How Ethics Applies to Insurance Law

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How do we ethically represent insureds and insurers? How do we avoid violating the Rules Regulating The Florida Bar and our Oath of Attorney by serving the insurer over the insured's interests? We must first spend some time understanding the applicable Rules Regulating The Florida Bar, our Oaths of Attorney, and the applicable law.

We must first understand that the tripartite (three party – insured, lawyer and insurer) relationship does not mean that the entity writing the checks will always get our first loyalty. Blindly putting the insurer's interests first accepts a risk you were not paid a premium to assume. As does, putting your interests (financial, or marketing for future business) ahead of the insured or the insurer.

DETERMINING WHO IS YOUR CLIENT

First, we must know whom we represent. That is easiest when we simply represent insurers. The insurer is the company underwriting and legally responsible for the coverage. Insurers often work through managing general agencies, third party administrators, and outside adjusters. Reinsurance agreements may mean the real parties in interest are not even the name on the policy itself. Still, the reinsurers follow the fortunes of insurers, owe the duty of utmost good faith, and are not the client when the insurer is the party.

When we represent multiple parties, we need to be aware of conflicts and possible conflicts. Conflicts that can be waived should, after consultation with the clients explaining the implications. Issue conflicts should also be discussed, that is if we represent other clients with positions on the law that are opposed to the positions on the law that this representation may require. We must simply not represent clients with actual conflicts that cannot be waived, and no fee, participation or otherwise should be entered into when such a conflict exists.

DUTY OF THE INSURANCE DEFENSE LAWYER

The client is the insured in the insurance defense context when the defense is assigned by an insurance company for an insured under a policy. Florida Ethics Opinion 97-1 found the primary duty of the attorney hired by an insurance company for the defense is to the insured, and that the insurance company could not order the attorney to seek a summary judgment on one count when doing so would relieve the insurer of the duty to defend all charges. That opinion also emphasized the duty of the defense lawyer to keep the insured informed of all developments while the representation continues.

Multiple insurers may cover a given claim, particularly when there are continuous torts, such as repeated acts of sexual abuse over time or a policy of illegal discrimination, combined with negligence of the insured. The duty to defend is several. Couch on Insurance 3D Section 200:38, "Duty to Defend Among Primary Insurers; Generally". The insurers all owe a complete duty of defense, "when two policies potentially apply to a loss, an insured can elect which of its insurers should defend and indemnify the claim by tendering its defense to one insurer and not the other, and, thereby, foreclose settling insurer from obtaining contribution from non-settling insurer." Couch on Insurance 3D

Section 200:40, "Insured's Choice Among Multiple Insurers". If primary coverage does not provide a defense, the excess insurer will be obligated to defend. Couch on Insurance 3D Section 200:46, "Primary Insurer Denies Coverage or Refuses to Defend". There may be multiple lawyers representing the insured, for different carriers, or lawyers monitoring for certain carriers as well.

At the onset of the representation, a complete "getting to know you" letter is a good idea to explain the nature of the relationship. Meeting with the insured in person to explain the nature of the relationship is proper, as is sending copies of everything to the insured and fully cooperating with the insured. A Statement of Insured Client's Rights provided below, and with The Rules Regulating The Florida Bar, should be used and supplemented as needed, as it fails to explain the rights of the insured under Florida Statutes when a defense is not timely provided and/or a reservation of rights is asserted by an insurer and will need to be modified.

The "getting to know you letter" explains who you are – your name, firm names, whether you are a paid employee of the insurance company or some other entity, the nature of your responsibilities, who your loyalties are owed to, the duty to communicate, the rights of the insureds to an unlimited defense, the communications to the insurer, settlement issues, and possible coverage issues.

Personal counsel may be hired by the insureds themselves, and who may become "mutually agreeable" counsel in the reservation-of-rights context. Their duties are crystal clear – until the carrier starts to make demands upon them or to make them agree to practice management guidelines. A lawyer must not give up his practice management to an insurance company, or she will be assisting in the unauthorized practice of law.

The non-joinder-of-insurers statute has led to much confusion about the role of insurance defense counsel. Before VanBibber v. Hartford Acc. & Indem. Ins. Co., 439 So. 2d 880 (Fla.1983) questioned and distinguished Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969) and upheld the constitutionality of Florida Statutes Section 627.7262, Nonjoinder of Insurers., "(1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured…," insurers were also parties to the litigation, before judgment. Now, although not parties to the litigation pre-judgment, the insurance companies are still real parties in interest who may or may not end up in the litigation post-judgment.

The Rules Regulating The Florida Bar are designed to protect clients. So is our oath we take to become attorneys. By providing a predictable framework for our professional conduct, the Rules protect careful lawyers. Third parties, such as insurers, are singled out in the Oath of Admission. Willful violation of the Oath is grounds for disbarment. The Oath cautions acceptance of compensation from others, "I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval." The Oath goes on to state, "I will never…delay anyone's cause for lucre or malice." The Oath in its entirety is as follows:

Oath of Admission to The Florida Bar

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

The Proposed Advisory Opinions of The Florida Bar Professional Ethics Committee (PAOs 99-2,3,4) answered questions from the Bar's Board of Governors Professional Ethics Review Committee, were the subject of unprecedented lobbying. While many defense attorneys privately agreed, virtually no present insurance defense attorneys would speak in public against the industry for fear of reprisals.

Let's examine the three Proposed Advisory Opinions of The Florida Bar Professional Ethics Committee PAOs, 99-2, 99-3 and 99-4 which were rejected by the Board of Governors, as they represent a carefully researched and reasoned view of the issues as The Rules Regulating The Florida Bar apply to the insurance defense practice. Also, when asked the same questions by attorneys having a present concern about these issues, as they are the product of Ethics Staff, the Professional Ethics Committee, and a Sub-Committee over many meetings, they will likely be the framework for the answers.

ISSUES OF PROTECTING THE PRIVILIGES OF YOUR CLIENTS

REJECTED/PROPOSED ADVISORY OPINION 99-2

The Rejected/Proposed Advisory Opinion 99-2 cautioned the attorney hired by an insurance company to represent an insured may not provide confidential information relating to the representation to an outside auditor or other third parties at the request of the insurance company, without the specific consent of the insured. Such consent cannot be implied by the contract between the insured and the insurance company.

PAO 99-2 cited previous Florida Bar Ethics Opinions 97-1, 93-5 and 81-5 and Alabama RO-98-02, D.C. 290, Hawaii 36, Indiana 98-4, Maine 164, Mississippi 246, Rhode Island 99-17, South Carolina 97-22, Tennessee 99-F-143, Utah 98-03 and Virginia 1723. Other related opinions include Alaska Opinion 99-1, Colorado Opinion 107, Idaho 136, Iowa 99-01, Kentucky E-404, Louisiana Informal Opinion Cited at 45 Louisiana Bar Journal 438, Maryland Opinion 99-7, New York 716, North Carolina Formal Opinion 10, Ohio Opinion 2000-2, Oregon Ethics Formal Opinion 1999-157, Oregon Proposed Formal Opinion 98-2R, Pennsylvania Informal Opinions 98-32 and 97-119, South Dakota Opinion 99-2, Texas Opinion 532, Vermont 98-7, Washington Informal Opinion 1758,

West Virginia Opinion LEI 99-02, and Wisconsin Opinion E-99-1. There is great unanimity of these opinions. With most finding that not only is such disclosure prohibited, but also that no consent to such disclosure is implied by the insurance contract and that express consent must be obtained. A decision finding waiver of privilege in a case involving the bills of counsel for MIT was considered by the Florida Bar's Professional Ethics Committee, see, United States v. Mass Inst. of Technology, 129 F.3d 681 (1st Cir. 1977).

In house counsel representing insureds have an obligation to protect the confidentiality of the files. If a lawyer leaves such employement, they should make efforts to insure that no privileged material is available to the adjusters or non-lawyer personnel. It might be advisable to take the files with you until such matters are protected, when there is only a ficitious law firm of insurance company employees.

PREVENTING MALPRACTICE

Lawyers representing insureds have a duty to properly defend them on claims and to preserve secrets, causes of action and otherwise protect their clients fully. When some claims are covered, in Florida, all claims must be fully defended. Counterclaims, cross-claims or third-party claims may be a needed part of the defense. The lawyer must not secretly strangle the defense to benefit the adjusters' budget mentality, when the policy provides a defense obligation which is expanded by Florida law. Acting reasonably, and totally in the best interests of the insureds is mandatory for Florida lawyers.

REJECTED/PROPOSED ADVISORY OPINION 99-3

Florida Bar Professional Ethics Committee Proposed Advisory Opinion 99-3 (which was rejected by the Board of Governors in December, 2000 for procedural reasons along with 99-2 and 99-4) said "an attorney is ethically prohibited from entering into an agreement with an insurance company to represent insureds where the attorney's independent professional judgment will be affected by restrictive billing practices imposed by the insurance company." Cited were Florida Bar Ethics Opinions 98-2, 97-1 and 85-5, and Alabama RO 98-02, Hawaii 37, Indiana 98-3, Mississippi 246, Rhode Island 99-18 and Virginia 1723.

Rule 4-1.8(f) mirrors the Oath's discussion of Third Party compensation, and provides the client must consent after consultation, there is no interference with the lawyers professional judgment or with the client-lawyer relationship, and the information relating to representation of a client is protected as required by Rule 4-1.6. The comment to the rule notes, "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." Restrictive billing guidelines assure counsel's professional dependence when they require the lawyer to call the adjuster before taking any action or doing any research or risk non-payment and the wrath of the adjuster.

Rule 5.4(d) similarly prohibits attorneys from allowing any person who recommends, employs or pays the attorney, to "direct or regulate the lawyer's professional judgment in rendering such legal services." The proposed opinion 99-3

cited Florida Ethics Opinion 97-1 on the primary duty being to an insured when an insurer orders the lawyer to move for summary judgment on the only covered count.

Florida Ethics Opinion 81-5 was also cited, which provides that a lawyer may not, under instructions for the insurance carrier, agree not to express any opinion to the insured as to the settlement value of the cases. In that fact pattern, the insurer did not want the lawyer it hired to give any opinions on the value of the cases. The opinion also mentioned the carrier can hire separate counsel for the insurer and the insured or joint counsel. Carriers want to hire one, and emphasize there will be no conflict, while at the same time utilizing practice management or billing guidelines. Multiple representation is prohibited if the exercise of the lawyer's independent professional judgment on behalf of a client is or is likely to be adversely affected. It was true at the time and no less true now that:

> "a person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client…. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent

another must constantly guard against erosion of his professional freedom." Opinion 81-5

The opinion went on to point out that the standards and responsibilities of counsel retained by an insurance company are not waived or relaxed by virtue of the source of employment. The Rules are not different here. If the carriers want to breach their duties to defend, they can – however, the lawyers cannot be a party to it.

The Florida Ethics Opinion 98-2 discussed set-fee agreements in insurance cases and found them permissible only if the lawyer's obligations to the client, including diligence, competence, prompt communication and confidentiality are not limited. Some set-fee agreements provide such low compensation that the attorney's independent professional judgment will necessarily be impaired. The set-fee arrangement was for all the insurer's third-party insurance defense work in Florida. Full disclosure to the client is required.

The guidelines examined in 99-3 were so restrictive and the interest of the attorney in seeking other referrals from the insurer made them impermissible on their face. Couch observes "an insurer cannot interfere with defense counsel's independent judgment and ethical obligation to defend the insured." Couch on Insurance 3D Section 200:48, p200-119. If the carrier attempts to restrict the attorney impermissibly, the lawyer must seek judicial approval to withdraw from the defense and must continually protect the insured's interests. Couch, supra, at p. 200-121.

Settlement is the right of the client, even if there is a right under the contract to allow the insurer to settle claims, or such a right under statute. Florida Ethics Opinion

86-6 discussed the medical malpractice statute and that the attorney must not participate in a settlement over the client's instructions.

Where the insurer refuses to defend, breaching the contract and leaving the insured exposed, the insured has a right to settle. The insured "can take whatever steps are necessary to protect itself from a claim." Employers Reinsurance Corp. v. Amphion Holdings Inc., 733 So.2d 588, 590 (Fla. 3rd DCA 1999). In Florida, an unauthorized (by the liability insurer) settlement with a defendant who is being defended by an insurer pursuant to a reservation of rights, may result in a loss of coverage. The Third District Court of Appeal, through Judge Cope, held that insureds breached the insurance policy by entering into settlement without consent of insurer. American Reliance Ins. Co. v. Perez 712 So.2d 1211 (Fla. 3rd DCA 1998.) Other jurisdictions have taken a different approach. For example, in Arizona, that may not be the case. See an excellent analysis of the law in "Unauthorized Settlement Agreements In A Reservation of Rights Context" Tort & Insurance Law Journal, Volume 34, Number 3, at page 799, Spring 1999.

A practice management guideline so restrictive that it makes the attorney the adjuster's puppet is essentially the unlicensed practice of law, which an attorney may not assist in. see, Rule 4-5.5 of the Rules Regulating The Florida Bar. However, the reporting requirements are often not objectionable in such guidelines, and may help to develop a format for communications between the carrier and the attorney defending its insureds.

Other states have reached similar conclusions to PAO 99-3, Alabama Opinion RO-98-02, Colorado Opinion 107, Hawaii Opinion 37, Idaho Opinion 136, Indiana Opinion 98-3, Iowa Opinion 99-01, Maryland Opinion 00-23, Mississippi Opinion 246,

Ohio Opinion 2000-3, Texas Opinion 533, Vermont Opinon 98-7, Virginia Opinion 1723, Washington Formal Opinion 195 and Wisconsin Opinion E-99-1. Those opinions, issued between 1998 and 2000 reflect a growing trend of insurers to manage insurance defense without regard for the ethics. Montana's Supreme Court in In The Matter of The Rules of Professional Conduct and the Insurer Imposed Billing Rules and Procedures, 2 P. 3d 806 (Montana 2000) found the requirements of prior approval fundamentally interferes with defense counsel's exercise of their independent judgment and creates the appearance of impropriety in its suggestion that it is the insurers rather than defense counsel who control the day to day details of the defense. Also, it found disclosure to third-party auditors of detailed billings violated the Rule.

REJECTED/PROPOSED ADVISORY OPINION 99-4

Rejected/Proposed Advisory Opinion 99-4 addresses the role of insurance company lawyers who represent insureds and law firms deriving a majority of income from an insurance company which pays the law firm to represent insureds. The "captive law firm" opinions carefully analyzed the current practices of house counsel and firms that are similarly controlled, but notes that even one case assignment with the possibility of more carries the same problems with it. Rules 4-1.7 (conflicts of interest) 4-1.8(f), 4-5.4(c) (professional independence of the lawyer) and 4-5.5(b) (assisting non-lawyers in the practice of law) were examined.

In 1969 the Florida Supreme Court in In Re Proposed Addition to the Rules Governing Conduct of Attorneys in Florida, 220 So. 2d 6 (Fla. 1969) rejected a proposed Bar Rule prohibiting a bank or insurance company from hiring lawyers to provide legal services to its customers. The Supreme Court reiterated the conflict of interest rules

applying to any lawyer's representation, and mentioned that further study was likely. That study has not been done in any detail, but the unlicensed practice of law issues are now being studied.

ABA Informal Opinion 1476 concerns the situation where an attorney was hired to represent both an employer and employee. There the attorney learned facts indicating that the employee might not be entitled to coverage. The ABA opinion concluded that the insurer or employer could not be informed unless the employee consented after being fully informed of the consequences of the disclosure. That was despite the joint representation.

Numerous states have considered the in house counsel issues, in addition to the ABA Informal Opinion 1476 in 1981, Alabama Opinion 81-855, Alaska Opinion 99-2, California Opinion 1987-91, Illinois Opinion 89-17, Iowa Opinion 87-16, Iowa Opinion 88-14, Michigan Opinion CI 1146, Nassau County NY Opinion 89-41, North Carolina Opinion 326, Ohio Opinion 95-14, Oklahoma Opinion 309, Pennsylvania Opinion 96-196, Philadelphia Opinion 86-108, Tennessee Formal Opinion 93-F-132 and Virginia Opinion 598. Kentucky and North Carolina has made the practice of in house counsel operations illegal. Kentucky has also disallowed flat rate billing arrangement by insurers, see American Ins. Ass'n. v. Kentucky Bar Ass'n., 917 S.W.2d 568 (Ky 1996),. See also "Captive firms of insurers get stung in court – Ethics breaches, Unlicensed practice found in two states" by Gail Cox, Nat'l L.J., May 15, 2000 at page 1.

The National Law Journal Article examined a wrongful termination lawsuit by Donald Ricketts who worked for Farmers Insurance Group, which resulted in a finding that the insurer engaged in the illegal practice of law and the attorneys assisted in the

illegal practice of law. It is illegal for insurers to practice law and a violation of the ethics rules for a lawyer to participate, according to Ricketts and the trial judge, in Ricketts v. Farmers Group, No. BC 165961. Judge Soussan G. Bruguera found the insurer, "Farmers Insurance Exchange and Early Maslach & Price, by their use of non-attorney personnel to control the defense of the insureds did engage in the illegal practice of law" and she found the supervising and other attorneys engaged in the illegal practice of law or assisted the illegal practice of law.

Attorney Ricketts raised his concerns with the managing attorney, Stephen S. Price, who dismissed them as attacks by outside counsel who wanted the business, according to the article. Once, he was provided a Spanish-speaking interpreter who interpreted a meeting with a client, and provided the confidential information to the insurance company which used it to void coverage. Defending an accountant in a document heavy case, the carrier refused to allow the organization and indexing of the records, preventing trial preparation for months. Ricketts was awarded over $2,000,000 for his wrongful termination. However, Indiana refused to bar house counsel in Cincinnatti Ins. Co. v. Wills, 717 N.E. 2d 151 (Ind. 1999). The National Law Journal article contained some errors about the names of the Florida Bar committees (insurance practice section was mentioned – but there is not one) involved in related issues.

House counsel operations must reveal their status as employees of insurance companies, and are now more often doing so on their letterheads since the Florida Bar Professional Ethics Committee's Opinion 98-3, which the headnote describes as, "It is impermissible for in-house attorneys who are employed to represent insureds to state or imply that they practice in a separate independent law firm. The relationship between the

attorney and the insurer should be disclosed to the client and appear on the letterhead and business card of the attorney." Ethics committees in other states have specifically found that it is unethical and deceptive for salaried in-house attorneys, employed by an insurance company, to represent themselves to be outside counsel. Oklahoma Opinion 309; Virginia Opinion 775; Ohio Opinion 95-14; Tennessee Ethics Opinion 93-F-132; California Ethics Opinion 1987-91.

ENTITLEMENT TO INDEPENDENT COUNSEL

Clients have a right to have their own lawyers advise them. Usually, at their own expense. However in the context of insurance company payment for a defense, the lawyer may be paid by the carrier, yet may need to take an aggressive and unwelcome approach (from the carrier's economic perspective) for the insured client. Florida law recognizes the need for independent counsel is acute in the reservation-of-rights (when the insurance company has not settled, needs to defend, but also wants to deny coverage if it can) context. Any lawyer assigned by the insurer has a duty of full disclosure, particularly with a reservation-of-rights to certain facts not being covered, including that the insured can essentially hire his own lawyer to be paid by the carrier pursuant to the statute at rates often multiples of the discounted rates insurers pay for law firms who get multiple assignments, or the prospect of the same. Often the defense expense and coverage counsel costs are the greatest incentive for the carrier to pay for settlements protecting the insured clients, even when coverage for indemnity may never be paid. It becomes a business decision for the carrier – e.g. pay a hundred thousand to settle or pay hundreds of thousands for defense costs even if the defense wins. In most instances, the insured is happy to be fully protected from a settlement, and the carrier is happy to cut its defense costs. Sometimes a carrier

decides to defend to meet other goals, such as making a case so expensive for a plaintiffs' lawyer that even when she wins she "loses" by the large investment of time and costs. That insurer defends so the next case will be rejected.

The purpose of Florida Statute § 627.426 is to protect the policyholder and guarantee that the insurer who issues a reservation-of-rights (typically by a letter to the insured explaining why the coverage may not apply to all the asserted claims) upholds the duty to defend the insured by retaining independent counsel. Mutually agreeable counsel for the purposes of Florida Statute § 627.426 can be waived by the failure to comply with the Statute and the failure to timely retain and pay for mutually agreeable counsel.

Mutually agreeable counsel means that the insured has input on the attorneys chosen to represent them, and if counsel is not agreed to by both the insurer and the insured, the Court can determine appropriate counsel and set the fees and costs to be allowed. If a reasonably competent attorney appears before the trial court, and no proper objection is asserted, most likely the trial judge will respect that choice, knowing the purpose of the statute is to allow the insured input by using the terms "mutually agreeable" in the statute which varies from most liability policies which allow the insurer to choose. The insurer's consent should not be unreasonably withheld or delayed, or the court can take whatever action it deems proper, including finding waiver of coverage defenses.

A carrier that fails to pay for the insured's selection of counsel or fails to find another counsel agreeable to the insured, and pay for them within the statutory time period, has not only waived coverage defenses, but has also opened the insured up to choosing to stipulate to settle the case with a consent judgment and assignment of statutory causes of action to the claimants. Also, a carrier which fails to pay for the defense provided in the policy (often an

unlimited defense), for example delaying payments or arbitrarily paying for only a percentage of the costs when under Florida law all claims must be defended by the carrier if any allegations are covered, waives any policy defenses, and possibly creates unlimited liability for itself.

SELECTION OF INDEPENDENT COUNSEL

Selection of independent counsel in some states means the insured chooses. Mutually agreeable counsel in Florida, discussed above, can essentially be the same thing. A lawyer who fails to inform her new clients of the nature of her firm's relationship with the very insurer who is denying coverage is making a big mistake. Some firms will do that.

I have heard of law firms which did not mention the reservation-of-rights triggering the rights of the insured under statute to select mutually agreeable counsel to be paid for by the carrier. Failing to inform may serve the short-term interests of the lawyer in getting another assignment and for the carrier by not having to pay open market rates for competent litigation counsel, however, it is an inexcusable breach of ethics, for it takes much of the incentive for settlement out of the calculus for the carrier. If a large, uncovered judgment is rendered, you can bet that another attorney will point that out and the lawyer may find herself with a claim for legal negligence and a bar complaint.

I have even seen a form entitled "Consent to Representation" that was presented to make it appear that the insurance company assigned firm was mutually agreeable, with no explanation to the insured that there was a right to mutually agreeable counsel under the statute with a reservation-of-rights being asserted by the carrier against its insured.

One carrier I am aware of provides the insured with his own counsel of choice in first party claims. What that means is if that carrier is negotiating a claim, or defending a claim

by its insured (for example a property loss, fire loss or business interruption claim) and it believes there is a dispute for coverage under the policy, it will tell its insureds to hire their own counsel and the carrier will pay for it. That is an honorable approach, which is admirable. The insured selects his own counsel, who is paid by the carrier regardless of whether the insured wins or loses.

The mutual insurer reasons the money is the insureds', so if a legitimate coverage dispute arises, why make it a hardship on the insureds to resolve it. Lawyers can and should recommend their clients do the right thing, even if it exceeds the legal minimums of conduct required by law. In Florida, an insured who succeeds in litigation against the insurer gets a fee award under Florida Statutes Section 627.428.

Even when the payment is from the insured's pocket, insurance defense counsel should advise their clients of their rights to hire their own lawyer, and the reason it makes sense. Insurance defense counsel may also be coverage counsel for the carrier on other cases. If there is a need to take a position adverse to the carrier on a coverage case that could have implications on other claims, the lawyer is in an unwaivable conflict. Most carriers do not take kindly to their defense lawyers suing them, and our Rules prohibit waiver of that kind of conflict, even if both parties ostensibly wish to waive.

Given the nature of the conflicts, it is best to suggest that the insured seek their own counsel. Ask friends or family, or research it over the internet so the choice can be truly their own. It is also permissible to suggest a few names, but those attorneys should not have any other cases from the carrier or its affiliates to be independent. The mere recommendation may be viewed as suggesting some influence, so the attorney should strongly suggest the client ask around and find their own coverage counsel. Board Certified

Civil Trial Lawyers and Business Litigation Attorneys, Martindale-Hubbell, the ABA Tort Trial and Insurance Practices (TIPS)section membership, or plaintiff's bar associations (Florida Justice Association) might be good sources for independent personal counsel for insureds.

Settlement is the prerogative of the clients, even when the client may have to pay for it. Some clients cannot accept the possibility of a loss of a case which could be precedent for many other claims, perhaps uncovered, for example. Adverse publicity over poor business practices could lose much more financially than what is at stake for the carrier defending one claim. Criminal liability concerns and the results of aggressive discovery and depositions in a civil case might be a reason to settle even if the carrier is not paying all or part of the settlement.

Attempts by carriers to totally remove the lawyer from settlement issues in the liability defense context are unethical for a lawyer to participate in. Florida Ethics Opinion 81-5 provides that a lawyer may not be ordered to not to express any opinion as to the settlement value of the cases. The "**don't ask** for settlement authority, **don't tell** us the exposure" approach is impermissible in the third party insurance defense practice. Even in the first party context, it may not be wise to remain mute when the claims personnel say they know better. A documented file on settlement value could be a lawyer's best defense when the adjuster's strategy backfires. When it is not in writing, the adjuster may later wrongfully blame the attorney for the loss the attorney warned of.

WHAT DO YOU DO IF YOU GET DOCUMENTS WITH HIDDEN DATA?

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 06-2
(September 15, 2006)

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents.

RPC:	4-1.1, 4-1.2, 4-1.4, 4-1.6, 4-4.4(b)
Opinions:	93-3, New York Opinion 749, New York Opinion 782
Case:	*Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005)
Misc:	David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004), *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004)

The Board of Governors of The Florida Bar has directed the committee to issue an opinion to determine ethical duties when lawyers send and receive electronic documents in the course of representing their clients. These ethical responsibilities are now becoming issues in the practice of law where lawyers may be able to "mine" metadata from electronic documents. Lawyers may also receive electronic documents that reveal metadata without any effort on the part of the receiving attorney. Metadata is information about information and has been defined as "information describing the history, tracking, or management of an electronic document."[1]

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, including what was deleted from or added to the final version of the document, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.[2]

This opinion does not address metadata in the context of documents that are subject to discovery under applicable rules of court or law. For example, the opinion does not address the role of the lawyer acting as a conduit to produce documents in response to a discovery request.

The Florida Rules of Professional Conduct require lawyers to protect information that relates to the representation of a client. Rule 4-1.6(a) provides as follows:

> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The Comment to Rule 4-1.6 further provides:

> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

In order to maintain confidentiality under Rule 4-1.6(a), Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information that leave the lawyers' offices, including electronic documents and electronic communications with other lawyers and third parties.

Rule 4-4.4(b) addresses inadvertent disclosure of information and provides as follows:

> A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The comment to rule 4-4.4 provides additional guidance:

> Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.
>
> Some lawyers may choose to return a document unread, for example, when the

> lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 4-1.2 and 4-1.4.

The duties of a lawyer when sending an electronic document to another lawyer and when receiving an electronic document from another lawyer are as follows:

> (1) It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.
>
> (2) It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.[3]
>
> (3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must "promptly notify the sender." *Id.*

The foregoing obligations may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:

> To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

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[1]*The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age,* Appendix F (The Sedona Conference Working Group Series, Sept. 2005 Series), available at http://www.thesedonaconference.org. The Microsoft Word and Microsoft Office online sites also contain detailed information about metadata, showing examples of metadata that may be stored in Microsoft applications and explaining how to remove this information from a final document. Examples of metadata that may be hidden in Microsoft documents include the name of the author, the identification of the computer on which the document was typed, the names of previous document authors and revisions to the document, including prior versions of a final document.

[2]Further references regarding metadata and eliminating metadata from documents may be found on Microsoft's user support websites at http://support.microsoft.com/kb/290945 and http://support.microsoft.com/kb/q223790/. *See also*, Michael Silver, "Microsoft Office metadata: What you don't see can hurt you" *Tech Republic Gartner 2001* http://techrepublic.com.com/5100-1035_11-5034376.html. The court's discussion of metadata in *Williams v. Sprint/United Management Company,* 230 F.R.D. 640, 96 Fair Empl.Prac.Cas. (BNA) 1775 (2005) is also very helpful.

[3]The ethical implications of such hidden information in electronic documents have been discussed in legal journals and ethics opinions in other states, The New York Bar Association has issued Opinion 749 (2001), which concluded that attorneys may not ethically use computer software applications to surreptitiously "mine" documents or to trace e-mail. New York Ethics Opinion 782 (2004), further concluded that New York lawyers have a duty to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets. Legal commentators have published articles about ethical issues involving metadata. David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). *See also*, Brian D. Zall, "Metadata: Hidden Information in Microsoft Work Documents and its Ethical Implications," 33 *Colo. Lawyer* No.10, p. 53 (Oct. 2004).

[Updated: 10-31-2006]

NON-LAWYERS IN THE INSURANCE CONTEXT

In The Florida Bar v. York,689 So. 2d 1037 (Fla. 1996) the Supreme Court held that an: (1) individual, in reviewing customer/clients' potential property damage claims by listening to their verbal recitation of what had occurred, reviewing reports, reviewing statutes, then writing letters, sending fax memos and serving as representative to accept responses from recipients of those demands and offering to accept payments from them, was doing things that only licensed attorney at law or public adjuster was legally authorized to do; (2) individual's threats to file suit with or on behalf of his customer/clients was "practice of law" that he was not licensed to perform; and (3) appropriate action was to enjoin individual from any further unauthorized practice of law through program through which he currently provided such services, or any other similar program by another name.

WHAT TO DO IF YOUR INSURED CLIENT WANTS TO LIE?

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 04-1
June 24, 2005

A lawyer whose client has repeatedly stated that the client will commit perjury must withdraw from the representation and inform the court of the client's intent to lie under oath. When the withdrawal and disclosure occur depends on the circumstances and may be made ex parte in camera if permitted by the court.

Note: This opinion was approved by The Florida Bar Board of Governors on October 21, 2005.

RPC: 4-1.2(d), 4-1.6, 4-1.7, 4-1.16, 4-3.3
Statutes: 837.02 and 777.011, Florida Statutes

A member of The Florida Bar has inquired about the appropriate course of conduct in the representation of a client who has stated his intent to commit perjury at his upcoming criminal trial. The client has repeatedly expressed the clients intent to commit perjury and, despite the lawyers repeated warnings, insists upon testifying falsely. The client has been warned that the lawyer must and will advise the court if a fraud is made upon the court. The lawyer has questioned the lawyers ethical obligations under this scenario. This inquiry addresses the circumstances when a lawyer definitely knows that the client intends to commit perjury. This is distinct from the many other situations where the lawyer may suspect but does not know that the client intends to commit perjury. This opinion only addresses this specific inquiry.

Many ethics rules relate to this inquiry. Rule 4-1.2(d), Rules Regulating The Florida Bar, prohibits a lawyer from assisting a client in conduct the lawyer knows or reasonably should know is criminal or fraudulent. Rule 4-1.6, the confidentiality rule, which is very broad, applies "to all information relating to the representation, whatever its source." Comment, Rule 4-1.6. However, there are exceptions to the confidentiality rule. Rule 4-1.6(b)(1) requires a lawyer to reveal information necessary to prevent a client from committing a crime. While interpretation of statutes is beyond the scope of an ethics opinion, it appears that it is a crime for a lawyer to permit or assist a client or other witness to testify falsely. See Florida Statutes 837.02 and 777.011.

The "Candor Towards the Tribunal" rule, Rule 4-3.3, provides in pertinent part:

> **(a) False Evidence; Duty to Disclose.** A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * *

> (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> **(b) Extent of Lawyer's Duties.** The duties stated in paragraph (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6 [concerning lawyer-client confidentiality]. [Emphasis added.]

A lawyers' obligation to make disclosures under Rule 4-3.3 is triggered when the lawyer knows that a client or a witness for the client will make material false statements to a tribunal. Under the facts presented, the lawyer knows the client will make a misrepresentation to the court because the client has repeatedly expressed his intent to commit perjury.

> The comment to Rule 4-3.3 provides the following guidance:
>
> If a lawyer knows that the client intends to commit perjury, the lawyers first duty is to attempt to persuade the client to testify truthfully. If the client still insists on committing perjury, the lawyer must threaten to disclose the clients intent to commit perjury to the judge. If the threat of disclosure does not successfully persuade the client to testify truthfully, the lawyer must disclose the fact that the client intends to lie to the tribunal and, per 4-1.6, information sufficient to prevent the commission of the crime of perjury.

A lawyer is required to reveal information that is necessary to prevent a client from committing a crime, including the crime of perjury. Rule 4-1.6(b)(1), Rules Regulating The Florida Bar. The comment to Rule 4-1.6 provides:

> It is admittedly difficult for a lawyer to know when the criminal intent will actually be carried out, for the client may have a change of mind.

* * *

> Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the clients interest should be no greater than the lawyer reasonably believes necessary to the purpose.

If the lawyer knows that the client will testify falsely, withdrawal does not fulfill the lawyers ethical obligations, because withdrawal alone does not prevent the client from committing perjury. Rather, a lawyer must disclose to the court a clients intention to

commit perjury. Timing of the disclosure may vary based on the facts of the case and, in some cases, may be made ex parte in camera. Ultimately, the method of disclosure is subject to the discretion of the court. This disclosure causes a conflict of interest between the lawyers ethical obligation to disclose and the clients interest. Rule 4-1.7, Rules Regulating The Florida Bar. Due to the conflict, the lawyer must move to withdraw. Rule 4-1.16(a), Rules Regulating The Florida Bar. Notwithstanding good cause to withdraw, if the court requires the lawyer to continue the representation, the lawyer must comply with the courts order. Rule 4-1.16(c), Rules Regulating The Florida Bar. A lawyer may offer the clients testimony in the narrative only if the court orders the lawyer to do so. Rule 4-3.3(a)(4), Rules Regulating The Florida Bar.

In the event that the client does not give advance notice to the lawyer prior to testifying falsely, Rule 4-3.3(a)(2) and the comment require the lawyer to take reasonable remedial measures to rectify the fraud. The comment to Rule 4-3.3 states:

> When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.
>
> * * *
>
> If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation....[I]f withdrawal will not remedy the situation or is impossible and the advocate determines that disclosure is the only measure that will avert a fraud on the court, the advocate should make disclosure to the court. It is for the court then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

In conclusion, when a lawyer is representing a criminal client who has stated an intention to commit perjury, the lawyer is obligated, pursuant to Rules 4-1.2(d), 4-1.6(b)(1) and 4-3.3(a)(4), to disclose the clients intent to the court. If the lawyer is not given advance notice of the clients intent to lie, and the client offers false testimony, then the lawyer must convince the client to agree to disclosure and remediation of the false testimony; failing that, the lawyer must disclose to the court anyway. Absent client consent, the lawyers disclosure of the clients false testimony or intent to offer false testimony will create a conflict between the lawyer and the client requiring the lawyer to move to withdraw from representation pursuant to Rule 4-1.16(a). If the court requires the lawyer to remain in the case, despite good cause for withdrawal, the lawyer must do so. Rule 4-1.16(c). It is then up to the court to determine what should be done with the information. This opinion is limited to the situation presented when a lawyer knows that his or her client is going to commit perjury. This opinion does not address the situation when a lawyer merely suspects but does not know that the client intends to commit perjury.

[Updated: 10-25-2005]

PLAINTIFFS' LAWYERS IN THE INSURANCE CONTEXT

It is not just insurance defense and coverage counsel that must be careful to follow professional ethics. Plaintiffs' lawyers can learn a thing or two from the catastrophic claims practices of a lawyer seeking insured clients. The Florida Bar v. Wolfe 759 So.2d 639 (Fla. 2000). The Supreme Court held that in-person solicitation of clients in areas where their homes had been damaged by tornadoes and offering legal services, presenting residents with prepared pamphlets and brochures, and offering residents prepared contingency fee contracts which did not comply with the rules regulating the State Bar warranted one-year suspension from the practice of law, followed by a three-year probationary period.

Attorney Wolfe stipulated to the following facts on counts of The Bar's complaint against him. On February 23, 1998, a series of tornadoes struck Osceola and Seminole Counties, Florida, damaging homes and killing or injuring a large number of people. Between March 1, 1998, and March 7, 1998, Wolfe approached David Cignotti, Paul Bruno, Nancy Thomas, and Janet Sharp at their respective homes in Osceola and Seminole Counties.

The home of each individual had been damaged by the tornadoes and Thomas's husband was killed. Attorney Wolfe advised each of these individuals that he could assist them in obtaining the maximum settlement from their insurance companies and gave them flyers and brochures advertising his services. Attorney Wolfe gave Mr. Cignotti and Ms. Sharp extra brochures and flyers for them to distribute to friends and neighbors.

Wolfe presented all four parties with contingency fee contracts. After the Mr. Cignotti advised Wolfe that Carmen Rivera, Mrs. Cignotti's mother, owned the home where they resided and which had been damaged by the tornadoes, Wolfe presented them with a completed contingency fee contract to be signed by Rivera. Wolfe told the Cignottis that his fee would be 10% of any gross recovery or 25% of any amount obtained in excess of the insurance company's current offer, with a required $350 cost deposit to be provided prior to the rendition of services.

Wolfe gave Bruno and his wife a contingency contract which provided that Wolfe's fee would be 10% of any gross recovery. Wolfe delivered a contingency fee contract with the names of Thomas and Rose Serrano filled in to Thomas, which provided that Wolfe's fee would be 20% of the gross recovery, with an initial $250 cost deposit to be provided. Wolfe never spoke to Serrano or met Serrano. All conversations concerning her interest in the home were conducted through a friend of Thomas, and Serrano. Thomas executed the contract, but Serrano declined.

Wolfe gave the Sharps a contingency fee contract which provided that Wolfe's fee would be 25% of the gross recovery or 25% of the $84,800 already offered by their insurance company. It appears that Rose Serrano was co-owner of a home with Thomas.

In March, 1998, Wolfe advised Jose Vasquez that he would pay him a referral fee for each Hispanic client referred to Wolfe in exchange for Vasquez providing translation services. Vasquez referred at least one client to Wolfe, Marilyn Escobar, in connection with the damage inflicted upon her home by the tornadoes. Vasquez' parents retained Wolfe to represent them in obtaining the maximum settlement from their insurance company.

The Vasquez family paid Wolfe $250 and Wolfe's fee was to be 25% of the recovery. The Vasquez' insurance company did not receive any communication from Wolfe until approximately May 23, 1998. The Vasquezes also had trouble contacting Wolfe by telephone to inquire about the status of the matter.

Count II was that Wolfe did not file either his flyer or his brochure with the Florida Bar's standing committee on advertising either prior to, or contemporaneously with, its first dissemination. Neither the flyer nor the brochure (1) were accompanied by a statement of Wolfe's qualifications and experience; (2) were marked "Advertisement" in red ink; (3) stated that if the recipient had already retained counsel for representation in the matter, the advertisement should be disregarded; or (4) disclosed the source from which Wolfe obtained his information regarding the recipient's need for legal services. The flyer did not disclose whether (1) the client would be liable for any expenses in addition to the fee, (2) the client would be liable for expenses regardless of the outcome of the case, or (3) the percentage fee would be computed before expenses were deducted from the recovery.

Wolfe's brochure contained numerous testimonials and endorsements concerning his past representation of clients in negotiating insurance claims. The brochure contained statements that were likely to create unjustified expectations about the results he could achieve, such as "he knows his business and gets excellent results." The brochure contained self-laudatory statements such as "reliable performance of superior quality."

Count III concerned the contingency fee contracts that Wolfe entered into, or attempted to enter into, with Ms. Rivera, the Brunos, Ms. Thomas, Ms. Serrano, and the Sharps were obtained through in-person solicitation where Wolfe had no prior personal,

professional or familial relationship with any of the prospective clients. The contingency fee contracts (1) were not accompanied by a statement of client's rights; (2) contained no language stating that the clients had received and read the statement of client's rights; (3) contained no language stating that the client could rescind the contract, in writing, within three business days after the date of execution; (4) were not marked "Sample" even though Wolfe did not meet with or speak to several of the prospective clients in whose names the contracts were written; namely, Ms. Rivera, Ms. Serrano, and Mrs. Bruno.

As to Count I, Wolfe stipulated to the following violations: Rules Regulating the Florida Bar 4-7.4(a) ("A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship ....") and 4-7.4(b)(1)(A),(F) ("A lawyer shall not send ... a written communication to a prospective client for the purpose of obtaining professional employment if (A) the written communication ... relates to an accident or disaster involving the person to whom the communication is addressed ... unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; ... (F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer."). The Florida Bar v. Wolfe, excerpt from: 759 So.2d 639 to 642.

Plaintiffs just want to be paid.

In Opinion 00-2, the Professional Ethics Committee of The Florida Bar determined that schemes where the insurance company would direct the net proceeds were improper. An attorney should not participate in a settlement arrangement in which an insurance company pays the settlement directly into an account in the client's name.

Such an arrangement circumvents the trust accounting rules, an attorney's duty to third parties who may have an interest in the settlement funds, and participation in the IOTA program. The opinion was reconsidered and that language follows, here:

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 00-2 (Reconsideration)
(January 21, 2005)

A lawyer may participate in a settlement agreement in which the insurance company deposits directly into a client's financial account only the portion of the settlement proceeds owed to the client, but may not participate in a settlement if the funds deposited directly into the client's financial account include attorney's fees, costs and funds ot which a third party may have a claim.

RPC: 5-1.1(e)

OPINIONS: 00-2, 02-4

Insured Defendants' need to know.

Opinion 02-7 is an opinion concerning the statement of insured client's rights. This form was passed by the Board of Governors and must be used. Similar warnings and communication must be provided in any insurance defense situation, even if the type of case is not set forth in the Rule, 4-1.8(j).

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 02-7
September 13, 2002

An attorney hired by an insurance company to defend an insured in an employment discrimination claim must provide a copy of the insured statement of client's rights only if there is an element of personal injury involved in the claim. The attorney should make similar disclosures to the insured even if there is not an element of personal injury, but may choose the method of disclosure.

RPC: 4-1.8(j)

A member of The Florida Bar has inquired whether Rule 4-1.8(j), adopted by the Supreme Court of Florida on April 25, 2002, requires an attorney to provide a client with a copy of the Statement of Insured Client's Rights when the attorney is hired by an insurance company to defend an insured in an employment discrimination claim pursuant to a policy for employment practice liability insurance.

Rule 4-1.8(j) provides as follows:

> When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims, the Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation.

The answer to the inquiry depends on the nature of the discrimination claim that the lawyer is hired to defend. If the discrimination claim includes an element of personal injury, the lawyer must provide the insured client with a copy of the Statement of Insured Client's Rights in accordance with the rule.

If there is no element of personal injury, the lawyer is not required to provide the insured client with a copy of the Statement of Insured Client's Rights. The lawyer still has obligations to disclose to the client the nature of the attorney-client relationship and the client's rights. As stated in the comment to Rule 4-1.8(j):

> Establishment of the statement and the duty to provide it to an insured in tort cases involving personal injury or property damage should not be construed as lessening the duty of the lawyer to inform clients of their rights in other circumstances. When other types of insurance are involved, when there are other third-party payors of fees, or when multiple clients are represented, similar needs for fully informing clients exist, as recognized in rules 4-1.7(c) and 4-1.8(f).

Therefore, even if the rule does not require the lawyer to provide the Statement of Insured Client's Rights, the lawyer should make similar disclosures to the client. The lawyer may choose how and in what form to make those disclosures.

Here are the applicable Rules Regulating The Florida Bar and the actual form:

(j) Representation of Insureds. When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims, the Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation. The lawyer shall sign the statement certifying the date on which the statement was provided to the insured. The lawyer shall keep a copy of the signed statement in the client's file and shall retain a copy of the

signed statement for 6 years after the representation is completed. The statement shall be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights shall be deemed to augment or detract from any substantive or ethical duty of a lawyer or affect the extradisciplinary consequences of violating an existing substantive legal or ethical duty; nor shall any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation. This disclosure statement highlights many, but not all, of your rights when your legal representation is being provided by the insurance company.

1. *Your Lawyer*. If you have questions concerning the selection of the lawyer by the insurance company, you should discuss the matter with the insurance company and the lawyer. As a client, you have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours and give you this information in writing, if you request it. Your lawyer is responsible for keeping you reasonably informed regarding the case and promptly complying with your reasonable requests for information. You are entitled to be informed of the final disposition of your case within a reasonable time.

2. *Fees and Costs*. Usually the insurance company pays all of the fees and costs of defending the claim. If you are responsible for directly paying the lawyer for any fees or costs, your lawyer must promptly inform you of that.

3. *Directing the Lawyer*. If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests. Your preferences should be communicated to the lawyer.

4. *Litigation Guidelines*. Many insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance company should either explain the guidelines to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the

insurance company has declined authorization for the service or action.

5. *Confidentiality*. Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim. If the lawyer learns of information indicating that the insurance company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information in confidence. If the lawyer cannot do so, the lawyer may be required to withdraw from the representation without disclosing to the insurance company the nature of the conflict of interest which has arisen. Whenever a waiver of the lawyer-client confidentiality privilege is needed, your lawyer has a duty to consult with you and obtain your informed consent. Some insurance companies retain auditing companies to review the billings and files of the lawyers they hire to represent policyholders. If the lawyer believes a bill review or other action releases information in a manner that is contrary to your interests, the lawyer should advise you regarding the matter.

6. *Conflicts of Interest*. Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company. The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you believe the lawyer provided by the insurance company cannot fairly represent you because of conflicts of interest between you and the company (such as whether there is insurance coverage for the claim against you), you should discuss this with the lawyer and explain why you believe there is a conflict. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. *Settlement*. Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies your agreement is required. If you want to object to or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring you to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

8. *Your Risk*. If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay it. Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.

9. *Hiring Your Own Lawyer*. The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. You also may hire another lawyer, at your own expense, to monitor the defense being provided by the insurance company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.

10. *Reporting Violations*. If at any time you believe that your lawyer has acted in violation of your rights, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar call (850) 561-5839 or you may access the Bar at www.FlaBar.org.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS, PLEASE ASK FOR AN EXPLANATION.

CERTIFICATE

The undersigned hereby certifies that this Statement of Insured Client's Rights has been provided to..... (name of insured/client(s))..... by ..... (mail/hand delivery)..... at .....(address of insured/client(s) to which mailed or delivered, on ..... (date)......

____

[Signature of Attorney]

____

[Print/Type Name]

Florida Bar No.: ________________

Arbitration agreement acceptable.

Defense lawyers may have agreements with clients and/or insurers to arbitrate all disputes, under Florida Statutes or under The Rules Regulating The Florida Bar.

ETHICS OPINIONS ON THE WEB

The Florida Bar's Website is an excellent tool to research the ethical issues and prior opinions of the Professional Ethics Committee. http://www.floridabar.org which currently lists the following insurance-related opinions:

Insurance Cases

Adjusters continuing settlement negotiations after suit filed 70-33
Arbitrator, insurance defense attorney serving as 87-10 Attorney-client relationship with insured 97-1

Claimant's attorney

Communicating with insured directly to give notice of intent to file suit 59-27 , 71-3

Contacting insured directly to obtain assignment of bad faith claim against insurance carrier 65-70 , 71-3
Forwarding to unrepresented insured copies of correspondence addressed to insurance company 67-26
Sending copy of settlement offer directly to insurance company when claimant's attorney suspects that insurance company's attorney is not conveying information 76-21

Conflict of interests
Accepting set fee per case from insurance company 98-2
Attorney employed by insurance carrier to represent defendant advising defendant of plaintiff's offer to release defendant 65-70
Insurance company lawyer preparing estate analyses for prospective clients of company 64-33

Representing
Carrier and also serving as non-neutral arbitrator 87-10
Carrier and employer, preparing coverage opinion letter 93-8
Insured

And injured minor when paid by insurer 66-5
And insurance carrier when interests conflict 78-17
Attorney-client relationship with insured or client 65-70 , 70-58 , 81-5 , 86-6 , 97-1 , 98-2 , 98-3
In dispute with insurance carrier when carrier is paying fee 70-58
When insurance company directs attorney to file for summary judgment 97-1
When insurer restricts performance of duties 81-5

Insurer and also representing minor or personal representative in friendly suit 66-5 , 76-2 , 77-18
One party to accident against second party, then third party against first party 66-77
Personal injury plaintiffs against particular insurance company while also representing that company against similar plaintiffs 65-41 , 75-17 , 75-17 Rec .
Physician and insurer in malpractice action 86-6
Plaintiff in action against another insurance company after plaintiff and lawyer's company settle 66-7
Duties owed by insurance company's attorney to injured minor 66-5
Duty of lawyer paid by insurance carrier to advise insured of plaintiff's offer to release insured 65-70
Fee, set fee per case from insurance company 98-2
Filing suit to resolve fee dispute with subrogated insurer 61-33
"Firm name" used by in-house counsel 98-3
In-house attorney's letterhead and business cards disclosing relationship with insurer 98-3
Insurance company's refusal to disburse settlement funds until claimant's attorney indemnifies company against claim of predecessor attorney 74-2

Negotiating with insurance company adjusters
Generally 70-33
Nonlawyer employee of law firm handling negotiations 74-3

Preparing coverage opinion letter when representing carrier and employer 93-8
Referring clients to insurance carrier in return for referral fee 67-25

Settlement offer conditioned upon direct payment into checking account in client's name 00-2 , 00-2 (Rec)
Statement of Client's Rights 02-7

Insurance defense attorneys must be careful to avoid conflicts of interest. See the Rule, below, with commentary and the Oath of Attorney of The Florida Bar:

RULE 4-1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 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.

(b) Notwithstanding the existence of a conflict of interest under subdivision (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;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. 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.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(e) Representation of Insureds. Upon undertaking the representation of an insured client

at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some

circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

Representation of Insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer’s fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time

the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Updated: 11-07-2006]

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CONFLICTS IN THE AUTO/INSURANCE LITIGATION CONTEXT

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 02-3
June 21, 2002

The Professional Ethics Committee discusses various situations involving representation of both driver and passenger(s) in a car accident, determining that whether or not a conflict of interests exists and whether or not a conflict may be waived, must be done on a case-by-case basis.

RPC: 4-1.7(a) and (b); 4-1.9(a) and (b); 4-1.16(a) and (d)

Opinions: 72-7; 73-2; 89-1; 95-4; Oregon 200-158; Philadelphia 91-12;

Pennsylvania 97-116; Texas 500; Illinois 93-9; New Jersey 373

Cases: State Farm Mutual Ins. Co. v. K.A.W., 575 So.2d 630 (1991); The Florida Bar v. Mastrilli, 614 So.2d 1081 (1993); Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992), rev. dismissed, 618 So.2d 208 (Fla.1993); The Florida Bar v. King, 664 So.2d 925, 927 (Fla. 1995); Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995)

The Committee has recently received an inquiry from a Florida Bar member regarding whether an attorney need avoid representation due to a conflict when the attorney is asked to represent both passenger and driver in a suit for negligence/property damage against a third party driver in an auto accident. This is an issue that arises in personal injury cases in various fact situations, including the following:

1. The driver and passenger prospective clients are both injured and liability is clearly with the third party driver. There are no claims of comparative negligence or fault against the plaintiff driver.

2. The driver and passenger prospective clients are both injured and liability lies mostly with the third party driver. However, the third party's insurance company is alleging comparative fault by the plaintiff driver.

3. Driver and passenger prospective clients are members of the same family and both are injured in an auto accident. While the plaintiff driver may have been partly at fault, the driver was uninsured and has no assets to satisfy an adverse judgment.

4. The driver and passenger prospective clients are both injured and evidence shows that the plaintiff driver was definitely at fault as well as the third party driver of the other vehicle.

5. The driver and passengers, who are members of the same immediate family, are all injured and the third party tortfeasor is claiming some fault on the part of the driver. The driver is the wife/mother of the passengers. Her liability policy has denied coverage for the other family members due to a "family exclusion" clause in the policy; she has no significant assets.

Regarding multiple representation of clients, Rule 4-1.7, Florida Rules of Professional Conduct, provides:

(a) **Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

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

(2) each client consents after consultation.

(b) **Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in 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 interest, unless:

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

(2) the client consents after consultation.

Rule 4-1.7(c), Florida Rules of Professional Conduct, continues:

> (c) **Explanation to Clients**. 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.

The Florida Rules of Professional Conduct, ethics opinions and opinions of Florida courts provide guidance in these matters. The Florida Supreme Court has issued an opinion specifically dealing with ethical issues involved in representing both driver and passenger(s) in an auto accident. The Court held in The Florida Bar v. Mastrilli, 614 So.2d 1081 (Fla. 1993), that one attorney could not simultaneously represent both driver and passenger in an auto accident where the passenger is pursuing a claim for negligence against the driver. Dual representation in these circumstances would violate Rule 4-1.7(a), supra. This decision echoes an earlier Florida Ethics Opinion 73-2, which reached the same conclusion.

Similarly, the Court held in State Farm Mutual Ins. Co. v. K.A.W., 575 So.2d 630 (Fla.1991), that a law firm which had represented driver and passengers against third party insurers and tortfeasors could not later represent the passengers against the driver. The firm was disqualified due to the strenuous objection of a real party in interest, the insurer, even though the driver had a new attorney at the time he was sued and had consented to the passengers' suit. Id.

Such conflict issues may not be apparent at an initial consultation with prospective clients. Conflict issues may arise later or be resolved during discovery and litigation. Conflict issues that arise in personal injury auto accident cases can present various fact situations, including the following:

Scenario 1

Where there are no actual or potential claims by passengers against the driver of the vehicle in which the passengers were injured, one attorney can ethically represent all parties as long as there is sufficient insurance coverage by the third party tortfeasor to cover the injuries of all injured plaintiffs. If there is not sufficient funding to cover the injuries of all the plaintiffs, one attorney may represent all the parties, with their knowing consent and waiver of conflict, only if all the plaintiffs are able to agree regarding the distribution of benefits/recovery among themselves. Rule 4-1.7(a)(1) and (2), Florida Rules of Professional Conduct.

Individual representation of each of the plaintiffs is advisable to determine the apportionment of benefits obtained from the third party tortfeasor. If each plaintiff is advised independently, this assures that waivers of conflict are knowing and informed as required by Rule 4-1.7(a)(1) and (2). The parties may agree among themselves to submit to intra-familial arbitration with an independent arbitrator to determine the distribution of benefits on an equitable basis. Independent guardians appointed to represent injured minors can be useful in this regard. The lawyer representing all the claimants as plaintiffs cannot be involved in determining the distribution of the recovery among the various plaintiffs.

Scenario 2

Where the third party tortfeasor is making a claim against the driver of a vehicle in

which passengers were injured, and this claim is based upon valid objective evidence, one attorney cannot represent both driver and passenger(s). Similarly, in a one car accident, where there is evidence of negligence by the driver, one attorney cannot represent both driver and passenger(s). A conflict exists under Rule 4-1.7(a) and (b), Florida Rules of Professional Conduct; Ethics Opinion 73-2; The Florida Bar v. Mastrilli, supra.

As noted in the Comment to Rule 4-1.7, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." In determining whether a conflict exists, the attorney should look at the situation as if he or she were representing the passenger(s) alone. If, in that situation, the attorney would sue the driver, then in most circumstances, the attorney cannot represent both driver and passenger(s). Florida law allows suits by one spouse against the other spouse to the extent of insurance coverage. Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

Scenario 3

Typically, the only exception to the conclusion in Scenario 2 would be when passenger and driver are members of the same family and the driver is uninsured or otherwise judgment proof. Comparative fault precepts may come into play. Fla. Stat. Sec. 768.81 (1999). Where a conflict of interest exists under Rule 4-1.7, lawyers must be very cautious in undertaking multiple representation. The Florida Bar v. Mastrilli, supra. The situation must be one in which an independent attorney would determine that it is not worthwhile or appropriate to sue the driver because there is no legal or economic basis for a claim under the circumstances. Comment to Rule 4-1.7. The same conclusion would be reached if the third party tortfeasor's claim against the driver is bogus and without substantiation in fact. As set forth in Oregon Ethics Opinion 2000-158:

> There may be situations in which allegations of contributory negligence do not create an actual conflict. The passengers may disagree with the adverse driver's factual contentions. If the driver and the passengers are closely related, the passengers may not wish to pursue intra-family claims. Assuming that these decisions not to pursue claims are made voluntarily and without influence arising from the lawyer's obligations to the driver, there is no actual conflict between the clients.

Again, knowing consents and waivers must be obtained from all parties in these circumstances. It may be the better practice for these consents to be obtained in writing and for the parties to be given the opportunity to consult with independent counsel before waiving an actual conflict.

Scenario 4

Where the driver and passengers are all injured, but evidence shows that the plaintiff driver was partly at fault or at least a substantial question is raised as to the fault of the plaintiff driver under objectively valid evidence obtained, such that an independent attorney would advise the passenger to sue the driver, there exists a Rule 4-1.7(a) conflict between the passengers and driver. Under these circumstances one attorney cannot represent both driver and passengers, even with the consent of the clients involved. Rule 4-1.7(a) and Comment; Mastrilli, supra.; Texas Ethics Opinion 500, Oregon Ethics Opinion 2000-158. The same result may obtain if the driver were a former client of the attorney representing the passengers in the accident. Rule 4-1.9(a) and (b), Florida Rules of Professional Conduct.

Scenario 5

When passenger and driver are members of the same family and the driver is underinsured, uninsured or otherwise judgment proof, one attorney can represent all parties against the driver's uninsured/underinsured motorist policy and against the tortfeasor if the situation is such that an independent attorney would determine that it is not worthwhile or appropriate to sue the driver because there is no legal or economic basis for a claim under the circumstances. Comment to Rule 4-1.7. The same result would obtain if the tortfeasor's claim against the driver is bogus and without substantiation in fact. Oregon Ethics Opinion 2000-158, supra. Knowing consents and waivers must be obtained from all parties in these circumstances. The attorney for the passengers may wish to have independent guardians appointed for any minor children to make sure that their interests are properly and independently represented in these circumstances. All parties, including the guardians for any minor passengers, should be given the opportunity to consult with independent counsel before waiving an actual conflict.

When conflict determinative facts do not come to light until after an attorney has already begun to represent both driver and passengers, remedial measures may be required. If discovery reveals, for example, that a non-waivable conflict exists between co-clients, the attorney may be required to withdraw from representation of both driver and passengers because of the direct conflict between them. Rule 4-1.7(a); Rule 4-1.16(a) and (d), Florida Rules of Professional Conduct; Florida Ethics Opinion 95-4. Even if the attorney had only brief meetings with both driver and passengers, representation may be deemed to have begun under pertinent caselaw. In Florida, a prospective client's subjective belief that his or her meeting with an attorney (in person or by telephone) was a meeting seeking and receiving legal advice, may create an attorney client relationship, if the client's belief was reasonable. Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992), review denied, 618 So.2d 208 (Fla.1993). The test is not whether a fee was paid or an engagement agreement signed, but whether the client reasonably believed that he or she was consulting an attorney seeking legal advice. Garner v. Somberg, 672 So.2d 852 (Fla. 3d DCA 1996).

Summary

In each of the factual situations set forth above, if the attorney determines that a conflict exists, the attorneys must follow Rule 4-1.16(a) and (d), Florida Rules of Professional Conduct, withdraw from the representation and protect the clients during the withdrawal process by providing them with copies of necessary documents and, if needed, obtaining extensions of time for them to find new counsel. Where an attorney withdraws from representing either driver, passenger, or both because of a conflict, the attorney cannot take a referral fee for referring the former client's case to another lawyer. Florida Ethics Opinion 89-1. The conflict would prohibit the

attorney's acceptance of joint responsibility for the representation as required by Rule 4-1.5(f)(4)(D)(i) and (ii), Florida Rules of Professional Conduct, and Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995).

As shown in the varying fact situations set forth above, each case must be dealt with on its own facts, following the guidelines set forth in Rules 4-1.7 and 4-1.9, Florida Rules of Professional Conduct and the above cited decisions.