the delay in payment of the judgment is chargeable to the insurance company, since it controls in the litigation." In *Berlant v. McAllister*, (fn12) the Court described the insurerinsured relationship as follows:

To begin with we must know that the insurance carrier is obligated by its contract to pay all sums (up to the limits of the policy) which [the insured] may be, or shall become, liable to pay. This means that the carrier cannot be made to pay money until a judgment has been rendered against the insured []. However, this does not prevent the carrier from making a settlement of all claims against its insured before a judgment is rendered. The likelihood of losing the suit, the cost of defending it, and the possibility of settling for a sum less than the foreseeable costs and expenses are all matters which a carrier will consider in determining whether to settle a case or to defend it. The insurance contract provides that the insurer will, at its own expense, investigate, defend or settle any claims against the insured. It does not provide for any representation of its insured in an action against another party. Separate counsel always represents an insured plaintiff when he sues or an insured defendant when he counterclaims. The insurance attorney only represents the insured insofar as any claim is made against him for which the insurance company might be liable.

In *Beck v. Farmers Insurance Exchange*, (fn13) the Court addressed obligations of the insurer as follows:

In a third-party situation [where the insurer contracts to defend the insured], the insurer controls the disposition of claims against its insured, who relinquishes any right to negotiate on his own behalf. . . . An insurer's failure to act in good faith exposes its insured to a judgment and personal liability in excess of the policy limits. . . . In essence, the contract itself creates a fiduciary relationship because of the trust and reliance placed in the insurer by its insured. . . . The insured is wholly dependent upon the insurer to see that, in dealing with claims by third parties, the insured's best interests are protected. In addition, when dealing with third parties, the insurer acts as agent for the insured with respect to the disputed claim. Wholly apart from the contractual obligations undertaken by the parties, the law imposes upon all agents a fiduciary obligation to their principals with respect to matters falling within the scope of their agency.

The Utah Rules of Professional Conduct do not in any way diminish or modify the rights or obligations of the insured or the insurer.

¶ 11 *Ethical Obligations Cannot Be Modified by Agreement.* A lawyer's ethical duties under the Utah Rules of Professional Conduct cannot be diminished or modified by an agreement between the attorney and the attorney's client or between the attorney and a third party. This principle applies equally to agreements concerning insurance company guidelines and fee agreements with insurance companies. For example, an attorney's obligations to provide competent representation to a client, (fn14) to act with reasonable diligence and promptness in representing a client, (fn15) to exercise independent professional judgment and render candid advice, (fn17) cannot be limited by agreement. With respect to attorneys' fee agreements, the comment to Rule 1.5 states: "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interests." Accordingly, notwithstanding any agreement pertaining to fees or pertaining to the manner in which litigation may be conducted, lawyers subject to the Utah Rules of Professional Conduct must at all times comply with them.

¶ 12 *Consent For Third-Party Payment.* Rule 1.8(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 clientlawyer relationship; and

(3) Information relating to representation of a client is protected by Rule 1.6.

Rule 1.8(f) applies by its terms to a lawyer employed to defend litigation brought by a third party against an insured, whether or not the insurer is a client. Accordingly, an insured must consent to an insurer's paying a lawyer employed to defend litigation brought by a third party against an insured. For purposes of Rule 1.8(f), the insured manifests this consent by entering into the insurance contract and accepting the representation offered. No new or separate consent is necessary.

¶ 13 *Information Under Rule 1.4(b).* Under Rule 1.4(b), the insurance defense lawyer must "explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation." With respect to the insured as a client, the lawyer must inform the insured sufficiently to enable the insured to make informed decisions regarding the representation. The lawyer could accomplish this by sending the insured a letter at the outset of the representation informing the insured of relevant information. Although doing so would be a prudent

practice, we do not hold that a lawyer must provide a written explanation. In ¶ 17 of this Opinion, we discuss the kinds of information that might be included in a letter to the insured at the outset of the representation.

¶ 14 *Limitation of Scope Under Rule 1.2.* Many perceived issues concerning insurance company guidelines can be resolved with proper attention to limitations on the scope of the representation under Rule 1.2. Under that rule, the scope of the attorney's representation may be limited by agreement. (fn18) The comments to Rule 1.2 specifically refer to the retention of a lawyer by an insurance company to represent an insured:

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. (fn19)

Limitations on the objectives or scope of an attorney's services should be determined jointly by the attorney and the client. The comment to Rule 1.2 states:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. (fn20)

¶ 15 If both insurer and insured are clients, both must agree to limitations on the objectives or scope of an attorney's services. If only the insured is the client, the insured must agree. The lawyer could obtain the insured's consent at the outset of the representation by sending the insured a letter informing the insured of the relevant limitations. For example, the claims asserted against the insured may include claims that exceed insurance policy limits, claims that are not covered by insurance, or interests of the insured (such as reputation) that the insurer has no obligation to protect. In these situations, special care should be taken to provide information necessary for the insured to understand and agree to any appropriate limitations and to implement means to provide additional representation the insured may desire.

¶ 16 Although doing so would be a prudent practice, we do not hold that a lawyer must provide a written explanation or obtain the client's consent in writing. In the next paragraph, we discuss the kinds of information that might be included in a letter to the insured at the outset of the representation. The lawyer could inform the insured in the letter that the insured's consent to the limitations on the objectives or scope of the lawyer's services will be presumed unless the insured objects within a specified time period. The insured could manifest consent to the limitations by accepting the defense without objection.

¶ 17 *Information That Could Be Provided at the Outset.* Subject to any limitations on confidential information under Rule 1.6(a), (fn21) which may apply if the insurer is also a client, the insurance defense lawyer could provide the insured with information such as the following:

(1) the fact of the lawyer's selection by the insurer to defend against the claim and appropriate information concerning the lawyer;

(2) the identity of the insurer;

(3) the identity of the lawyer's client or clients (i.e., whether or not there are multiple insureds who will be clients and whether or not the insurance company will be the lawyer's client);

(4) relevant policy information, including facts pertaining to the lawyer's compensation by the insurer;

(5) to the extent they are not disputed by the parties, the insurer's rights and obligations under the insurance policy with respect to defense and settlement of the litigation;

(6) to the extent they are not disputed by the parties, the insured's rights and obligations under the insurance policy with respect to defense and settlement of the litigation;

(7) how the representation will be conducted, including any limitations on the objectives or scope of the representation (fn22) and the insurer's normal practices in directing representations including by way of litigation or billing guidelines;

(8) how settlement proposals will be handled;

(9) that, unless the insured objects and subject to the

requirements of the Utah Rules of Professional Conduct, the lawyer intends to proceed in accordance with the directions of the insurer;

(10) issues pertaining to confidential information and obtaining consents to convey confidential information between insured and insurer; (fn23)

(11) issues pertaining to avoidance and resolution of conflicts of interest; (fn24)

(12) risks to the insured, including the implications of the insurer's rights, obligations, and procedures and any other relevant risks, such as an excess judgment or noncovered claims; and

(13) the insured's right to hire a lawyer at the insured's expense, including for purposes other than defense of the claim. (fn25)

While the foregoing items are provided as non-exhaustive illustrations, we do not hold that a defense lawyer must address every item in every case. Under Rule 1.4(b), the insurance defense lawyer must explain the matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

¶ 18 *Professional Independence Under Rules 1.8(f) and 5.4(c).* Rule 1.8(f)(2) requires that a lawyer accepting compensation for representing a client from one other than that client assure that "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." This rule applies to a lawyer employed to defend litigation brought by a third party against an insured, whether or not the insurer is also a client.

¶ 19 Rule 5.4(c) provides: "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." Rule 5.4(c) applies to a lawyer employed to defend litigation brought by a third party against an insured, whether or not the insurer is a client. Rule 5.4(c) expressly prohibits a lawyer from permitting a person who employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering the legal services. Rule 5.4(c) draws no distinction between advice and action and speaks directly to professional judgment in rendering legal services. This is not to say, however, that the scope of the lawyer's representation may not properly be limited as provided in Rule 1.2. To the extent the scope of the lawyer's representation properly is limited, the lawyer is not authorized to render services outside the scope of the representation. But agreements respecting insurance company guidelines or flat-fee arrangements with insurance companies cannot free the lawyer from the obligation to exercise independent professional judgment both in setting limits on the representation and in rendering services within the scope of the representation.

¶ 20 *Summary of Analysis of Insurance Company Guidelines.* With these principles in mind, we conclude that an insurance defense lawyer's agreement to abide by insurance company guidelines is not per se unethical and that the ethical implications of insurance company guidelines must be evaluated on a case-by-case basis. An insurance defense lawyer must not permit compliance with guidelines and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured. (fn26) Obligations of attorneys under the Utah Rules of Professional Conduct cannot be diminished or modified by an agreement between the attorney and the attorney's client or by an agreement between the attorney and an insurer. Before accepting a representation of an insured party that will be governed in part by insurance company guidelines, a defense lawyer must determine that compliance with the guidelines will not be inconsistent with the lawyer's professional obligations. If compliance with the guidelines will be inconsistent with the lawyer's professional obligations, and if the insurer is unwilling to modify the guidelines, the lawyer must not undertake the representation.

¶ 21 After accepting a representation of an insured party that is governed in part by insurance company guidelines, a defense lawyer must at all times comply with the Utah Rules of Professional Conduct, including Rules 1.1 (competent representation), 1.2 (limitation of scope of representation), 1.3 (diligence and promptness), 1.4 (communication requirements), 1.8(f) (consent), and 5.4(c) (no direction or regulation of the lawyer's professional judgment). If the lawyer determines that the insurer's interpretation or application of the guidelines in particular circumstances is in any way inconsistent with the lawyer's professional obligations under the Utah Rules of Professional Conduct, and if the insurer will not withdraw its interpretation or application of the guidelines, the lawyer must still act in conformity with the Rules. (fn27)

¶ 22 In any case where an insurer's refusal to authorize services that the lawyer, in her independent professional judgment, believes are necessary to comply with the Utah Rules of Professional Conduct, the lawyer should consider the following options:

(1) communicating with the insurer and the insured in an attempt to resolve the matter,(fn28)

(2) obtaining the agreement of the insured to pay for the

services (perhaps with a reservation of rights to seek payment from the insurer at a later time);

(3) agreeing to provide the services without compensation (and perhaps reserving the right to seek compensation from the insurer at a later time); or

(4) withdrawing from the representation.

If withdrawal is necessary because of an irreconcilable conflict between the insured and the insurer, the lawyer should comply with all applicable provisions of Rules 1.7 and 1.16 and any applicable rules of court.

Flat-fee Arrangements

¶ 23 *A Request on Flat-Fee Arrangements.* The Committee has also received a separate request for an advisory opinion concerning ethical issues raised by flat-fee arrangements with insurance companies under which counsel is employed to defend a case or a group of cases for a flat fee. Because this request raises some of the same issues and analysis discussed in connection with insurance company guidelines for defense attorneys, we consolidate the two requests to issue a single opinion.

¶ 24 *Applicable Rules and Prior Opinion 136.* Rule 1.5 of the Utah Rules of Professional Conduct addresses ethical issues relating to attorneys' fees. As we wrote in Opinion No. 136, "Fixedfee contracts . . . are not prohibited by Rule 1.5 of the Utah Rules of Professional Conduct" and, further, "The only specific types of fees expressly prohibited by Rule 1.5 are contingent fees in divorce and criminal defense cases." (fn29)

¶ 25 In Opinion No. 136, we addressed the question of whether a client's advance payment made as a "fixed fee" or "nonrefundable retainer" could be considered to be earned by the lawyer when received and, therefore, not required to be deposited in a trust account. We stated that fixedfee contracts or nonrefundable retainers are not expressly prohibited by Rule 1.5, and that the issue became whether such arrangements should be considered *per se* unreasonable under the Rule. We adopt a similar analysis here. Rule 1.5 does not expressly prohibit flat-fee arrangements. We conclude, therefore, that flat-fee arrangements, including flat-fee arrangements with liability insurance carriers, are not *per se* unethical. It does not follow, of course, that all flat-fee agreements are in compliance with the Utah Rules of Professional Conduct.

¶ 26 Improper Curtailment of Services. The comment to Rule 1.5 provides:

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client.

Thus, Rule 1.5 prohibits flat-fee arrangements with insurers if the proposed arrangement would improperly curtail services to be provided to the client that would normally be within the scope of the representation. For example, a flat-fee agreement that is so low as to induce the lawyer to shirk his duties to the insured would be unethical. A lawyer may, of course, provide the necessary services for little or no additional fee, but the lack of further funding (from the insurer, for example) will not justify cutting corners on the lawyer's ethical obligation to the client. Such situations should be fully explained to the insured. On the other hand, a flat-fee arrangement that is so high as to result in a clearly excessive fee would also violate Rule 1.5(a).

¶ 27 *Compliance with the Rules.* Our conclusion that flat-fee arrangements with insurance carriers are not *per se* unethical does not free a lawyer from strict compliance with the applicable rules or standards of professional behavior. To provide some guidance to members of the Utah Bar, we will address some of the ethical considerations.

¶ 28 Rule 1.1 requires a lawyer to provide "competent representation to a client." This includes the "thoroughness" and "preparation reasonably necessary for the representation." A lawyer is also required to act with "reasonable diligence and promptness" under Rule 1.3. It is often stated that a lawyer is to represent her client "zealously." (fn30) A lawyer should strictly adhere to these ethical standards, regardless of the nature of the fee arrangement or remuneration paid to the lawyer. Lawyers entering into flat-fee arrangements with insurance companies must use extra caution to assure that the representation they provide to the insured complies with these ethical obligations. Lawyers may not compromise these standards even if the financial arrangement to which they agreed with the insurance company results in a more-than-expected time commitment or worse-than-expected financial result for the lawyer. This also means, of course, that the lawyer should avoid entering into any flat-fee arrangement if there is reasonable cause to believe that future time and financial pressures may prevent the lawyer from providing competent, thorough, diligent and prompt representation to the insured.

¶ 29 Under Rule 1.2, the lawyer must abide by the client's decisions concerning the objectives of the representation (subject to certain guidelines) and must consult with the client regarding the means by which the objectives of the litigation will be pursued. A lawyer should not enter into a flat-fee agreement with an insurer that would prevent

meaningful participation by the insured in determining the objectives of the representation and the means of pursuing them. This may require, as a matter of prudence, consultation with the insured prior to entering into the flat-fee arrangement.

¶ 30 The comment to Rule 1.5 provides, "Where someone other than the client pays the lawyer's fee or salary . . . , that arrangement does not modify the lawyer's obligation to the client. . . . [S]uch arrangements should not interfere with the lawyer's professional judgment." Rule 1.8(f) expressly requires the lawyer to maintain her "independence of professional judgment" when someone other than the client pays the lawyer's fee. These rules apply to a lawyer's representation of an insured, just as they do in all other relevant cases. A lawyer who enters into any type of flat-fee arrangement with an insurer must use caution to assure that she exercises independent professional judgment on behalf of the insured. This is particularly important in situations where the scope of the case has unexpectedly increased beyond the attorney's original expectations in agreeing to a fixed fee.

¶ 31 It has been suggested that flat-fee arrangements should be prohibited to protect the interests of lawyers in maintaining profitable fee arrangements with insurance companies. It is not this Committee's role to regulate the competing economic interests of lawyers and insurance companies. Rather, it is our role to interpret the Utah Rules of Professional Conduct and to encourage ethical behavior for the protection of those who receive legal representation. Nothing in the Utah Rules of Professional Conduct prohibits flat-fee arrangements, and it would be improper for us to impose such a restriction where the Utah Supreme Court has chosen not to do so. Our discussion of some of the relevant concerns will provide guidance to lawyers and should promote competent representation for insureds who receive legal representation. As in any other case, the disciplinary procedures of the Utah State Bar and other legal proceedings are available to insureds who believe their lawyers have compromised their ethical duties because of a flat-fee arrangement with the insurer. (fn31)

¶ 32 In rendering this opinion, this Committee is aware of the arguments concerning economic and market factors vigorously promoted in the literature by both the insurance industry and the insurance defense bar. We are also mindful of our limited role, which is to interpret the Utah Rules of Professional Conduct and provide guidance to the members of Bar. Our role is not to regulate the market for legal services or to influence the economics of purchasing or providing legal services. Lawyers and insurance companies are free to negotiate fee arrangements that suit their respective economic interests so long as no lawyer on either side violates the Utah Rules of Professional Conduct. Insurance companies and lawyers may enter into fee arrangements that limit the amount of compensation the lawyer will be paid. We emphasize, however, that lawyers entering into such arrangements must use care to assure that their representation complies with all applicable ethical standards, even if the fee arrangement requires the lawyer to perform services for a reduced rate or even without compensation.

¶ 33 **Conclusion:** An insurance defense lawyer's agreement to abide by insurance company guidelines or to perform insurance defense work for a flat fee is not per se unethical. The ethical implications of insurance company guidelines must be evaluated on a case by case basis. An insurance defense lawyer must not permit compliance with guidelines and other directives of an insurer relating to the lawyer's services to impair materially the lawyer's independent professional judgment in representing an insured. If compliance with the guidelines will be inconsistent with the lawyer's professional obligations, and if the insurer is unwilling to modify the guidelines, the lawyer must not undertake the representation. Flat-fee arrangements for insurance defense cases are unethical if they would induce the lawyer to improperly curtail services for the client or perform them in any way contrary to the client's interests. Obligations of lawyers under the Utah Rules of Professional Conduct, including the duty zealously to represent the insured, cannot be diminished or modified by agreement.

Footnotes

1. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-413; Ala. Ethics Op. RO-98-02; Colo. Bar Assoc. Ethics Comm. Formal Op. 107 (Sept. 18, 1999); Disciplinary Bd., Haw. Sup. Ct., Formal Op. 37 (Mar. 27, 1999); Ind. State Bar Assoc. Legal Ethics Op. 3 of 1998; Iowa Sup. Ct. Bd. of Professional Ethics & Conduct, Op. 99-01 (Sept. 8, 1999); Mass. Bar Op. 00-4; Miss. Bar, Op. 246 (1999); Neb. Advisory Comm., Advisory Op. 00-1; Ohio Op. 2000-3 (June 1, 2000); Penn. Bar Assoc. Comm. on Legal Ethics and Professional Responsibility, Formal Op. 2001-200 (June 28, 2001); R.I. Sup. Ct. Ethics Advisory Panel Op. 99-18 (Oct. 27, 1999); Tenn. Bd. of Professional Responsibility, Sup. Ct. of Tenn., Formal Ethics Op. 2000-F-145; Tex. Ethics Op. 533 (Sept. 2000); Vt. Bar Op. 98-07; Va. Leo 1723 (Nov. 23, 1998); Wash. State Bar Assoc. Formal Op. 195 (1999); Wis. State Bar Comm. on Professional Ethics, Formal Op. E-99-1 (Sept. 10, 1999); *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000). We have been advised that proposed ethics opinions critical of insurance company billing guidelines were rejected by the Florida Bar Association's Board of Governors at its December 2000 meeting (proposed opinions 99-2, 99-3 and 99-4) and the Supreme Court of Georgia (proposed opinion 99-R2) (unpublished order Sept.

17, 2001).

2. Utah Ethics Adv. Op. 98-11, 1998 WL 779176 (Utah St. Bar), addressed the ethics of a retainer agreement proposed by the Utah State Office of Recovery Services (ORS) for an attorney who would represent both ORS, as statutory lien claimant with prior rights on recoveries, and individual claimants in recovering medical claims. In that context, the Committee held that the State of Utah could propose a retainer agreement, but cautioned that it was not holding that attorneys representing the State may draft retainer agreements that violate the Utah Rules of Professional Conduct, noting that it would be unethical for the retainer agreement to (1) require the individual claimants to surrender the right to terminate the lawyer or (2) otherwise cause the attorney executing it to violate the Utah Rules of Professional Conduct. The Committee found that the attorney could not agree to conditions that would violate Rule 1.7(b).

3. *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 817 (Mont. 2000).

4. Utah Ethics Advisory Op. Comm. R. Procedure § I(b)(1) (2001) ("Committee opinions shall interpret the Rules of Professional Conduct adopted by the Utah Supreme Court but, except as necessary to the opinion, shall not interpret other law.") and id. § I(b)(2) ("The following requests are outside the Committee's authority: . . . (iii) Requests for legal, rather than ethics opinions.").

5. *See, e.g., Cincinnati Insurance Co. v. Willis*, 717 N.E.2d 151, 161 (Ind. 1999); *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000).

6. *See, e.g., Paradigm Insurance Co. v. The Langerman Law Offices*, 24 P.3d 593 (Ariz. 2001) (express agreement was not a prerequisite to the formation of an attorney-client relationship; when insurer has assigned attorney to represent an insured, lawyer had a duty to the insurer to benefit both the insurer and the insured when their interests coincided; lawyer had duty to a non-client and could be liable for negligent breach).

7. *See generally Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 727 (Utah App. 1990) (a legal malpractice action):

> In general, except where an attorney is appointed by a court, the attorney-client relationship is created by contract. . . . The contract may be express or implied from the conduct of the parties. . . . The relationship is proved by showing that a party seeks and receives the advice of an attorney in matters pertinent to the lawyer's profession. . . . Such a showing is subjective in that a factor in evaluating the relationship is whether the client thought an attorney-client relationship existed. . . . However, a party's belief that an attorney-client relationship exists, unless reasonably induced by representations or conduct of the attorney, is not sufficient to create a confidential attorney-client relationship. . . . In sum, "[i]t is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship."

(Citations omitted.)

8. See note 4, *supra*.

9. We do not, however, assume that the foregoing summary is a complete statement of insurance company guidelines.

10. 429 P.2d 39, 42 (Utah 1967).

11. 425 P.2d 769, 77172 (Utah 1967).

12. 480 P.2d 126, 127 (Utah 1971).

13. 701 P.2d 795, 799-800 (Utah 1985) (citations omitted).

14. Utah Rules of Professional Conduct 1.1 & cmt; Rule 1.2 cmt. Refer to Appendix B.

15. *Id.* 1.3. Refer to Appendix B.

16. *Id.* 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice").

17. *Id.* 5.1; 5.3. Refer to Appendix B.

18. Rule 1.2 provides, in pertinent part: "(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), (d), and shall consult with the client as to the means by which they are to be pursued. (b) A lawyer may limit the objectives of the representation if the client consents after consultation."

19. Utah Rules of Professional Conduct 1.2 cmt. (2002).

20. The client has the ultimate authority to determine the expense to be incurred. In some situations, the client may determine that no expense will be incurred by designating certain actions that will not be taken.

21. Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client except as stated in paragraph (b), unless the client consents after consultation."

22. For example, the defense lawyer could not represent both insured and insurer as to matters such as insurance coverage. In cases where the claim exceeds policy limits or includes non-covered claims, or where the insured desires

services outside the scope of the representation to be paid for by the insurer, the defense lawyer should provide the insured with information concerning limits on the representation and available means of addressing such matters.

23. For example, the letter might include information necessary to inform the insured as to issues pertaining to submission of bills to the insurer or to outside auditing services. *See* Utah Ethics Advisory Op. 98-03, 1998 WL 199533 (Utah St. Bar).

24. For example, if both insured and insurer are clients, Rule 1.8(g) provides, in pertinent part: "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement." If both insured and insurer are clients, or if representation of a sole client insured may be materially limited by the lawyer's responsibilities to the insurer, conflicts must be addressed as provided in Rule 1.7.

25. For example, unless the policy provides otherwise, the insurer will likely have no obligation to pay the defense lawyer to assert counterclaims or claims insureds may have against third parties, to protect interests of the insured other than defending against the amount of the claim (such as reputation or other interests), or to defend the insured against criminal charges.

26. In addition, a lawyer governed by the Utah Rules of Professional Conduct (such as a lawyer employed by an insurer) must not propose that a defense lawyer enter into an agreement if compliance with the agreement, including guidelines and other directives of an insurer relating to the lawyer's services, would impair materially the defense lawyer's independent professional judgment in representing an insured.

27. We believe that, in many cases, perceived conflicts may be resolved by consultation.

28. Under Rule 1.4(a), the insurance defense lawyer must keep the client or clients "reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

29. Utah Ethics Adv. Op. 136, 1993 WL 755253 (Utah St. Bar) (citing Rule 1.5(d)).

30. *See, e.g.,* Utah Rules of Professional Conduct, Preamble.

31. *See* Fla. Bar Professional Ethics Comm., Op. 982 (1998) (a lawyer may accept a set fee per case from an insurance company to defend all of the insurer's third party insurance defense work unless the lawyer concludes that her independent professional judgment will be affected by the arrangement); Conn. Bar, Professional Ethics Comm., Op. 9720 (1997) (flat-fee arrangement with insurer permissible; lawyer's obligations to client remain); Ohio Ethics Op. 977 (1997) (flat-fee arrangement with insurer permissible if agreement is reasonable and adequate, not excessive or so inadequate that it compromises professional judgment; representation must be competent and zealous); Ore. Ethics Op. 199198 (1991) (flat-fee arrangement with insurer permissible provided lawyer fulfills ethical duties to insured); *contra,American Insurance Assoc. v. Kentucky Bar Assoc.*, 917 S.W.2d 568 (Ky. 1996)

APPENDIX A & B

APPENDIX A

Hawaii:

[P]rovisions which prohibit activity which, in the lawyer's professional judgment, are necessary in the representation of the client or provisions which provide a [disincentive] to perform those tasks are ethically unacceptable. As an example, unreasonable restrictions on preparation and discovery, and the limitation on compensable communication among attorneys in an office regarding a legal matter would, in all likelihood, affect an attorney's independent judgment on behalf of the client.**1**

Indiana:

[I]f the negotiated financial terms result in a material disincentive to perform those tasks which, in the lawyer's professional judgment, are reasonable and necessary to the defense of the insured, such provisions are ethically unacceptable. Especially troublesome are those provisions of the subject agreement which tend to curtail reasonable discussion between members of the defense team on a daytoday basis, and which seek to dictate the use of personnel within the lawyer's office. Another example of a provision resulting in a material disincentive provides that if the senior litigator performs a particular service, e.g., argument of motions and other court appearances, conduct of depositions, or review of medical records or legal research, which could have been performed 'suitably' (in the carrier's view) by an associate or paralegal, the service may be billed only at the hourly rate for the associate or paralegal. Similarly, the contract provides that once an associate attorney is assigned to a given matter, another associate may not be substituted without prior approval of the carrier. Such impairments of the responsible attorney's exercise of professional judgment as to the assignment of the most effective member of the litigation team to a given task is ethically impermissible. Lastly, to require, or even

permit, counsel to rely upon legal research by an unsupervised paralegal invites legal malpractice—a breach of counsel's duty to the insured—and is intolerable. Such provisions, even though intended merely to achieve cost efficiency, infringe upon the independent judgment of counsel, and tend to induce violations of our ethical rules.**2**

Massachusetts:

For example, an insurer's litigation guidelines may mandate that all deposition notices be drafted by paralegals, although the precise content of some deposition notices may require significant substantive and strategic legal input. If the lawyer has a reasonable basis to believe that the creation of a particular deposition notice presents too complicated a task for a paralegal to perform competently, then the lawyer's ethical obligations, as described above, compel the lawyer not to delegate that task. In the event that the lawyer's decision subsequently is challenged by the insurer who is paying his or her fees, then the Committee believes that the lawyer must consider whether the issue is significant enough to warrant withdrawing from the representation under Rule 1.16(a)(1).**3**

Ohio:

It is improper under DR 5107(B) [Avoiding Influence By Others Than The Client] for an insurance defense attorney to abide by an insurance company's litigation management guidelines in the representation of an insured when the guidelines directly interfere with the professional judgment of the attorney. Attorneys must not yield professional control of their legal work to an insurer. Guidelines that restrict or require prior approval before performing computerized or other legal research are an interference with the professional judgment of an attorney. Legal research improves the competence of an attorney and increases the quality of legal services. Attorneys must be able to research legal issues when they deem necessary without interference by nonattorneys. Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate, or senior attorney are an interference with an attorney's professional judgment. Under the facts and circumstances of a particular case, an attorney may deem it necessary or more expedient to perform a research task or other task, rather than designate the task to a paralegal. This is not a decision for others to make. The attorney is professionally responsible for the legal services. Attorneys must be able to exercise professional judgment and discretion. Guidelines that require approval before conducting discovery, taking a deposition, or consulting with an expert witness are an interference with an attorney's professional judgment. These are professional decisions that competent attorneys make on a daily basis. Guidelines that require an insurer's approval before filing a motion or other pleading are an interference with an attorney's professional judgment. Motion by motion evaluation by an insurer of an attorney's legal work is an inappropriate interference with professional judgment and is demeaning to the legal profession. If an insurer is unsatisfied with the overall legal services performed, the insurer has the opportunity in the future to retain different counsel.**4**

Rhode Island:

[Provisions] that require the insurer's preapproval for specified legal services, extend beyond the financial and working relationship between the insurer and defense counsel, and infringe upon the attorneyclient relationship between the insured and the inquiring attorney. For example, the insurer's prior approval is required before defense counsel engages in the following: conducting legal research in excess of three hours; filing counterclaims, crossclaims or thirdparty actions; visiting the accident scene; preparing substantive dispositive motions or briefs; customizing interrogatories or document requests; and scheduling depositions. The insurer's prior approval is also required before defense counsel incurs expenses related to any of the following: retaining expert witnesses; scheduling independent medical examinations or peer reviews; instituting surveillance; and conducting additional investigations. To the extent that the insurer reserves unto itself the right to withhold approval for reasonable and necessary legal services to be provided to an insured, these provisions of the guidelines impermissibly interfere with the independent professional judgment of the inquiring attorney. By agreeing to abide by the preauthorization provisions, an attorney impermissibly abdicates the obligations imposed by Rule 2.1 and Rule 5.4(c). Therefore, the inquiring attorney may not agree to them. Furthermore, such provisions result in a material disincentive to provide legal services that are reasonable and necessary to the defense of the insured. See Indiana Bar Assoc. Op. 3 (1998). A material disincentive creates a conflict of interest pursuant to Rule 1.7.**5**

Washington:

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 'defacto' 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

on violation of RPC 5.4(c).**6**

APPENDIX B

Relevant Portions of the Utah Rules of Professional Conduct

Rule 1.1—Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The comment to Rule 1.1 provides, with respect to thoroughness and preparation:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

The comment to Rule 1.2—Scope of Representation provides, with respect to agreements limiting the scope of representation:

The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law *and the lawyer's professional obligations. . . An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1* or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue."

(Emphasis added.)

Rule 1.3—Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

The comment to Rule 1.3 notes, however, that: "A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2."

Rule 1.4—Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Rule 1.8—Conflict of interest: prohibited transactions.

. . . .

(f) 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 clientlawyer relationship; and

(3) Information relating to representation of a client is protected by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 5.1—Responsibilities of a partner or supervisory lawyer

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3—Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Appendix A Footnotes

1. Disciplinary Bd., Haw. Sup. Ct., Formal Op. 37 (Mar. 27, 1999).

2. Ind. State Bar Assoc. Legal Ethics Op. 3 of 1998.

3. Mass. Bar Op. 00-4.

4. Sup. Ct. of Ohio, Bd. of Commissioners on Grievances and Discipline, Op. 2000-3 (June 1, 2000).

5. R.I. Sup. Ct. Ethics Advisory Panel Op. 99-18 (Oct. 27, 1999).

6. Wash State Bar Assoc., Formal Op. 195 (1999).

Rules Cited:

1.12,1.4(b),1.5,1.8(f),5.4(c)