

# **ETHICS UPDATE:**

## **“AN ETHICAL GUIDE FOR INSURANCE ADJUSTERS”**

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## **INDEX**

- I. INTRODUCTION INTO ETHICS
- II. COMMON THEMES THAT UNDERLIE ETHICAL CODES AND CREEDS
- III. TRANSLATING ETHICS INTO A LEGAL STANDARD OF CARE
- IV. CPCU SOCIETY'S ENFORCEMENT OF ETHICAL STANDARDS
- V. ETHICAL CONSIDERATIONS IN THE TRIPARTITE RELATIONSHIP

## **I. INTRODUCTION INTO ETHICS**

### **A. What are Ethics?**

The Webster's Dictionary defines ethics as "the discipline of dealing with what is good and bad and with moral duties and obligations." While this definition gives us an indication of what ethics is, it fails to provide definitive insight because different people and organizations have different standards and values. Thus, an action considered to be ethical by one person might not be considered ethical by another. Your ethics may be formed by a number of factors, such as your religious beliefs, how you were raised, life experiences, and your society's leaders. However, despite these differences in our cultures and backgrounds, the presence of corruption and the need for honesty, integrity and respect is universal.

### **B. Why are Ethics Important in Business?**

The well-publicized legal and ethical failings at Enron, Arthur Andersen, WorldCom and United Way remind us that the choices individuals make about ethical issues have far-reaching practical consequences. Without ethics, not only will it adversely affect the way the public will view your business or profession, but it will be difficult to work towards a goal because there would be no way to pick between a limitless number of goals. When a rational ethical standard is taken, we are able to correctly organize our goals and actions to accomplish our most important values. The Institute of Business Ethics (IBE) found that companies displaying a "clear commitment to ethical conduct" consistently outperform companies that do not display ethical conduct. Any flaw in our ethics can reduce our ability to be successful in our endeavors.

### **C. Statistics – Ethics on the Rise**

Because of the increased awareness of the necessity of ethics in the workplace, businesses have been encouraging and enforcing ethics. In the 2003 National Business Ethics Survey (NBES), major findings indicated:

1. 82% of the participants in 2003 said that top management in their organizations kept promises and commitments, as compared with 77% in 2000.
2. Two key ethics-related problems in the workplace - (1) observed misconduct and (2) pressures to compromise ethics standards - have declined since the 2000 Survey. Observed misconduct dropped from 31% in 2000 to 22% in 2003, while pressure fell from 13% to 10% during this time period. Declines in observed misconduct and pressure have occurred primarily among non-management employees.
3. Reporting of misconduct by employees has increased steadily in the surveys conducted in 1994 (48%), 2000 (57%) and 2003 (65%). Employees indicate that values such as honesty and respect are practiced more frequently in their organizations in 2003.

## **II. COMMON THEMES UNDERLIE THE ETHICAL CODES AND CREEDS**

### **A. Comparison of CPCU Society Creed and Canon and Rules of the Code of Professional Ethics and Texas Lawyer's Creed and Disciplinary Rules of Professional Conduct.**

- a. Within the last 20 years, more businesses and professions have created codes of ethics to govern them. If these codes are taken seriously, they can alert employees to moral issues, improve choices and reduce unethical behavior.
- b. There is no standard Code of Ethics that governs adjusters in Texas. However, the CPCU Society has developed its own Canons and Rules of the Code of Professional Ethics. Similar to many other professions, such as the Texas Lawyer's Creed and Disciplinary Rules of Professional Conduct, there are common themes that exist in these codes. After a comparison of both the CPCU's Society Creed and Canon and Rules of the Code of Professional Ethics and the Texas Lawyer's Creed and Disciplinary Rules of Professional Conduct, there are five pervasive themes which can be recognized.

#### **c. FIVE COMMON THEMES:**

##### **1. Serve the Public's Interest**

- The CPCU Society's Code of Ethics specifically states in Canon 1 that its members are "to place the public's interest above their own." R3.2 states that its members "shall not allow the pursuit of financial gain or other personal benefit to interfere with the exercise of sound professional judgment."
- Similarly, the Texas Lawyer's Creed states that as a lawyer, you should not be deterred by your own self-interest. Further, the Texas Lawyer's Creed states that you are to be responsible to assure that all persons have access to competent representation regardless of wealth or position in life, and encourages pro-bono work.
- As a professional, to better serve the public's interest, you must remain involved in community-related issues and activities, thereby demonstrating that your business is a responsible community contributor. In other words, become and stay community involved!

##### **2. Maintain Professional Standards**

- The CPCU Society's Code of Ethics in Canon 3 requires its members "to obey all laws and regulation, and to refrain from any conduct that would cause harm to others." Further, in R. 4.1 and 4.2, it asks its members to "competently and consistently discharge his or her occupational duties" and to

“support efforts to effect such improvements . . . and the overall efficiency with which insurance mechanism functions.”

- Similarly, for lawyers who are admitted to the Texas State Bar, you take an oath to uphold the United States Constitution and the Texas Constitution. The Texas Lawyer’s Creed states that we should “always be conscious” of our duties to the judicial system.
- However, both the CPCU Society’s Canons and Texas Lawyer’s Creed require its member to go beyond upholding the law and doing one’s job:
  - Raise Professional Standards and Improve your Skills:
    - The CPCU Society’s Professional Code in Canon 5 and R. 5.1 state that its members are to raise the professional standards by supporting personnel policies and practices which will attract qualified individuals to the insurance business. Canon 2 states that CPCU Society members should seek continually to maintain and improve their professional knowledge, skills and competence. You are to keep informed on technical matters that are essential to the maintenance of the CPCU Society’s professional competence in insurance, risk management or related fields. Rule 2.1.
    - The Texas Lawyers Creed states that a lawyer owes its client skill and learning. And all Texas lawyers are required to take 15 hours worth of continuing education courses, which includes three hours of ethics training.

### 3. Be Respectful

- The CPCU Society Code of Ethics in Canon 6 requires its members to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance practitioners, and with members of other professions.
- Similarly, the Texas Lawyer’s Creed has a detailed list of how we are to treat our clients, other lawyers and judges. Specifically, it states that as a lawyer, “I will advise my client of proper and expected behavior” and that “civility and courtesy are expected and not a sign of weakness.”

### 4. Be Trustworthy

- CPCU Society’s rule 6.2 states that a CPCU shall not disclose to another person any confidential information entrusted to, or obtained by, the CPCU in the course of the CPCU’s business or professional activities, unless a disclosure of such information is required by law or is made to a person who necessarily must have the information in order to discharge legitimate occupational or professional duties.
- Similarly, both the Texas Rules of Evidence and Texas Disciplinary Professional Rules of Conduct have strict guidelines on upholding client confidentiality. Texas Disciplinary Professional Rules of Conduct R. 1.05

lays out exactly what a lawyer cannot reveal and the limited circumstances when a lawyer is allowed to reveal privileged information.

- CPCU Society goes beyond confidentiality in R. 6.3, by providing that a CPCU “shall not knowingly misrepresent or conceal any limitations on the CPCU’s ability to provide the quantity or quality of professional services required by the circumstances.” Further, R. 7.2 states that a CPCU “shall not misrepresent the benefits, costs, or limitations of any risk management technique or any product or service of an insurer.”
- Similarly, the Texas Lawyer’s Creed goes beyond mere confidentiality, in stating that as a lawyer “I will be loyal and committed to my client’s lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.”

#### 5. Always Uphold the Code

- The CPCU Society’s Canon 8 states that its members “should honor the integrity of the CPCU designation and respect the limitations placed on its use.” Canon 9 states that its members “should assist in maintaining the integrity of the Code of Professional Ethics.”
- Similarly, the Texas Lawyer’s Creed states that lawyers are obligated to educate his or her clients, the public, and other lawyers regarding the spirit and letter of this Creed.

### III. TRANSLATING ETHICS INTO A LEGAL STANDARD OF CARE

#### A. Texas Insurance Code Chapter 541 Prohibited Conduct

Chapter 541 of the Insurance Code contains prohibited conduct for handling claims. While under Texas law, an insurance agent can be liable to the insured for violation of statutory duties under both the Deceptive Trade Practices Act (DTPA) and the Insurance Code, this section only gives a summary of Chapter 541 of the Insurance Code. See *Aspen Specialty Ins. Co. v. Muniz Engineering, Inc.*, 514 F. Supp 2d. 972, 984 (S.D. Tex. 2007).

- **Misrepresentations Regarding Policy or Insurer - Chapter 541.051**  
It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to:
  1. make, issue, or circulate or cause to be made, issued, or circulated an estimate, illustration, circular, or statement misrepresenting with respect to a policy issued or to be issued:
    - a. the terms of the policy;
    - b. the benefits or advantages promised by the policy; or
    - c. the dividends or share of surplus to be received on the policy;
  2. make a false or misleading statement regarding the dividends or share of surplus previously paid on a similar policy;
  3. make a misleading representation or misrepresentation regarding:
    - a. the financial condition of an insurer; or
    - b. the legal reserve system on which a life insurer operates;
  4. use a name or title of a policy or class of policies that misrepresents the true nature of the policy or class of policies; or
  5. make a misrepresentation to a policyholder insured by any insurer for the purpose of inducing or that tends to induce the policyholder to allow an existing policy to lapse or to forfeit or surrender the policy.
- **Other prohibited acts – Chapters 541.052-59**
  1. False Information or Advertising: to make or publish untrue, deceptive or misleading statements or assertion regarding business of insurance or person in conduct of person's insurance business.
  2. Defamation of Insurer: Directly make or encourage the making of false, maliciously critical of, or derogatory to financial condition of insurer and calculated to injure a person engaged in business of insurance.

3. Boycott, Coercion or Intimidation: Cannot commit an act or enter into agreement of boycott, coercion or intimidation that results or attempts to result in the unreasonable restraint of or monopoly in business of insurance.
4. False Financial Statement: Cannot file false statement of financial condition of insurer or make or publish false statement. Also, cannot make false entry in insurer's report with intent to deceive agent who examines insurer's condition or public official where insurer is required by law to report.
5. Prohibited Rebates and Inducements: Cannot offer rebates or inducements to enter into insurance contract.
6. Unfair Discrimination in Life Insurance & Annuity Contracts: cannot make or permit an unfair discrimination between individuals of same class and equal life expectancy regarding rates charged, dividends, or other benefits payable or any of the other terms and conditions of contract.
7. Deceptive Name, Word, Symbol, Device or Slogan: Cannot use, display or publish name of insurance business or insurance related business that is same or deceptively similar to name adopted by insurance entity.

- **Unfair Settlement Practices - Chapter 541.060**

It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

1. misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
2. failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:
  - i. a claim with respect to which the insurer's liability has become reasonably clear; or
  - ii. a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;
3. failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;



4. failing within a reasonable time to:
    - i. affirm or deny coverage of a claim to a policyholder; or
    - ii. submit a reservation of rights to a policyholder;
  5. refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;
  6. undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;
  7. refusing to pay a claim without conducting a reasonable investigation with respect to the claim;
  8. with respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or
  9. requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless
    - i. a court orders the claimant to produce those tax returns;
    - ii. the claim involves a fire loss; or
    - iii. the claim involves lost profits or income.
- **Misrepresentation of Insurance Policy – Chapter 541.061**  
Both Chapters 541 and 542 deal with prohibitions of unfair settlement practices. Chapter 542 is applicable to insurers, not individuals. Chapter 541's prohibitions are applicable to any individual or company engaged in the business of insurance, including agents, brokers, and adjusters.

It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by:

1. making an untrue statement of material fact;
2. failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made;
3. making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact;

4. making a material misstatement of law; or
5. failing to disclose a matter required by law to be disclosed, including failing to make a disclosure in accordance with another provision of this code.

## **B. Legal Consequences of Violating Chapter 541**

As previously stated, Chapter 541's prohibitions are applicable to any individual or company engaged in the business of insurance, including agents, brokers, and adjusters. For there to be individual liability against an insurance company employee, there must be evidence sufficient to sustain a finding that the employee himself committed a violation of Chapter 541's prohibitions and that such violation was a cause of damage or legally recognized harm to the plaintiff. See Mark J. Courtois, *The Insurance Adjusters Essential Guide to Handling Claims*, at 11 (2005) (available at [http://www.ffllp.com/resources/adjusters\\_guide.asp](http://www.ffllp.com/resources/adjusters_guide.asp)).

Chapter 541 provides a private right of action for any person who sustains actual damages from a violation of the statute or certain provisions of the Deceptive Trade Practices Act. If the insurer commits the violation "knowingly," the trier of fact can award "an amount not to exceed three times the amount of actual damages." § 541.152(b). The finder of fact is given great discretion in determining an appropriate amount of statutory damages under the Texas Insurance Code. Kevin Risley, *The Unconstitutionality of Statutory Damages Under the Texas Insurance Code*, 47 S. Tex. L. Rev. 103, 122 (Tex. 2005). There is nothing in the statute that informs a juror (or a trial court) how to exercise that discretion. *Id.*

## **IV. CPCU'S ENFORCEMENT OF ETHICAL STANDARDS**

### **A. CPCU Society's Unethical Practices**

1. Aside from the CPCU's Canons, which has already been discussed, the CPCU Society has also made a list of both specified and unspecified unethical practices.

#### **a. Specified Unethical Practices**

- i. To violate any law or regulation duly enacted by any governmental body whose authority has been established by law.
- ii. To willfully misrepresent or conceal a material fact in insurance and risk management business dealings in violation of a duty or obligation.
- iii. To breach the confidential relationship that a member has with his client or with his principal.
- iv. To willfully misrepresent the nature or significance of the CPCU designation.
- v. To write, speak, or act in such a way as to lead another to reasonably believe that the member is officially representing the Society or a chapter of the Society unless the member has been duly authorized to do so.
- vi. To aid and abet in the performance of any unethical practice proscribed under this Section.
- vii. To engage in conduct which has been the subject of a presidential or Board of Directors directive to cease and desist.

#### **b. Unspecified Unethical Practices**

- i. A member shall not engage in practices which tend to discredit the Society or the business of insurance and risk management.
- ii. A member shall not fail to use due diligence to ascertain the needs of his or her client or principal and shall not undertake any assignment if it is apparent that it cannot be performed by him or her in a proper and professional manner.
- iii. A member shall not fail to use his or her knowledge and ability to perform his or her duties to his or her client or principal.

### **B. Ethics Violation Procedures**

1. Aside from the legal consequences of violating specific ethical principles, the CPCU Society has set forth the following procedures for its members who violate ethical principles.

#### **a. Inquiry**

- i. Upon written, signed request, the president shall cause an inquiry to be made for the purpose of determining whether there is reasonable basis

- to believe a violation of this Section has taken place. Requests should be directed to the executive vice president at the national headquarters.
- ii. Inquiry shall be made by a committee appointed by the president. A committee of inquiry (hereafter the "committee") shall be comprised of at least three persons, each of whom shall be a member of the Society. A finding concurred in by the majority of the committee shall be the finding of the committee.
  - iii. The committee shall review the written request. If the committee finds that the written request does not state allegations which, if sustained, would constitute violation of this Section, it shall so notify the president who shall notify the originator of the request. If the committee finds that the written request does state allegations which, if sustained, would constitute a violation of this Section, it may make inquiries of the member whose conduct is the subject of the request, and may make inquiries of other persons who may have knowledge of pertinent facts and circumstances.
  - iv. The committee shall find whether the evidence is sufficient to support the allegations in the request, and shall so notify the president who shall notify the member whose conduct is the subject of the request, and the originator of the request.
  - v. The committee may request guidance and advice from the Board of Directors or from the Ethics Committee. Such opinions or advice shall be reduced to writing and appended to the findings of the committee.
  - vi. Relevant information gathered by the committee shall be given to any appropriate conference panel.
  - vii. Where the time limits or the place for the conference called for in these procedures cannot reasonably accommodate the interests of the persons involved or for other good cause, the conference panel may adopt alternative time limits and processes to administer these procedures.

b. Conference

- i. Within 30 days after receipt of a committee finding that a violation may have occurred, the president shall appoint a conference panel (hereafter the "panel") which shall determine whether the conduct described in the request constitutes unethical conduct. The panel shall be comprised of three members of the Society, at least one of whom shall be a member or past member of the Board of Directors and none of whom shall have served on the committee.
- ii. Within 10 working days after appointment, the panel shall send notice of the purported violation by certified mail, return receipt requested, to the last known address of the member whose conduct is the subject of the request.
- iii. The notice shall specify the conduct which is subject of the request and the specified unethical practice involved and/or that the conduct

appears to constitute unspecified unethical conduct, and shall set a time and place for a conference which time shall not be less than 30 nor more than 90 days from the date of notice which place shall be not more than 100 miles from the residence of the member whose conduct is the subject of the request.

- iv. At the time and place fixed for the conference, the member whose conduct is the subject of the request shall have an opportunity to be heard, to present witnesses, to question witnesses, and to present written evidence.
- v. Within 10 working days after conclusion of the conference, the panel shall issue its finding. The finding of the panel shall be based exclusively on matters presented at the conference. A finding that the conduct is unethical must be unanimous finding of the panel and shall be in writing.
- vi. The panel finding shall be immediately communicated to the president, to the member whose conduct is the subject of the request, and to the originator of the request. In the case of a finding of specified unethical conduct, the panel shall submit its recommendation for action by the Board of Directors through the president.

c. Action

- i. The president shall immediately review the finding of the panel and, in the case of a finding of unspecified unethical conduct, shall direct the member to cease and desist from the unethical conduct. In the case of specified unethical conduct, the Board of Directors shall consider the gravity of the offense and shall expel, suspend, censure, or reprimand the member, and shall direct the member to cease and desist from unethical conduct. The action of the Board of Directors shall immediately be communicated to the member by certified mail, return receipt requested, at his or her residence.
- ii. Expulsion, suspension, or censure of a member shall be reported to the CPCU News. Reprimand of a member shall not be reported, and shall be communicated only to the member whose conduct has been found to be unethical.
- iii. The Board of Directors shall have prepared a synopsis of each case, without names, resulting in disciplinary action, and shall publish these synopses in CPCU News for education and guidance of all members.

## IV. ETHICAL CONSIDERATIONS IN THE TRIPARTITE RELATIONSHIP

### A. What is the Tripartite Relationship?

1. Defense attorneys often find themselves serving two clients with diverging interests – a policyholder in the midst of defending litigation and the liability insurance company paying the defense bill. This relationship is often called the “Tripartite Relationship.” This relationship often creates complex ethical issues for the defense counsel who must serve the interests of two clients – the insured and the insurer. Because of this unique relationship, it has garnered substantial amount of interest and has been a source of ethical, legal and economic tension in case law and ethics opinions. While much of what will be discussed deals specifically with the attorney’s obligations, it is very important for adjusters to be aware of the conflicts that can and do arise in this relationship.
2. Texas Supreme Court Justices Raul Gonzalez and Gregg Abbott noted that:
  - a. “The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom-line, wants to provide a defense at the lowest possible cost.”

### B. Ethical Principles and Responsibilities:

1. Who is the client?
  - a. While some insurance policies permit the policyholder to choose its own defense counsel, many policies consign this right to the insurance company. Often, the insurance company chooses defense attorneys that they have had an ongoing relationship with – in other words, the defense attorney regularly gets the insurance company’s business. This provides some obvious issues of who the attorney is going to listen to when there is a conflict. When a conflict arises between an insurance company and the policyholder, appointed defense counsel has the natural tendency to favor the interests of the insurance company because they are paying the attorney’s bills.
  - b. The Policy Holder:
    - i. Texas case law provides that though the insurer is paying the bills, the insurance defense counsel owes an unqualified duty of loyalty to the insured. *See State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 628 (Tex. 1998) (“(B)ecause the (defense counsel) owes an unqualified duty of loyalty to the insured . . . the lawyer must at all times protect the interests of the insured if those interests would be compromised by the **insurer's** instructions.”) (citing *Employers Cas.*

*Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973) (stating defense counsel “owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured”). Though some law had developed that defense counsel had “dual clients” (both the insured and the insurer), *Tilley* rejected that approach.

2. What are the duties?

- a. Once the client has been identified, it is still necessary to sort through the duties and obligations to each party in the tripartite relationship. The insurer, not the insured, has the ultimate determination of the nature of the legal representation afforded to the insured under the policy. However, neither the language of the policy nor the retainer agreement of the attorney can affect or diminish the lawyer’s ethical responsibilities to the insured under the Texas Disciplinary Rules once the attorney-client relationship is formed. The defense lawyer owes the insured the same duties of loyalty, confidentiality and competent representation as they do any other client.
- b. Loyalty and Competent Representation:
  - i. Under the Texas Disciplinary Rules of Professional Conduct 1.06(b)(2), “a lawyer shall not represent a person” where that engagement “reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.” This rule further prohibits a defense attorney from accepting an engagement when payment for the defense is provided by a third person.
  - ii. However, if an attorney accepts compensation from a third-party for representing a client, the defense counsel must follow Rule 1.08(e) of the Texas Disciplinary Rules of Professional Conduct, which provides that an attorney must:
    1. Obtain the client’s fully informed consent
    2. Protect against outside interference with the attorney’s “independence of professional judgment or with the client-lawyer relationship, and”
    3. Follow the confidentiality requirements imposed by Rule 1.05 of the Texas Rules of Professional Conduct, which prohibits any disclosure without the client’s consent.

Further, under Rule 1.06(c), the attorney must obtain consent “after full disclosure of the existence, nature, implications, and possible adverse consequences of the situation, if the opportunity for the representation to be materially affected exists. Without following all

of these ethical requirements, an attorney cannot accept payment from an insurer to represent an insured.

c. Confidentiality

- i. The attorney is placed in a difficult situation when he obtains information which may limit an insured's coverage defense. While an attorney must keep the insurer informed, he is also required to maintain the duty of confidentiality with his client, the policy holder.
- ii. Texas Disciplinary Rule of Professional Conduct 1.05 governs lawyer confidentiality. Lawyers are expected to comply with their duty of confidentiality, even in situations where the third party insurer is paying for representation.

C. **How Conflicts Arise:**

1. This fiscal relationship between the insurer and insurance defense counsel creates enormous pressure because the insurer retains the control of preparing a defense. Additionally, the cost lowering measures required by the relationship do not allow defense counsel to provide a vigorous defense free from outside influence. This conflict can easily compromise the insurance lawyer's duties to his client, the insured.
2. An understanding of how the interests of the insurer and insured may be adverse is important in determining whether a conflict of interest has or may arise. Two ethics opinions have been issued which address some conflicts which arise in the tripartite relationship.
  - a. **Ethics Opinion No. 532:** The Texas State Ethics Committee issued Opinion 532 to address the duty of confidentiality and the effect of an insurer's use of independent auditors to review client-billing statements of defense lawyers defending their insureds. This decision provided that lawyers must maintain the client's confidentiality despite the fact that a third party is paying the insured's legal expenses. Even if the insurance contract might contain a privilege to provide the insurer access to billing information, a defense attorney must uphold her duties to the client under the Texas Disciplinary Rules of Professional Conduct before disclosing confidential billing information. A lawyer's invoice or fee statement may contain confidential information, such as descriptions of matters discussed during telephone calls, subject matters of letter or even subject of research conducted. Thus, an insurance defense lawyer is obligated to protect this confidential information, and if she is required to submit her billing statement to a third party auditor, she breaches that obligation. However, if the client is informed of the possible adverse consequences of disclosing the fee statement, including the possibility in the waiver of the attorney-client privilege with respect to the information contained in the billing statement, a lawyer's invoice or fee statement may be forwarded to a third party auditor for review.



- b. **Ethics Opinion No. 533**: The Texas State Ethics Committee in Opinion 533 addressed whether it is permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with an insurance company's restrictions which may interfere with the lawyer's exercise of his or her independent professional judgment in rendering such legal services to the insured/client. The opinion points out that insurance companies are increasingly issuing litigation or billing guidelines imposed upon the lawyers they retain, which restrict how the counsel can conduct the defense of the insured. The committee acknowledged that an attorney is free to enter an agreement with the insurer regarding his fee and limiting the services to be rendered for the insured to matter related to insurance coverage. Further, the agreement may contain reasonable requirements for the attorney. However, it cannot control or attempt to regulate the lawyer's professional judgment or affect the lawyer's legal and ethical duties to the insured. Any decision which may affect the ultimate outcome of the litigation (aside from settlement which may be contractually assigned to the carrier) is left to the discretion of defense counsel in consultation with the insured. This does not give Texas insurance defense counsel the authority to run up unreasonable defense costs – Texas ethics rules provide an attorney's fees must be neither illegal nor unconscionable. Further, the carrier would likely remove the attorney from its approved list of counsel to use in the future. However, the bottom line is that a defense lawyer's responsibilities to the insurer cannot interfere with the duties owed to the client, the insured.

#### **D. Conclusion**

Unfortunately, there are not clear laws governing the relationship between the insured, the insurer and the attorney. It is abundantly clear that there is an increase of economic pressures on both insurance companies and the attorneys who defend their insureds. However, insurance companies and Texas lawyers should not allow the marketplace to dictate the ethical principles which govern their relationship and their relationship with the insured.