



VEHICLE INFORMATION
SERVICES, INC.

July 13, 2005

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Antitrust Modernization Commission
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**Immunities and Exemptions: Request for Comments
70 FR 28902-28907 May 19, 2005**

A. General Immunities & Exemptions

1. **In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions?**
 - c. **Should Congress subject immunities and exemptions to a “sunset” provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?**

Yes. Congress should subject immunities and exemptions to a sunset provision.

- d. **Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?**

Yes. Proponents should bear the burden of proving that the benefits exceed the costs.

2. **Please provide any relevant information about any of the immunities and exemptions below, including their costs, benefits, and impact upon commerce.**
 - g. **McCarran-Ferguson Act. 15 U.S.C. §§ 1011-15**

When it was enacted in 1945, the McCarran-Ferguson Act (MFA) may well have served a legitimate purpose. Insurers were smaller and regionally located and may have needed to collaborate and share information for the purpose of understanding and spreading risk for an appropriate premium. In 2005, however, the MFA no longer serves any legitimate purpose. Instead, it enables the insurance industry, one of the most powerful industries in this county, to engage in commerce with a significant advantage and to the detriment of other industries.

The MFA has caused states to create Departments of Insurance which are typically staffed by individuals who have worked in the insurance industry or who have significant ties to it. State insurance laws are often weak and ineffectual, and, compared to the remedial power of a state's Attorney General, an Insurance Commissioner's remedial power is largely confined to issuing cease-and-desist orders and requiring insurers to refund premiums paid. State insurance laws also provide very little protection for third party claimants and are focused almost exclusively on the relationship between the insurer and insured. This leaves third party claimants with no recourse against a recalcitrant insurer other than litigation with the insured.

While the MFA only entitles exemption from federal antitrust law when a state regulates activities "as the business of insurance", the Department of Justice and the state Attorneys General have been loath to address issues raised about insurance companies and their practices. Although the U. S. Supreme Court declared in *Group Life & Health Insurance Co. V. Royal Drug Co., Inc.*, 440 U.S. 205, 211, 99 S. Ct. 1067, 59 L. Ed. 2d 261(1979) that the "exemption is for the 'business of insurance,' not the 'business of insurers'", this is a distinction not often made at the state level.

Insurers have increasingly used their economic power to dictate terms as to how companies will provide services and goods to insureds and, in many cases, third party claimants. Collision repairers are "told" by insurers what labor rate the insurer will pay, which parts must be used, which suppliers to patronize, and sometimes how the vehicle is to be repaired. This is true for both insureds and third parties alike and is true irrespective of whether the repairer has any form of an agreement with the insurer. Repairers lose valuable time, profit, and productivity waiting for approval for charges from insurers, complying with demands to use aftermarket crash parts which frequently do not fit and must be returned, engaging in constant administrative activities demanded by insurers, purchasing particular software programs mandated for use by an insurer. Insurer interference with the specific manner and technique as to a vehicle's repair can readily place drivers and others on the road at risk. Complaints to government officials by repairers or their organizations go largely ignored. Repeated attempts to address the enforcement or viability of a 1963 Consent Decree entered into in *United States of America v. Association of Casualty and Surety Companies*, 63 Civ. 3106, (S.D.N.Y., Oct. 23, 1963) to stop price-fixing and control practices relating to property loss appraisals and collision repair compensation still remain unanswered by the Department of Justice.

Insurer practices recently became so oppressive and dictatorial relating to compensating attorneys for defending insureds, that Ohio attorneys had to seek an advisory opinion as to whether it was ethical for them to comply with insurer litigation management guidelines. The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline issued opinion 2000-03 (BCGD 00-03, June 1, 2000) opining that it was unethical for attorneys to abide by insurer litigation management guidelines that interfered with the exercise of professional judgment. (A copy of this opinion is being provided under separate cover as identified in the Comment Instructions.) Specifically cited by the Board as insurer mandates requiring the abrogation of professional judgment included: Dictating tasks which were to be performed by certain personnel (partner, associate, paralegal); restrictions on performing legal research; obtaining insurer approval prior to engaging in discovery or seeking expert assistance; and obtaining insurer approval prior to filing motions or pleadings.

The reference to the plight of attorneys and collision repairers are merely two limited examples of the burdensome effect the MFA and insurers' interpretation of its application have on commerce and trade. While there has been considerable nationwide discussion of the crisis in medical malpractice insurance and vigorous demands for tort reform, there has been little, if any, discussion of any contribution insurer claims handling and business practices have made to that problem. Patients suffer by insurers entering into contracts with pharmacies and pharmaceutical companies for the dispensing of only specific drugs to patients, irrespective of the brand or type of drug prescribed by the physician. Pharmacists spend hours on the telephone contacting physicians for permission to substitute the

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prescribed drug for one on the insurer's "approved" list, and physicians are interrupted from administering to patients to satisfy these calls.

As the *Royal Drug* court identified, the purchase of goods and services is not the business of insurance. Yet, insurers continue to engage in price-fixing, tying arrangements, and virtual boycotts of non-complying goods and service providers, and attempts by the providers to stop these actions are, ironically, often met with antitrust lawsuits brought by insurers against them.

The McCarran-Ferguson Act exemption harms overall trade and commerce in the United States, and I urge the Commission to recommend the elimination of this Act.

Respectfully submitted,

E. L. Eversman, J.D.
General Counsel

BCGD 00-03

THE SUPREME COURT OF OHIO
Board of Commissioners on Grievances and Discipline

OPINION 2000-3

Issued June 1, 2000

SYLLABUS: It is improper under DR 5-107(B) for an insurance defense attorney to abide by an insurance company's litigation management guidelines in the representation of an insured when the guidelines directly interfere with the professional judgment of the attorney. Attorneys must not yield professional control of their legal work to an insurer.

Guidelines that restrict or require prior approval before performing computerized or other legal research are an interference with the professional judgment of an attorney. Legal research improves the competence of an attorney and increases the quality of legal services. Attorneys must be able to research legal issues when they deem necessary without interference by non-attorneys.

Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate, or senior attorney are an interference with an attorney's professional judgment. Under the facts and circumstances of a particular case, an attorney may deem it necessary or more expedient to perform a research task or other task, rather than designate the task to a paralegal. This is not a decision for others to make. The attorney is professionally responsible for the legal services. Attorneys must be able to exercise professional judgment and discretion.

Guidelines that require approval before conducting discovery, taking a deposition, or consulting with an expert witness are an interference with an attorney's professional judgment. These are professional decisions that competent attorneys make on a daily basis.

Guidelines that require an insurer's approval before filing a motion or other pleading are an interference with an attorney's professional judgment. Motion by motion evaluation by an insurer of an attorney's legal work is an inappropriate interference with professional judgment and is demeaning to the legal profession. If an insurer is unsatisfied with the overall legal services performed, the insurer has the opportunity in the future to retain different counsel.

Other guidelines may or may not interfere with an attorney's professional judgment. Insurance defense attorneys must exercise discretion in making such determinations.

Attorneys must provide reasonable and necessary services at reasonable fees. Attorneys should communicate with the insurer regarding the status of the representation. The Board encourages attorneys to cooperate with insurers, but attorneys must not abdicate control of their professional judgment to non-attorneys.

OPINION: This opinion addresses a question regarding insurance defense attorneys abiding by an insurance company's litigation management guidelines.

Is it proper for an insurance defense attorney to abide by an insurance company's litigation management guidelines in the representation of an insured?

The use of litigation management guidelines by insurance companies is raising ethical concerns among members of the bar. See e.g., Connie B. Saylor, *Restrictive Billing Guidelines: The Ethical Problems*, For the Defense, Jan. 1998, at 32-35. The primary ethical concern is whether compliance with the guidelines interferes with the independent professional judgment of insurance defense counsel and consequently with the quality of

legal services provided.

The use of litigation management guidelines is a cost control measure for insurers. The guidelines are intended to improve cost efficiency. The guidelines direct defense counsel on how the defense is to be conducted. "[G]uidelines typically mandate the form and timing of reports to responsible claims personnel; condition, limit or restrict certain types of discovery; require prior approval for travel; condition or restrict the time spent on legal research or proscribe electronic or computerized research; and impose budgeting requirements." Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 *Geo. J. Legal Ethics* 475, 531 (1996).

Some examples of litigation management guidelines are as follows. Guidelines may require that the insurer's consent be obtained before filing a motion or taking a deposition; that discovery be postponed until the end of discovery periods; that the insurance company makes the judgment on whether discovery is necessary to the defense or whether an expert witness is necessary; that certain tasks must be performed by paralegals not attorneys; and that if the attorney takes discovery or files a motion without the insurer's consent, the attorney receives no compensation for the work performed.

It is a fact that the insurer enjoys some control over the insured's defense through the liability policy. A standard liability policy gives a company the right and duty to defend a suit and the right to investigate and settle claims. See e.g., Insurance Services Office, Inc., *Sample Commercial General Liability Policy* (1982, 1984), *Sample Personal Automobile Insurance Policy* (1985), reprinted in Kenneth S. Abraham, *Insurance Law and Regulation: Cases and Materials*, 439-48, 602-12 (1990).

Yet, it is axiomatic that no matter what the policy states, the insurance defense counsel may not yield professional control of the legal work to an insurer. Under DR 3-101 (A) "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." Under DR 5-107 (B) "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

The tension between insurer control of defense and settlement of claims and the exercise of an attorney's independent judgment on behalf of an insured exists in part because of the unsettled nature of the insured, insurer, defense counsel relationship. The insured purchases insurance from an insurance company. The insurance company promises to defend claims against the insured and to indemnify the insured for judgments and settlements. The insurance company hires an attorney to defend claims against insureds. The insured agrees to cooperate.

The relationship has been described as a "tripartite relationship." See e.g., Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 *Geo. J. Legal Ethics* 475, 476-83 (1996), Ronald E. Mallen, *Looking to the Millenium: Will the Tripartite Relationship Survive?* 66 *Def. Counsel. J.* 481 (1999). The precise nature of the relationship among an insured, an insurer, and defense counsel is enigmatic.

There are different views as to whether the insured and insurer are both clients, or whether the insured is a single client and the insurer is a third party payer, or whether the relationship is characterized otherwise. See e.g., *Atlanta International Insurance Co. v. Bell*, 475 N.W. 2d 294, 295 (Mich. 1991) (stating that "something less than a plenary attorney-client relationship exists between a defense counsel and an insurer"); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?* 72 *Tex. L. Rev.* 1583, 1590-1628 (1994) (supporting the view that the insurance company can be defense counsel's client jointly with the insured or even be the only client defense counsel represents); (Charles Silver, Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 *Duke L.J.* 255, 275 (1995) (endorsing the view that the retainer agreement determines the number of clients defense counsel represents); Joanne Pitullo, *Three-Way Street: Discord Between Insurers and Insureds Puts Defense Lawyers on Perilous Path*, 81 *A.B.A. J.* 102 (1995) (purporting that the majority view is that the insured is the sole client); *Cincinnati Bar Ass'n*, Op. 98-99-02 (undated) and *Vermont Bar Ass'n*, Op. 98-7 (undated) (advising that the defense lawyer's client is the insured, not the insurance company); and ABA, *Formal Op.* 96-403 (1996) (advising that "[a] lawyer hired by an insurer

to represent an insured may represent the insured alone or, with appropriate disclosure and consultation, he may represent both the insurer and the insured with respect to all or some aspects of the matter." The Board found no reported Ohio case law directly on point.

Within this patchwork of views regarding the nature of the relationship among the insured, insurer and defense counsel, questions emerge regarding what is ethical conduct for insurance defense attorneys. The unsettled nature of the relationship stimulates the search for ethical guidance.

Whether an insurance defense attorney may abide by an insurer's "litigation management guidelines" without violating ethical duties of the legal profession has been the subject of advisory opinions in this state and other states. The majority view is that certain carrier imposed limitations give rise to ethical problems. See. e.g., Kentucky Bar Ass'n, Op. E-331 (1988); Cincinnati Bar Ass'n, Op. 98-99-02 (undated); Indiana State Bar Ass'n, Opinion 3 of 1998; Rhode Island Sup Ct, Ethics Advisory Panel, Op. 99-18 (1999); Vermont Bar Ass'n, Op. 98-7 (undated); Sup Ct Tennessee, Bd of Professional Responsibility, Ops. 88-F-113 (1988), 99-F-143 (1999), 99-F-143(a)(1999). Several of these opinions are reviewed herein to illustrate the scope of insurer imposed litigation management guidelines on the practice of law and the responses thereto.

The Indiana State Bar Association in Opinion 3 of 1998 advised that "[t]he attorney may enter into a contract to provide legal services that gives to the carrier the right to control the defense of the insured, provided that such contract does not permit the carrier to direct or regulate the lawyer's professional judgment in rendering such legal services and does not provide or encourage financial disincentives that likely would cause an erosion-of the quality of legal services provided." The bar association pointed out that the professional and independent judgment of defense counsel and the quality of legal services is impinged by specific terms of some guidelines.

Especially troublesome are those provisions of the subject agreement which tend to curtail reasonable discussion between members of the defense team on a day-to-day basis, and which seek to dictate the use of personnel within the lawyer's own office. Another example of a provision resulting in a material disincentive provides that if the senior litigator performs a particular service, e.g., argument of motions and other court appearances, conduct of depositions, or review of medical records or legal research, which could have been performed "suitably" (in the carrier's view) by an associate or paralegal, the service may be billed only at the hourly rate for the associate or paralegal. Similarly, the contract provides that once an associate attorney is assigned to a given matter, another associate may not be substituted without prior approval of the carrier. Such impairments of the responsible attorney's exercise of professional judgment as to the assignment of the most effective member of the litigation team to a given task is ethically impermissible. Lastly, to require, or even to permit, counsel to rely upon legal research by an unsupervised paralegal invites legal malpractice-a breach a counsel's duty to the insured-and is intolerable. Such provisions, even though intended merely to achieve cost efficiency, infringe upon the independent judgment of counsel, and tend to induce violations of our ethical rules.

Indiana State Bar Ass'n, Opinion 3 of 1998.

The Rhode Island Supreme Court, Ethics Advisory Panel in Op. 99-18 (1999) advised that there were not ethical concerns with provisions that merely define the financial relationship between the insurer and defense counsel or with provisions that coordinate the roles of defense counsel and employees of the insurer assigned to the claim.

However, certain other provisions, specifically those that require the insurer's pre-approval for specified legal services, extend beyond the financial and working relationship between the insurer and defense counsel, and infringe upon the attorney-client relationship between the insured and the inquiring attorney. For example, the insurer's prior approval is required before defense counsel engages in the following; conducting legal research in excess of three hours; filing counterclaims, cross-claims or third-party actions; visiting the accident scene; preparing substantive dispositive

motions or briefs; customizing interrogatories or document requests; and scheduling depositions. The insurer's prior approval is also required before counsel incurs expenses related to any of the following: retaining expert witnesses; scheduling independent medical examinations or peer reviews; instituting surveillance; and conducting additional investigations. To the extent that the insurer reserves unto itself the right to withhold approval for reasonable and necessary legal services to be provided to an insured, these provisions of the guidelines impermissibly interfere with the independent professional judgment of the inquiring attorney.

Rhode Island Sup Ct, Ethics Advisory Panel, Op. 99-18 (1999).

The Cincinnati Bar Association in Opinion 98-99-02 considered litigation management guidelines that require prior approval of "necessary legal research" subject to an agreed budget; prior approval in the selection and retention of expert witnesses; and prior approval for making any motion before the court.

The bar association advised that "[t]he law firm may not ethically submit for prior approval legal research, selection and retention of experts, or motions. The auditors or insurance company employees reviewing the prior approval items are non-lawyers. Submission for prior approval violates DR 3-101 (A) - Aiding Unauthorized Practice of Law. Even if the auditors or insurance company employees were lawyers, the practice violates DR 5-107(B) - Avoiding Influence by Others Than the Client."

Cincinnati Bar Ass'n, Op. 98-99-02 (undated).

The disciplinary rules within the Ohio Code of Professional Responsibility do not specifically address the tripartite relationship that exists between an insurer, an insured, and defense counsel. Ethical Consideration 5-17 mentions insureds and insurers as an example of situations in which a lawyer may be asked to represent individuals with potentially different interests.

EC 5-17 TYPICAL POTENTIALLY DIFFERING INTERESTS

Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

This ethical consideration does not dictate a conclusion that an insured and insurer are to be assumed to be dual clients. Asking a lawyer to represent two clients in a particular case is not equated with a per se rule or assumption that a lawyer automatically in all cases represents an insurer as well as an insured. This Board supports the view expressed by the Cincinnati Bar Association that "[t]he insured, not the insurance company, is the client" of defense counsel.

The disciplinary rules are unequivocal that it is the lawyer who directs and regulates his or her own professional judgment, not the persons or entities paying for the rendering of legal services to another. This is true regardless of whether an attorney represents one client or dual clients. One client cannot direct an attorney's professional judgment with regard to another client. An attorney has a duty of loyalty to the insured and regardless of whether the insurer is considered a dual client or a third party payer, the attorney cannot allow the insurer to direct or regulate his or her professional judgment in legal services to the insured.

DR 5-107 AVOIDING INFLUENCE BY OTHERS THAN THE CLIENT

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal service.

This rule is reinforced by ethical considerations within the Ohio Code of Professional Responsibility that emphasize the attorney's duty of loyalty and duty of exercising professional judgment solely for the benefit of the client.

EC 5-1 LOYALTY TO CLIENT

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-21 INFLUENCE OF THIRD PARTIES ON ATTORNEYS

The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 COMPENSATION FROM OTHER THAN CLIENT

Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

In conclusion, it is this Board's view that it is improper under DR 5-107(B) for an insurance defense attorney to abide by an insurance company's litigation management guidelines in the representation of an insured when the guidelines interfere with the professional judgment of the attorney. Attorneys must not yield professional control of their legal work to an insurer.

Guidelines that restrict or require prior approval before performing computerized or other legal research are an interference with the professional judgment of an attorney. Legal research improves the competence of an attorney and increases the quality of legal services. Attorneys must be able to research legal issues when they deem necessary without interference by non-attorneys.

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Attorneys must provide reasonable and necessary services at reasonable fees. Attorneys should communicate with the insurer regarding the status of the representation. The Board encourages attorneys to cooperate with insurers, but attorneys must not abdicate control of their professional judgment to non-attorneys.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

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