**Opinion 533**
**September 2000**
**Tex. Comm. on Professional Ethics, Op. 533, V. 63 Tex. B.J. 8 (2000)**

**QUESTION**

May a lawyer, who is retained by an insurance company to defend its insured, ethically comply with litigation/billing guidelines which place certain restrictions on how the lawyer should conduct the defense of the insured?

**STATEMENT OF FACTS**

Lawyers who are involved in what is commonly known as insurance defense practice are often called upon by insurance companies (insurer) to represent policyholders (insured) under policies that exist between the insured and the insurer. The policy between the insurer and the insured defines the insurance company's obligation to defend the insurer and customarily provides that the insurance company will select and pay the lawyer.

Recently, insurance companies have issued litigation/billing guidelines which are imposed on the lawyers they retain. These guidelines place certain restrictions on how retained counsel can conduct the defense of the insured, including, but not limited to, discovery limitations and means of periodic reporting to the insurer. Examples of the limitations imposed on lawyers retained by insurance companies are the following:

1. Whether to hire an expert in the defense of the insured;
2. What, if any, legal research may be conducted by the lawyer in defense of the insured;
3. What, if any, depositions may be taken in the defense of the insured;
4. Whether the defense counsel may investigate the claims made against the insured;
5. Whether particular depositions may be videotaped;
6. Whether any motions, including motions to dismiss or for summary judgment, may be filed; and
7. Whether the lawyer or a paralegal should engage in the preparation of various documents.

**DISCUSSION**

The Texas Supreme Court has held that despite the fact that a lawyer is selected, employed, and paid by the insurance company, Nevertheless, such attorney becomes the attorney of record and the legal representative of the insured, and as such he owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured. *Employer's Casualty Company v. Tilley*, 496 S.W.2d 552 at 558 (Tex. 1973). Since *Tilley*, Texas courts have been unanimous in holding that an attorney-client relationship exists between an insured and the lawyer retained by the insured's insurer. See *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992); *Bradt v. West*, 892 S.W. 2d 56 (Tex. App.  Houston 1994).

Loyalty is an essential element in the lawyer's relationship to a client. (Rule 1.06, Comment 1, Texas Disciplinary Rules of Professional Conduct). In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice (Rule 2.01). The attorney-client relationship is a personal relationship in which the client generally must trust the lawyer to exercise appropriate judgment on the client's behalf. (Rule 5.04, Comment 4). Rule 5.04(c) specifically provides as follows:

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

Among other requirements, Rule 1.08(e)(2) provides that a lawyer shall not accept compensation for representing the client from one other than the client unless there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship.

Litigation/billing guidelines which interfere with the lawyer's professional judgment not only violate the above mentioned Rules but also Rule 1.01(b), which prohibits a lawyer from frequently failing to carry out *completely* the obligations that the lawyer owes to a client or clients' (emphasis added). Loyalty to the client/insured demands that the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. *State Farm Mutual Automobile Ins. Co. v. Traver,* 980 S.W.2d 625, at 628 (Tex. 1998).

When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to insurance coverage. (Rule 1.02, Comment 4). However, when restrictions in litigation/billing guidelines direct and control legal services rendered by the lawyer to a client and how those services are to be delivered, imposing such restrictions upon the lawyer would result in a violation of the Rules by the lawyer. Although the lawyer is free to enter into an agreement with the insurer regarding his fee and services to be rendered for the insured/client, such an agreement cannot override the ethical responsibilities of the lawyer under the Texas Disciplinary Rules. In other words, regardless of such an agreement with the insurer, the lawyer must at all times be free to exercise his or her independent professional judgment in rendering legal services to the client.

Although there may be some reasonable requirements related to third-party payment for legal representation, such as when to submit statements for legal services rendered or similar routine matters not affecting the actual representation of the client, no restriction or requirement by the third-party insurer can direct or regulate the lawyer's professional judgment in rendering such legal services or affect the lawyer's responsibility to the insured/client. As stated in Rule 5.04, Comment 5:

Because a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed or paid by one to represent another should guard constantly against erosion of the lawyer's professional judgment. The lawyer should recognize 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 the lawyer. The lawyer should be watchful that such persons or organizations are not seeking to further their own economic, political, or social goals without regard to the lawyer's responsibility to the client.

The Committee expresses no opinion as to the relationship between the insured and the insurer regarding contractual rights or duties they owe to each other or what contractual obligations the insurance company has to pay for legal services rendered. Those matters involve legal issues this Committee has no authority to address. The Committee understands that an insured can enter into different types of contractual relationships with an insurance company; however, such agreements between the insured and the insurer cannot affect or diminish a lawyer's ethical responsibilities to the insured under the Texas Disciplinary Rules once the insured becomes the client of the lawyer.

**CONCLUSION**

It is impermissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with an insurance company to restrictions which interfere with the lawyer's exercise of his or her independent professional judgment in rendering such legal services to the

insured/client.