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## Independent Counsel in Insurance

Douglas R. Richmond

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# Independent Counsel in Insurance

DOUGLAS R. RICHMOND\*

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## I. INTRODUCTION

Mention the term *independent counsel* to many lawyers and they think immediately of the process whereby the Attorney General of the United States requests the appointment of an independent counsel to investigate and prosecute crimes potentially committed by government officials. Business lawyers may think first of independent counsel in the context of counsel for independent directors on a corporate board. For insurance lawyers and most lawyers involved in tort litigation, however, the term *independent counsel* has clear meaning: it describes a lawyer engaged to defend an insured at a liability insurer's expense in a case in which the insurer has lost the right to control the insured's defense because of an irreconcilable conflict of interest. A conflict of interest does not erase a liability insurer's duty to defend its insured; the insurer must instead cure the conflict to honor its duty.<sup>1</sup> The insurer does this by ceding control of the defense to independent counsel. The lawyer selected as independent counsel makes all tactical decisions concerning the insured's defense, shares an attorney-client relationship solely with the insured, and is loyal only to the insured, while the insurer pays the lawyer's fees. Independent counsel in insurance are sometimes described as "*Cumis* counsel" in recognition of the seminal California case on the subject, *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*<sup>2</sup> In fact, the concept of independent counsel in insurance preceded *Cumis* by a number of years.<sup>3</sup>

For an insured to be entitled to independent counsel, there must be a conflict of interest that disqualifies a defense lawyer selected by the insurer from representing the insured.<sup>4</sup> Where there is no conflict of interest, there is no right to independent counsel. Beyond the essential requirement of a conflict, the circumstances implicating an insured's right to independent counsel vary between jurisdictions. Generally speaking, the path to independent counsel in any case starts when an insured requests that its liability insurer defend it in the suit and the

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1. *W. Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968); *Roussos v. Allstate Ins. Co.*, 655 A.2d 40, 43 (Md. Ct. Spec. App. 1995).

2. 208 Cal. Rptr. 494, 506 (Ct. App. 1984), *superseded by statute*, Willie L. Brown Jr.-Bill Lockyer Civil Liability Reform Act of 1987, ch. 1498, 1987 Cal. Stat. 5779 (current version at CAL. CIV. CODE § 2860 (West 1993)), *as recognized in* *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 71 Cal. Rptr. 2d 882 (Ct. App. 1998).

3. *See, e.g.*, *Prashker v. U.S. Guar. Co.*, 136 N.E.2d 871, 876 (N.Y. 1956) (offering independent counsel paid for by insurer as solution to expected conflicts of interest); *Emp'rs Fire Ins. Co. v. Beals*, 240 A.2d 397, 403-04 (R.I. 1968) (discussing two possible approaches to independent counsel), *abrogated on other grounds by* *Peerless Ins. Co. v. Viegas*, 667 A.2d 785 (R.I. 1995).

4. *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 124-25 (2d Cir. 2010) (discussing New York law).

insurer agrees to do so under a reservation of rights.<sup>5</sup> In theory, an insurer's defense under a reservation of rights poses a conflict of interest because the insurer may be more concerned with developing facts that will defeat coverage than with successfully defending the insured. As a result, the alleged conflict is sometimes assumed to disqualify any lawyer the insurer might hire to defend the insured. A minority of states accordingly hold that an insurer's defense under a reservation of rights entitles the insured to independent counsel at the insurer's expense.<sup>6</sup>

The majority and clearly better position, however, posits that not every reservation of rights creates a conflict of interest entitling an insured to independent counsel at the insurer's expense.<sup>7</sup> An insurer's interest in

5. An insurance company informs an insured of its reservation of rights by sending a reservation of rights letter. A reservation of rights letter is a unilateral notice stating that the insurer reserves the right to contest coverage despite its initial decision to undertake the insured's defense. A reservation of rights letter puts the insured on notice that there may be a conflict between its interests and those of the insurer, and that the insured may potentially be exposed to personal liability not covered by insurance. A letter from an insurer to an insured informing the insured that a verdict or judgment in the case may exceed the liability limits of the insured's policy, however, is *not* a reservation of rights letter. *Marathon Ashland Pipe Line LLC v. Md. Cas. Co.*, 243 F.3d 1232, 1249 (10th Cir. 2001). Such a letter is properly termed an "excess letter." In states that hold that a reservation of rights creates a conflict of interest between the insurer and the insured, an excess letter does not have the same effect. *See id.*

6. *See, e.g., Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.*, 200 F. Supp. 2d 84, 89–90 (D.R.I. 2002) (applying Massachusetts law); *Ins. Co. of N. Am. v. Spangler*, 881 F. Supp. 539, 544–45 (D. Wyo. 1995) (predicting Wyoming law); *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 610–11 (Alaska 2003); *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, ¶¶ 11–23, 905 A.2d 819, 825–29; *Moeller v. Am. Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1069 (Miss. 1996); *Federated Dep't Stores, Inc. v. Twin City Fire Ins. Co.*, 807 N.Y.S.2d 62, 66 n.1 (App. Div. 2006).

7. *See, e.g., Hartford Underwriters Ins. Co. v. Found. Health Servs., Inc.*, 524 F.3d 588, 593 (5th Cir. 2008) (discussing Louisiana law); *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 366, 371 (4th Cir. 2005) (discussing South Carolina law and collecting cases); *Rx.com Inc. v. Hartford Fire Ins. Co.*, 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006) (applying Texas law); *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797, 807–08 (S.D. Ind. 2005) (applying Indiana law); *Tyson v. Equity Title & Escrow Co. of Memphis*, 282 F. Supp. 2d 829, 831–32 (W.D. Tenn. 2003); *MetLife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 2d 90, 94 (D.P.R. 2000); *Long v. Century Indem. Co.*, 78 Cal. Rptr. 3d 483, 490–91 (Ct. App. 2008); *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1174 (Haw. 1999); *Mut. Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368–69 (Minn. Ct. App. 1991); *Twp. of Readington v. Gen. Star Ins. Co.*, No. HNT-L-205-05, 2006 WL 551404, at \*4 (N.J. Super. Ct. Law Div. Mar. 3, 2006); *Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 735 N.E.2d 48, 55 (Ohio Ct. App. 1999); *Nisson v. Am. Home Assurance Co.*, 917 P.2d 488, 490 (Okla. Civ. App. 1996); *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24, 40 (Tex. 2008); *Johnson v. Cont'l Cas. Co.*, 788 P.2d 598, 600 (Wash. Ct. App. 1990).

negating coverage is not alone a conflict of interest.<sup>8</sup> Rather, an insurance company defending under a reservation of rights is obligated to provide an insured with independent counsel only if the manner in which the case is defended can affect coverage.<sup>9</sup>

Regardless of the exact circumstances, the requirement that an insured be represented by independent counsel is significant because it reflects the insurer's loss of the very valuable right to control its insured's defense. Although an insurer may generally regain that right by agreeing to waive any coverage defenses,<sup>10</sup> that option is not always available or feasible. Moreover, an insured's entitlement to independent counsel raises a number of critical questions. For example, what qualifies a lawyer or law firm to serve as independent counsel? Who selects independent counsel? How or on what basis should independent counsel be compensated? Must independent counsel accept the same financial and administrative constraints that insurers impose on their regular counsel? What is the relationship between the insurer and independent counsel? What duties do independent counsel owe and to whom do they owe them? There is little authority to guide courts and lawyers analyzing these issues, and only a few states regulate independent counsel in any fashion. In the wake of *Cumis*, California enacted section 2860 of the California Civil Code, which is a fairly comprehensive statute controlling independent counsel relationships.<sup>11</sup> Alaska has a similarly thorough statute.<sup>12</sup> Within its insurance claims administration statute, Florida more modestly addresses compensation for independent counsel.<sup>13</sup>

This Article maps the critical contours of independent counsel in insurance, beginning in Part II with the appropriate identification or characterization of independent counsel, including their selection. Part III examines independent counsel's compensation. Finally, Part IV discusses independent counsel's relationship with the insurer in the case being defended.

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8. Nat'l Cas. Co. v. Forge Indus. Staffing Inc., 567 F.3d 871, 874–75 (7th Cir. 2009).

9. *Id.* at 875 (citing Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc., 843 N.E.2d 492, 498 (Ill. App. Ct. 2006)).

10. *See generally* State *ex rel.* Rimco, Inc. v. Dowd, 858 S.W.2d 307, 309 (Mo. Ct. App. 1993) (stating that an insurer “has the opportunity to control the litigation by accepting the defense without reservation”).

11. CAL. CIV. CODE § 2860 (West 2009).

12. ALASKA STAT. § 21.96.100 (2008).

13. FLA. STAT. § 627.426(2)(b)(3) (West 2005).

## II. IDENTIFYING, CHARACTERIZING, AND SELECTING INDEPENDENT COUNSEL

At the outset, it is important to identify what it means to be independent counsel, what qualifies lawyers or law firms to fill that role, and how independent counsel may be selected. Turning back the clock, there was a time when some courts championed an approach in which independent counsel were perhaps better characterized as separate counsel because they did not replace an insurer's chosen defense counsel. Instead, the insurer selected and paid for defense counsel for the insured just as it regularly would and additionally paid for another lawyer who was "pledged to promote and protect" the insured alone.<sup>14</sup> The insured was entitled to select the second lawyer, subject to the insurer's approval.<sup>15</sup> Although the insurer was allowed to approve the insured's selection of a lawyer, such approval was not to be "unreasonably withheld."<sup>16</sup>

The weaknesses in this approach are obvious. First, engaging separate counsel does not resolve the conflict of interest because the insurer retains control of the defense.<sup>17</sup> The insured receives independent advice and gains oversight ability, but neither benefit is a fair substitute for control of the defense. Second, injecting a second defense lawyer into a case without vesting one of the lawyers with ultimate authority for defense strategy and tactics is potentially awkward and inefficient. Although the lawyers might work harmoniously in conducting the defense, there may be times when agreement is unachievable. In the event of an impasse, the lawyer hired by the insurer should not be assigned ultimate authority given the conflict of interest requiring separate counsel. Third, making the insurer pay for two lawyers increases defense costs. If the insured will not allow the insurer to appoint sole defense counsel, it is accordingly preferable for the insurer to insist that the insured select independent counsel satisfactory to the insurer—as the insurer is permitted to do under the separate counsel approach<sup>18</sup>—and

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14. *Emp'rs Fire Ins. Co. v. Beals*, 240 A.2d 397, 404 (R.I. 1968), *abrogated on other grounds* by *Peerless Ins. Co. v. Viegas*, 667 A.2d 785 (R.I. 1995).

15. *Id.*

16. *Id.*

17. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 114, at 911 (4th ed. 2007) (noting that the "ultimate decision-making authority cannot be divided between two parties").

18. *Id.*

entrust that lawyer with the defense. Allowing the insured to select satisfactory independent counsel resolves the conflict of interest, preempts inefficiencies in the defense, and cuts defense costs. It is therefore no surprise that the modern rule favors independent counsel, not separate counsel, for an insured.<sup>19</sup>

#### A. *Identifying and Selecting Independent Counsel*

The selection of lawyers as independent counsel is often a contentious issue. The clear implication is that the insured must have the exclusive right to select independent counsel because affording the insurance company a role in the process will compromise the loyalty of any lawyer selected.<sup>20</sup> To be sure, when we speak of independent counsel in this context, we mean counsel independent from an insurer. To serve as independent counsel, a lawyer must be free of insurer control or influence. A lawyer's independence from an insurer, however, does not necessarily require that the insurer be excluded from the selection process.

The concern that underpins independent counsel doctrine is that a lawyer whom an insurer regularly engages to defend its insureds—so-called panel counsel—will either consciously or subconsciously favor the insurer over the insured in any given matter, including one in which coverage may be shaded in favor of the insurer.<sup>21</sup> This incentive is perceived to exist because the lawyer's relationship with the insurer is continual, supported by a strong financial interest in future assignments, and sometimes characterized by genuine friendships between the lawyer and members of the insurer's claims or legal staff.<sup>22</sup> Conversely, the lawyer's relationship with an insured "usually is transitory," seldom extending beyond a single case or claim.<sup>23</sup> Few insureds are potential sources of future engagements for a defense lawyer.

Yet, lawyers hired by insurers regularly defend insureds in cases in which the insured's and insurer's interests are not perfectly aligned.<sup>24</sup> The insurance defense bar has generally proven able to zealously defend

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19. *Id.*

20. See 4 RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 30:3, at 149–50 (2010 ed.).

21. Lawyers who regularly defend insureds for insurers are known as panel counsel because they are selected from panels of law firms with which carriers have continuing relationships. Panel firms agree to abide by an insurer's billing and litigation management requirements. They typically negotiate special compensation arrangements with insurers. Insurers often have different panels of firms for different types of coverage or lines of business.

22. 4 MALLEN & SMITH, *supra* note 20, § 30:3, at 149–50.

23. *Id.* at 150.

24. JERRY & RICHMOND, *supra* note 17, § 114, at 919.

insureds in such circumstances, and it is crystal clear that the overwhelming majority of insurance defense attorneys vigorously defend the insureds they are hired to represent regardless of insurers' coverage positions.<sup>25</sup> There is no persuasive reason to believe that they would do otherwise. Defense lawyers who subvert insureds' interests to insurers' interests risk professional discipline and malpractice liability.<sup>26</sup> Insurers that condone or encourage such conduct risk bad faith liability. A reservation of rights does not alter an insurer's contractual duty to defend its insured.<sup>27</sup> Upon weighing these factors, it is reasonable to conclude that insurers should be permitted to select independent counsel for insureds as long as the appointed defense lawyers understand that the insured is their sole client and the insurer acts honestly and responsibly in the process. Several courts have endorsed this approach.<sup>28</sup>

*Federal Insurance Co. v. X-Rite, Inc.*<sup>29</sup> leads this line of authority. X-Rite and its CEO, Darrell Thompson, were sued on several theories in a case referred to as the "O'Connor litigation."<sup>30</sup> X-Rite engaged Varnum, Riddering, Schmidt & Howlett (Varnum), to defend the O'Connor litigation and, two months later, notified its insurer, Federal Insurance Co. (Federal), of the suit and retention of Varnum.<sup>31</sup> Federal responded by way of a letter acknowledging its duty to defend the O'Connor

25. *Id.*

26. See MALLEN & SMITH, *supra* note 20, § 30:3, at 154 ("[E]mployment by an insurer does not diminish the ethical obligations and standard of care for insurance defense counsel.").

27. See *Willis Coroon Corp. v. Home Ins. Co.*, 203 F.3d 449, 452 (7th Cir. 2000) (applying Illinois law); *Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co.*, 839 So. 2d 614, 616 (Ala. 2002) (quoting *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137 (Wash. 1986)); 1 ALAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 4:20, at 4-172 (5th ed. 2007).

28. See, e.g., *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 371-74 (4th Cir. 2005) (interpreting South Carolina law); *H.K. Sys., Inc. v. Admiral Ins. Co.*, No. 03C0795, 2005 WL 1563340, at \*16 (E.D. Wis. June 27, 2005) (predicting Wisconsin law); *Travelers Indem. Co. of Ill. v. Royal Oak Enters., Inc.*, 344 F. Supp. 2d 1358, 1374-76 (M.D. Fla. 2004) (predicting Florida law); *United States v. Daniels*, 163 F. Supp. 2d 1288, 1290 (D. Kan. 2001) (interpreting Kansas law); *Cent. Mich. Bd. of Trs. v. Emp'rs Reinsurance Corp.*, 117 F. Supp. 2d 627, 633-37 (E.D. Mich. 2000) (interpreting Michigan law); *Cardin v. Pac. Emp'rs Ins. Co.*, 745 F. Supp. 330, 335-38 (D. Md. 1990) (discussing Maryland law); *Fed. Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1228-30 (W.D. Mich. 1990); *Finley v. Home Ins. Co.*, 975 P.2d 1145, 1154 (Haw. 1998).

29. 748 F. Supp. 1223.

30. *Id.* at 1224-25.

31. *Id.* at 1225.

litigation, declining to allow Varnum to continue as defense counsel, proposing to substitute the firm of Vandever, Garzia, Tonkin, Kerr & Heaphy (Vandever) for Varnum, and reserving its rights to deny coverage with respect to three of the causes of action.<sup>32</sup> Neither X-Rite nor Thompson responded to Federal, and the O'Connor litigation went on with Varnum holding the defense helm.<sup>33</sup> Months later, when Federal insisted that Vandever be substituted as defense counsel for Varnum, X-Rite revealed for the first time that it had received a \$125,000 settlement offer through mediation that would soon expire.<sup>34</sup> The next communication of any significance came months later, when Varnum informed Federal that the O'Connor litigation had settled for \$125,000, requested that Federal indemnify X-Rite for the settlement, and sought reimbursement of roughly \$71,000 in attorney's fees.<sup>35</sup> Federal responded by filing a declaratory judgment action in a Michigan federal court.<sup>36</sup>

The parties filed cross-motions for summary judgment in the declaratory judgment action.<sup>37</sup> One of the issues was whether X-Rite was entitled to insist on counsel of its choice at Federal's expense.<sup>38</sup> After surveying the law from various jurisdictions, the court concluded that it was not.<sup>39</sup> In a footnote, the court explained the meaning of *independent counsel*:

"Independent counsel" is a term which has not been defined in the case law. The representation of Vandever . . . was tendered to X-Rite with a clear explanation of the firm's role, designed to assure X-Rite of its independence. Specifically, Federal assured X-Rite that Vandever . . . would handle the defense of all claims asserted against X-Rite; that it would represent X-Rite only, not Federal, and would direct its efforts only to the best interests of X-Rite; and that it would not be involved directly or indirectly in coverage issues. These assurances are reasonable and, absent any contrary showing, effective to establish [Vandever's] independence.<sup>40</sup>

The *X-Rite* court also detailed the pertinent facts:

When Federal received notice of the action against X-Rite, it proceeded in accordance with black letter Michigan law by undertaking the defense with a reservation of rights. Further, Federal tendered the representation of "independent counsel," the Vandever . . . firm. X-Rite objected not because it believed Vandever . . . was not "independent," but because it questioned the qualifications of . . . Vandever . . . to competently defend [two of the] claims [asserted against it], and because it believed the conflict created by Federal's reservation

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1228.

40. *Id.* at 1228 n.1 (emphasis added) (internal quotation marks omitted).

of rights gave it the absolute right to retain counsel of its choice at Federal's expense.<sup>41</sup>

Furthermore, X-Rite's conduct evidenced "a cavalier disregard" for the language in the Federal policy granting Federal the right to defend its insureds and thus protect its own interests in any litigation implicating its duty to defend.<sup>42</sup> Unless Federal's contractual right to defend was "to be deemed mere surplusage," it had to be viewed as granting the insurance company "some prerogative with respect to the [O'Connor litigation] beyond simply paying defense costs."<sup>43</sup> The fact that Federal was not entitled to absolute control over the defense of the O'Connor litigation by virtue of its conflict of interest did not compel the conclusion that it lost its right to defend entirely. Absent some public policy to the contrary, Federal's contractual right to defend X-Rite and Thompson could hardly "contemplate anything less than its participation in the selection of [defense] counsel."<sup>44</sup> As for public policy, the court observed: "Public policy requires the insurer to act with utmost good faith. As long as this standard is observed, the Court may not interfere with the terms of the parties' agreement."<sup>45</sup>

The *X-Rite* court was unwilling to conclude that an insurer defending under a reservation of rights automatically breaches its duty of good faith and fair dealing by selecting defense counsel. To do so would be to presume that defense counsel are unable to represent their client, "the insured, without consciously or unconsciously compromising the insured's interests."<sup>46</sup> The court reasoned that the defense bar deserved greater confidence and respect than that presumption would accommodate.<sup>47</sup>

In summary, the court determined that the conflict of interest attributable to "Federal's reservation of rights did not automatically entitle X-Rite to counsel of its choice at Federal's expense."<sup>48</sup> There being no evidence that Vandevier was not independent or that by insisting on Vandevier's representation Federal acted in bad faith, created an actual conflict of interest, or otherwise prejudiced X-Rite's

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41. *Id.* at 1228 (footnote omitted).

42. *Id.* at 1229.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (footnote omitted).

47. *Id.* ("The Court is unable to conclude that Michigan law professes so little confidence in the integrity of the bar of this state.")

48. *Id.* at 1230.

interests, the court concluded that X-Rite acted unreasonably in refusing a defense by Vandever in the O'Connor litigation.<sup>49</sup>

*Travelers Indemnity Co. v. Royal Oak Enterprises, Inc.*<sup>50</sup> is a more recent case on point. This case arose out of the death of Royal Oak employee John Tilton, who was killed on the job in Royal Oak's Ocala, Florida facility.<sup>51</sup> Royal Oak was insured under a workers' compensation and employers' liability insurance policy issued by Travelers.<sup>52</sup> Tilton's estate sued Royal Oak in a local state court for alleged negligence in causing Tilton's death.<sup>53</sup> Travelers hired Wayne Argo, of the two-lawyer firm Weiner & Argo, to defend the suit.<sup>54</sup> Royal Oak thought Weiner & Argo was too small to handle the case but nonetheless acquiesced in the firm's engagement.<sup>55</sup>

Some three months into the litigation, Tilton's estate offered to settle for \$750,000, which was within the Travelers policy's liability limits.<sup>56</sup> Argo informed Travelers and the vice president of the Royal Oak's Ocala facility of the offer.<sup>57</sup> Only days before the settlement offer was due to expire, the estate's lawyers told Argo of their intent to amend their complaint to allege punitive damages.<sup>58</sup> Argo informed Travelers of this development and opined that the court would likely grant the amendment if requested but did not share the information with Royal Oak.<sup>59</sup> Travelers permitted the estate's settlement offer to expire.<sup>60</sup>

The estate eventually filed its motion to amend, and the proposed amended complaint not only sought punitive damages but for the first time included an intentional tort claim.<sup>61</sup> The intentional tort claim would abrogate Royal Oak's workers' compensation immunity and would further fall outside the coverage afforded by the Travelers policy.<sup>62</sup> After studying the proposed amended complaint, Travelers sent Royal Oak a reservation of rights letter with respect to both the punitive damage and intentional tort claims.<sup>63</sup> Travelers also wrote that Weiner & Argo would continue to represent Royal Oak but added: "We elicit

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49. *Id.*

50. 344 F. Supp. 2d 1358 (M.D. Fla. 2004).

51. *Id.* at 1361.

52. *Id.*

53. *Id.* at 1362.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1362–63.

63. *Id.* at 1363.

your participation in the selection of counsel, and will assume that [Weiner & Argo] is mutually agreeable to you if you do not notify us to the contrary in writing within ten (10) days.”<sup>64</sup> Finally, Travelers informed Royal Oak of its right to engage personal counsel at its own expense to advise and represent it in connection with the allegations that Travelers believed were not covered under its policy.<sup>65</sup>

Royal Oak promptly responded with a letter of its own, questioning Weiner & Argo’s ability to effectively represent it given the firm’s size, asserting that Travelers had not allowed it to have meaningful input into the selection of defense counsel, faulting Travelers for allowing the \$750,000 settlement offer to lapse, and criticizing Travelers for permitting the settlement offer to expire without consultation.<sup>66</sup> These and other examples, Royal Oak complained, indicated that Weiner & Argo might not be sufficiently independent to guard its interests and prevented it from agreeing to the firm’s continued defense of the Tilton case.<sup>67</sup> Thus, Royal Oak continued, it was engaging the Atlanta firm of King & Spalding to defend it in the Tilton matter, and it reserved its own rights to recoup King & Spalding’s fees from Travelers.<sup>68</sup>

Countering, Travelers suggested several other firms in the Ocala area to replace Weiner & Argo.<sup>69</sup> Royal Oak rejected the alternative firms, and ultimately, Travelers agreed to pay 75% of the fees and expenses to have a King & Spalding lawyer join Argo as co-counsel.<sup>70</sup>

The trial court granted the estate’s motion to amend its complaint, and after the estate filed the amended complaint, Travelers filed a declaratory judgment action in a Florida federal court.<sup>71</sup> Travelers then settled the Tilton case for \$750,000.<sup>72</sup> Travelers sought to recover that sum from Royal Oak in the declaratory judgment action, and Royal Oak counterclaimed to recover the fees it paid to King & Spalding.<sup>73</sup> Both sides moved for summary judgment.<sup>74</sup>

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64. *Id.* (quoting Travelers’ reservation of rights letter) (internal quotation marks omitted).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1363–64.

69. *Id.* at 1364.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

Royal Oak asserted three bases for requiring Travelers to pay for its independent counsel: (1) Argo's defense was so inadequate that Royal Oak was forced to hire independent counsel, (2) Travelers defended under a reservation of rights, and (3) there was a conflict of interest between Travelers and Royal Oak obligating Travelers "to pay for [independent counsel] of Royal Oak's choosing."<sup>75</sup> The court rejected all three arguments, with the first two falling quickly. As for the first, any alleged errors by Argo were immaterial and did not prejudice Royal Oak.<sup>76</sup> As a result, Royal Oak was not "forced" to retain independent counsel.<sup>77</sup> Regarding the second, there was simply no support for it under Florida law.<sup>78</sup> That left Royal Oak's conflict of interest argument.

Royal Oak argued that a conflict arose when the Tilton estate amended its complaint to add the punitive damage and intentional tort claims, thereby "prompt[ing] Travelers to reserve its rights to deny coverage."<sup>79</sup> After discussing the competing positions on conflicts of interest in insurance defense, the court predicted that the Florida Supreme Court would hold that on these facts Travelers was not obligated to pay for Royal Oak's independent counsel.<sup>80</sup> In so deciding, the court focused on Travelers' right to defend Royal Oak:

This meaningful contract right should not be penalized merely because there exists the potential for insurer-selected counsel to become impermissibly conflicted in its representation. To so hold would require this Court to recognize a conclusive presumption, based on nothing more than the existence of a potential conflict between the insured and the insurer, that counsel is unable to provide independent representation. The Court is not willing to graft such an unwarranted presumption into the law. Instead, there must be some evidence to suggest that the conflict between the insurer and the insured actually affected counsel's representation so that it may be said that counsel's actions elevated the interests of the insurer over those of his client, the insured.<sup>81</sup>

Royal Oak contended that Argo prioritized Travelers' interests when he informed it of the Tilton estate's plan to amend its complaint but did not similarly inform Royal Oak.<sup>82</sup> Had it known of the prospective amendments, Royal Oak contended, it would have urged Travelers to settle the case while there was only the covered negligence count to consider.<sup>83</sup> The court was not persuaded. When the settlement offer was made, the estate had not yet moved to amend its complaint, and

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75. *Id.* at 1368.

76. *Id.* at 1369.

77. *Id.*

78. *Id.* at 1369–71.

79. *Id.* at 1371.

80. *Id.* at 1374.

81. *Id.*

82. *Id.*

83. *Id.*

Travelers had yet to reserve its rights.<sup>84</sup> As a result, the conflict on which Royal Oak's argument rested was merely potential, not actual.<sup>85</sup> Argo had informed Royal Oak when the estate actually moved to amend its complaint, but the company did not then urge settlement before the motion was granted.<sup>86</sup> Finally, the court had previously determined that Travelers did not act in bad faith in declining the estate's initial settlement offer.<sup>87</sup>

There was no evidence that the conflict between Travelers and Royal Oak in any way affected Argo's defense of Royal Oak—Argo recognized that he owed Royal Oak a duty of loyalty and acted accordingly.<sup>88</sup> Royal Oak never complained of Argo's disloyalty, and there was no evidence that Travelers attempted to compromise Argo's professional judgment.<sup>89</sup> Although Royal Oak was within its right to engage King & Spalding to supplement Argo's defense, it did not follow that Travelers was obligated to finance that exercise.<sup>90</sup>

Finally, the court was convinced that rules of professional conduct and the threat of legal malpractice liability sufficiently protected insureds from misconduct by allegedly conflicted defense counsel.<sup>91</sup> Royal Oak's counterclaim for reasonable attorney's fees therefore failed.

The *X-Rite* and *Royal Oak* courts make good points about the trustworthiness of insurer-hired defense lawyers and the lack of justification for presuming that they will either consciously or subconsciously compromise the interests of insureds they are engaged to defend. The *Royal Oak* court's view that state ethics rules and the threat of malpractice liability safeguard insureds' interests is understandable. Accordingly, it is reasonable to conclude that an insurer's selection of defense counsel for an insured does not alone establish that lawyer's lack of independence.<sup>92</sup> Nonetheless, neither the *X-Rite* nor *Royal Oak* decisions nor those of like-minded courts grant insurers an unfettered

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1374–75.

89. *Id.* at 1375.

90. *Id.*

91. *Id.*

92. *See, e.g.*, Cent. Mich. Bd. of Trs. v. Emp'rs Reinsurance Corp., 117 F. Supp. 2d 627, 636 (E.D. Mich. 2000) (discussing the sanctity of fiduciary relationships and the nature of the tripartite relationship between insurers, insureds, and insurance defense counsel).

right to select independent counsel for insureds. Insurers must exercise good faith when selecting defense counsel, and any lawyer hired to defend an insured in a case involving a conflict of interest must be “truly independent.”<sup>93</sup> An insurer may initially establish the independence of lawyers it selects by clearly instructing the lawyers at the outset of the case that (1) the insured is their sole client, (2) they are to direct all their efforts to benefit the insured alone, and (3) they are to have no role whatsoever in coverage matters.<sup>94</sup> An insured may reject independent counsel selected by an insurer if the insured can demonstrate that such instructions were not given, were somehow ineffective, or were disregarded by the lawyer. This showing requires more than mere conjecture or speculation on the insured’s part. Once a representation is underway, an insured may reject independent counsel appointed by an insurer if the lawyer’s representation is “objectively inadequate,” meaning that the lawyer “fails to ‘vigorously and adequately’ defend the insured.”<sup>95</sup> That determination will naturally pivot on the facts of the particular case.

At the other end of the spectrum, a number of courts hold that the insured is entitled to select independent counsel.<sup>96</sup> Indeed, this approach has been described as the majority rule.<sup>97</sup> Courts adhering to this rule assume that an insurer’s instructions to a defense lawyer functioning as independent counsel to represent the insured alone and to act exclusively for the insured’s benefit cannot overcome the lawyer’s “human nature” to treat the insurance company as a client.<sup>98</sup> These courts further reason that it is not satisfactory to burden the insured with suing the defense lawyer for malpractice somewhere down the road should the lawyer

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93. *Id.* at 635.

94. *Fed. Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1228 n.1 (W.D. Mich. 1990); *see also Cardin v. Pac. Emp’rs Ins. Co.*, 745 F. Supp. 330, 335–37 (D. Md. 1990) (suggesting that satisfaction of the first two factors is sufficient to confer “independent counsel” status).

95. *Trinity Universal Ins. Co. v. Stevens Forestry Serv., Inc.*, 335 F.3d 353, 356 (5th Cir. 2003) (quoting *Nat’l Union Fire Ins. Co. v. Circle, Inc.*, 915 F.2d 986, 991 (5th Cir. 1990)).

96. *See, e.g., Liberty Mut. Ins. Co. v. Tedford*, 658 F. Supp. 2d 786, 794 (N.D. Miss. 2009) (interpreting Mississippi law); *Union Ins. Co. v. Knife Co.*, 902 F. Supp. 877, 880–82 (W.D. Ark. 1995) (predicting Arkansas law); *Cunniff v. Westfield, Inc.*, 829 F. Supp. 55, 57 (E.D.N.Y. 1993) (applying New York law); *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 610 (Alaska 2003); *Joseph v. Markovitz*, 551 P.2d 571, 576–77 (Ariz. Ct. App. 1976); *Compulink Mgmt. Ctr., Inc. v. St. Paul Fire & Marine Ins. Co.*, 87 Cal. Rptr. 3d 72, 75 (Ct. App. 2008); *Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc.*, 843 N.E.2d 492, 498 (Ill. App. Ct. 2006); *Smith v. Reliance Ins. Co. of Ill.*, 01-888, p. 12 (La. App. 5 Cir. 1/15/02); 807 So. 2d 1010, 1022; *Moeller v. Am. Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1070–71 (Miss. 1996).

97. *See Knife Co.*, 902 F. Supp. at 880–81.

98. *Id.* at 881.

succumb to inevitable pressures and subordinate the insured's interests to the insurer's.<sup>99</sup>

*CHI of Alaska, Inc. v. Employers Reinsurance Corp.*<sup>100</sup> is a leading case recognizing insureds' right to select independent counsel. Employers Reinsurance Corp. (ERC) offered to defend CHI in a serious personal injury action under a reservation of rights.<sup>101</sup> CHI protested that the reservation of rights created a conflict of interest entitling it to independent counsel under Alaska law and insisted that its personal attorney, Brett von Gemmingen, defend it.<sup>102</sup> ERC expressed concern about von Gemmingen's experience in handling cases of this nature and suggested that CHI provide it with the names of more experienced lawyers that ERC might engage as independent counsel.<sup>103</sup> CHI refused the request, and in response, ERC offered to allow von Gemmingen to represent CHI on the uncovered claim triggering the reservation, while ERC retained a firm of its choosing to act as co-counsel and to assume responsibility for the overall defense of the suit.<sup>104</sup> CHI declined that offer as well and then filed a declaratory judgment action to vindicate its position on retaining independent counsel of its choice.<sup>105</sup>

ERC and CHI both moved for summary judgment. CHI argued that ERC should have no role in selecting defense counsel because "any attorney selected by an insurance company '[would] attempt to help his real client, the insurance company, at the expense of the insured.'"<sup>106</sup> Retaining von Gemmingen to defend claims outside of coverage would not resolve the conflict, CHI reasoned, because the dual representation that ERC proposed would permit the law firm hired by ERC "to work against the interests of the insured and in addition would cause confusion concerning who [was] to control various litigation decisions."<sup>107</sup> ERC argued that it had eliminated any potential conflicts of interest by allowing von Gemmingen to defend the uncovered claim at its expense.<sup>108</sup> The trial court found for ERC, and CHI appealed to the Alaska Supreme

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99. *See id.*

100. 844 P.2d 1113 (Alaska 1993).

101. *Id.* at 1114.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (quoting CHI's court papers).

107. *Id.* at 1114–15.

108. *Id.* at 1115.

Court.<sup>109</sup> The supreme court was asked to answer two key questions. First, did the co-counsel scheme ERC proposed satisfy CHI's right to independent counsel? Second, did CHI have the unilateral right to select independent counsel?

The court concluded that ERC's proposed co-counsel arrangement did not satisfy its duty to provide independent counsel for CHI because it did not cure the conflict of interest.<sup>110</sup> There were two reasons for this. First, the law firm selected by ERC would have access to information known to or held by CHI that could be used against CHI in subsequent coverage litigation.<sup>111</sup> Second, the law firm selected by ERC would be able to direct the defense and, in doing so, might be able to influence the ultimate coverage determination.<sup>112</sup>

With respect to CHI's right to select independent counsel, the court began its analysis by noting that "most cases" on the subject "express the view that the insured has the right to select independent counsel of its choice."<sup>113</sup> The court agreed that an insured has the unilateral right to select independent counsel of its choice but tempered by its implied duty of good faith and fair dealing.<sup>114</sup> In this context, the insured's duty of good faith and fair dealing requires it to select as independent counsel a lawyer "who is, by experience and training, reasonably thought to be competent to conduct the defense."<sup>115</sup> As the court explained its reasoning:

Such a result . . . fairly balances the interest of the insured—being defended by competent counsel of undivided loyalty—with the interests of the insurer—having the defense of the insured conducted by competent counsel. The insurer is only required to pay the reasonable cost of the defense. . . . This provides a measure of protection for insurers against overbilling—and overlitigating—by independent counsel.<sup>116</sup>

It was unclear whether von Gemmingen was qualified to defend CHI in the underlying case. There was at least some evidence that he might not be because it was a serious case and he had been out of law school for only four years at the time the controversy arose.<sup>117</sup> On remand, it would be necessary for the trial court to determine his qualifications.<sup>118</sup>

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109. *Id.*

110. *Id.* at 1119.

111. *Id.*

112. *Id.* at 1119–20 (quoting Michael A. Berch & Rebecca White Berch, *Will the Real Counsel for the Insured Please Rise?*, 19 ARIZ. ST. L.J. 27, 37–38 (1987)).

113. *Id.* at 1120 (citing *Am. Family Life Assurance Co. v. U.S. Fire Co.*, 885 F.2d 826, 831 (11th Cir. 1989)).

114. *Id.* at 1121.

115. *Id.*

116. *Id.* (citations omitted).

117. *Id.* at 1126 (Moore, J., concurring in part and dissenting in part).

118. *Id.* at 1121 (majority opinion).

If von Gemmingen was qualified to handle the case, then the defense could go forward with him in charge.<sup>119</sup> If he was not qualified, however, CHI would be required to select different independent counsel.<sup>120</sup>

The *CHI of Alaska* decision was not unanimous. There was a reasoned dissent by Justice Daniel A. Moore Jr., who, despite agreeing that the insured should be entitled to select independent counsel, expressed concern that allowing the insured to do so unilaterally did not adequately respect the insurer's contractual right to defend the insured.<sup>121</sup> He would have thus qualified an insured's right to select independent counsel by allowing an insurer a "right of reasonable approval" over the insured's choice.<sup>122</sup> Under his proposed regime, an insurer would not be able to "unreasonably withhold" approval of an insured's proposed independent counsel.<sup>123</sup>

Justice Moore was also bothered by the majority's requirement that an insured employ as independent counsel a lawyer "reasonably thought to be competent to conduct the defense" of the underlying litigation because the majority failed to specify by whose standards competency should be measured.<sup>124</sup> Absent any objective criteria for determining independent counsel's competency, the measure of protection the majority thought it was affording to insurers was "both inadequate and unworkable."<sup>125</sup> In light of von Gemmingen's relative inexperience, ERC's reluctance to accept him as defense counsel was understandable.<sup>126</sup>

Finally, Justice Moore reasoned that the majority's concern that allowing insurers a voice in the selection of independent counsel would somehow taint the defense was either speculative or exaggerated.<sup>127</sup> If insurer-selected defense lawyers were to breach their duties to the insured as part of a scheme to further the insurer's interests, the lawyers would potentially expose themselves to professional discipline and malpractice liability, and the insurer would face liability for bad faith.<sup>128</sup> Those remedies adequately protect insureds and serve "as a strong

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119. *Id.*

120. *Id.*

121. *Id.* at 1121–22 (Moore, J. concurring in part and dissenting in part).

122. *Id.* at 1122.

123. *Id.*

124. *Id.* at 1125.

125. *Id.* at 1126.

126. *Id.*

127. *Id.* at 1127–28.

128. *Id.* at 1128.

disincentive to both insurers and defense counsel to compromise the insured's interest."<sup>129</sup>

Justice Allen Compton also dissented. He observed that a lawyer hired by an insured was just as subject to ethical pressures as was a lawyer hired by an insurer, and that a lawyer selected by an insured might still be tempted to favor the insurer's interests if the lawyer thought that the insurer might ultimately offer a more rewarding financial relationship than that provided by the insured.<sup>130</sup> Justice Compton recognized that the insured should be allowed to select independent counsel, but he proposed that an insured's right to appoint independent counsel should be subject to the insured's contractual duty to cooperate.<sup>131</sup>

### *B. Two Independent Counsel Are a Crowd*

In states that permit insureds to select independent counsel as a means of remedying an alleged conflict of interest, an insured generally must reject defense counsel offered by the insurer before it may employ its desired defense counsel at the insurer's expense.<sup>132</sup> If the insured does not do so, it must pay for any personal counsel whom it engages.<sup>133</sup> An insurer that has satisfied its duty to furnish independent counsel for an insured has no obligation to additionally pay for an insured's personal counsel.<sup>134</sup> This is true regardless of whether the insured's personal counsel is actively involved in the defense or simply supervises or monitors defense counsel engaged by the insurer. It also holds true where, for example, an insured has regular corporate counsel and wants its insurer to compensate those lawyers for time spent supervising or coordinating the activities of the defense lawyers that the insured selects as independent counsel.

This rule is sensible. An insurer has no duty to provide an insured with duplicative representation in a case in which the insurer controls the defense, and there is no reason that transfer of defense control to the insured should change matters. Any protection from insurer influence

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129. *Id.* at 1128–29.

130. *Id.* at 1130 (Compton, J., dissenting).

131. *Id.* at 1130–31.

132. *See, e.g.,* *Trinity Universal Ins. Co. v. Stevens Forestry Serv., Inc.*, 335 F.3d 353, 356 & n.3 (5th Cir. 2003) (interpreting Louisiana law); *Zurich Am. Ins. Co. v. Frankel Enters., Inc.*, 509 F. Supp. 2d 1303, 1311–12 (S.D. Fla. 2007) (discussing Florida law); *Aguero v. First Am. Ins. Co.*, 927 So. 2d 894, 897–98 (Fla. Dist. Ct. App. 2005).

133. *Trinity Universal Ins. Co.*, 335 F.3d at 356.

134. *Bituminous Cas. Corp. v. Zadeck Energy Grp., Inc.*, 416 F. Supp. 2d 654, 661 (W.D. Ark. 2005) (deciding case under Arkansas law); *Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.*, 200 F. Supp. 2d 84, 93–94 (D.R.I. 2002) (applying Massachusetts law); *N.Y. State Urban Dev. Corp. v. VSL Corp.*, 563 F. Supp. 187, 190–91 (S.D.N.Y. 1983).

that the insured arguably requires is accomplished by the appointment of a single law firm or lawyer as independent counsel. Moreover, an insurer that is required to provide an insured with independent counsel is still bound only to pay reasonable attorney's fees.<sup>135</sup> To require an insurer to pay two lawyers to do the job of one is "patently unreasonable."<sup>136</sup>

### *C. Summary and Synthesis*

It is generally reasonable to allow an insurance company to appoint independent counsel for an insured. The insurer must act honestly and objectively in doing so, of course, and must exercise good faith at all times. There are three ways that an insurer may control the selection of independent counsel for an insured. First, the insurer may appoint defense lawyers from among the law firms with which it regularly deals and instruct the lawyers that they are to (1) represent the insured alone, (2) consider the insured their sole client, (3) act exclusively in the insured's best interests at all times and be guided by the insured's best interests when making all strategic or tactical decisions, and (4) have absolutely no role in coverage issues insofar as the insurer is concerned.<sup>137</sup> Second, an insurer might appoint a lawyer from a firm that, although not a member of the insurer's regular defense panel, is on a list of law firms that the insurer has preselected for independent counsel assignments based on their capabilities and, presumably, the reasonableness of their proposed fees. Third, the insurer might select a lawyer from a firm with which it has no prior relationship but whom the insurer reasonably believes is qualified to represent the insured. Any lawyers appointed under the second or third options must receive the

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135. *Chi. Title Ins. Co. v. FDIC*, 172 F.3d 601, 604–06 (8th Cir. 1999) (applying Minnesota law); *Hartford Cas. Ins. Co.*, 200 F. Supp. 2d at 93 (citing *Magoun v. Liberty Mut. Ins. Co.*, 195 N.E.2d 514, 519 (Mass. 1964)); *MetLife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 2d 90, 96 (D.P.R. 2000); *CHI of Alaska, Inc.*, 844 P.2d at 1121 (majority opinion); *IMC Global v. Cont'l Ins. Co.*, 883 N.E.2d 68, 80 (Ill. App. Ct. 2007); *Nisson v. Am. Home Assurance Co.*, 917 P.2d 488, 490–91 (Okla. Civ. App. 1996).

136. *Hartford Cas. Ins. Co.*, 200 F. Supp. 2d at 93.

137. *Fed. Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1228 n.1 (W.D. Mich. 1990); *see also Cardin v. Pac. Emp'rs Ins. Co.*, 745 F. Supp. 330, 335–37 (D. Md. 1990) (suggesting that satisfaction of the first three factors listed here is sufficient to characterize a defense lawyer selected by an insurer as independent counsel).

same instructions with respect to their expected independence as the lawyers chosen under the first approach.

As for why it is reasonable to allow an insurer to select independent counsel subject to the conditions outlined above, that is simple: it is *unreasonable* to assume that a defense lawyer selected by an insurer will either consciously or subconsciously favor the insurer over the insured and somehow prejudice the insured in the process.<sup>138</sup> An attorney employed by an insurer to defend an insured “is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.”<sup>139</sup> State ethics rules prohibiting conflicts of interest and mandating confidentiality and independence of professional judgment, and potential liability for breach of fiduciary duty and legal malpractice, are powerful incentives for insurer-selected independent counsel to faithfully serve the insureds they are hired to represent.<sup>140</sup> There is no empirical evidence to support the seeming presumption that defense lawyers picked by insurers will naturally succumb to business influences and subvert insureds’ interests as a result, and anecdotal reports of such alleged disloyalty are scarce at best.<sup>141</sup> Indeed, given the vast number of cases in which insurance defense counsel participate, and the exceedingly few cases in which their conduct is challenged, it is far more logical to presume that defense lawyers engaged by insurers will put aside their business considerations and provide insureds the competent, diligent, and faithful representation they deserve.

In addition, the supposedly symbiotic relationship between insurance companies and their panel counsel whom courts fear will jeopardize insureds’ representations when coverage is at issue is arguably a relic. Insurers’ relentless efforts at cost control and litigation management have alienated or disillusioned many defense lawyers. The last two decades have borne witness to “[t]he dramatic deterioration of the relationship between many insurance defense firms and the insurers that engage their services.”<sup>142</sup> From an overall perspective, defense lawyers’ loyalty to their insurance company clients has also been strained by insurers’ increasing willingness to move business for economic or

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138. See *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co.* of S.C., 433 F.3d 365, 373 (4th Cir. 2005); *X-Rite, Inc.*, 748 F. Supp. at 1229; *Finley v. Home Ins. Co.*, 975 P.2d 1145, 1151–54 (Haw. 1998).

139. *State Farm Fire & Cas. Co. v. Mabry*, 497 S.E.2d 844, 847 (Va. 1998) (quoting *Norman v. Ins. Co. of N. Am.*, 239 S.E.2d 902, 907 (Va. 1978)).

140. *Twin City Fire Ins. Co.*, 433 F.3d at 373.

141. See Michael M. Marick & Karen M. Dixon, *The Insurer’s Contract “Right” To Defend—The “Tripartite” Relationship Reconsidered*, 39 TORT TRIAL & INS. PRAC. L.J. 1119, 1127–28 (2004).

142. *Id.* at 1227.

performance-related reasons. Long story short, courts' presumption of a close and harmonious relationship between insurers and their regular defense counsel is seriously suspect, and it therefore provides an unreliable basis for guiding independent counsel decisions.<sup>143</sup>

To the extent that courts distrust lawyers' motives, there is no assurance that independent counsel selected by an insured will be devoted to the insured. A lawyer selected as independent counsel by an insured may nonetheless favor the insurer's interests out of the belief or hope that, over the long term, the insurance company will be a more fertile source of legal business than the insured. Depending on the insured, this may well be true even where independent counsel is the insured's regular lawyer.

Furthermore, an insurer has no incentive to influence independent counsel's defense of the insured in a fashion detrimental or prejudicial to the insured, or to prod independent counsel to manipulate coverage. An insurer that did so would surely be estopped from asserting any coverage defenses it otherwise might have enjoyed,<sup>144</sup> and it would face bad faith liability.<sup>145</sup> Because bad faith liability carries with it the potential for damages well beyond an insurer's policy limits, as well as the threat of punitive damages, it effectively brakes insurers' potential inclination to compromise independent counsel relationships.

Even if an insurer required to provide an insured with independent counsel is deemed to have lost its right to defend the subject case such that the insurer's right to defend cannot be a basis for allowing the insurer to select independent counsel, good practical reasons remain for allowing insurers to select independent counsel. Liability insurers are professional litigants. Insurers typically select their regular defense counsel based on the lawyers' experience and skill in the substantive areas of risk being underwritten. To do otherwise would be foolhardy

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143. *See id.* at 1128 & n.30 (noting that "strong and valuable working relationships" do exist between many defense firms and insurers without necessarily creating an attorney-client relationship, and urging courts to examine the facts of the particular case rather than relying on assumptions that may not be accurate).

144. *See Two Bears Co. v. Am. State Ins. Co.*, No. 98-35407, 1999 WL 390922, at \*1 (9th Cir. May 24, 1999) (explaining that for this reason, and because of defense counsel's ethical constraints, Oregon law does not grant insureds a right to independent counsel); *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1170 (Haw. 1999) (noting that an insurer is estopped from denying coverage when it defends in such a manner as to seriously prejudice the insured).

145. *See Twin City Fire Ins. Co.*, 433 F.3d at 373; *Delmonte*, 975 P.2d at 1174.

because the lawsuits they defend for their insureds typically do not involve coverage issues, and therefore it is usually the insurers' money alone that is at stake. In contrast, many insureds do not have the same knowledge of counsel's competence or skills or are not as adept at evaluating lawyers' capabilities. Finally, unless and until an insurer actually denies coverage, it remains the insurer's money that is at stake. In fact, insurers routinely indemnify insureds in cases defended under a reservation of rights, either because the coverage defenses that initially drove the reservation do not develop or because indemnifying the insured is preferable from a business standpoint.

Although it is generally reasonable to allow an insurer to appoint independent counsel for its insured as long as the insurer does so honestly and objectively, an insurer cannot be permitted to select as independent counsel a lawyer it employs as staff counsel or who practices in a captive law firm that the insurer controls.<sup>146</sup> It is simply impossible to describe an insurance company employee as "independent" of the insurer, no matter how conscientious or honorable the employed lawyer may be. For that matter, no prudent insurer should want to appoint one of its employed lawyers as independent counsel for an insured out of the legitimate concern that the attendant appearance of impropriety will spawn bad faith or breach of contract allegations.

If a court does not trust an insurer to designate independent counsel, a reasonable second option is for the insured to select independent counsel with the insurer's consent.<sup>147</sup> The insurer must act reasonably in approving or disapproving the insured's choice of independent counsel.<sup>148</sup> If the insurer exercises its veto power over the insured's choice, it must have a good reason for doing so.<sup>149</sup> An insurer that unreasonably refuses to consent to the insured's choice of counsel risks breaching its duty to defend. This approach gives the insured a high level of confidence that its defense counsel are truly independent from the insurer while at the same time protecting the insurer's interests in having the case defended

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146. *Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.*, 200 F. Supp. 2d 84, 90 (D.R.I. 2002).

147. *See, e.g., Maddox v. St. Paul Fire & Marine Ins. Co.*, No. 01-1264, 2002 U.S. Dist. LEXIS 26686, at \*10 (W.D. Pa. May 29, 2002) (permitting insured to select counsel but allowing insurer the right to veto the insured's choice "with good reason"); *Ctr. Found. v. Chi. Ins. Co.*, 278 Cal. Rptr. 13, 21 (Ct. App. 1991) (stating that insurer's approval of independent counsel appointed by insured could not be "unreasonably withheld" (quoting *Emp'rs Fire Ins. Co. v. Beals*, 240 A.2d 397, 404 (R.I. 1968), *abrogated on other grounds by Peerless Ins. Co. v. Viegas*, 667 A.2d 785 (R.I. 1995))).

148. *Ctr. Found.*, 278 Cal. Rptr. at 21 (agreeing that the insurer had a right to approve counsel retained by the insured "provided that such approval was not unreasonably withheld").

149. *Maddox*, 2002 U.S. Dist. LEXIS 26686, at \*10.

by capable lawyers who are not antagonistic toward it. In some cases, insurers may prefer this approach over appointing independent counsel themselves. The advantage to an insurer in this approach is that it reduces the likelihood of a dispute over the selection of independent counsel and minimizes the prospect that the insured will later allege bad faith or premise an estoppel argument on the theory—whether meritorious or not—that independent counsel somehow favored the insurer in conducting the defense.

Next, there is the current majority rule, which vests the insured with sole discretion in selecting independent counsel, qualified by the insured's duty of good faith and fair dealing.<sup>150</sup> Following this approach, an insured may voluntarily decide to work with the insurer to select mutually agreeable independent counsel, but it is not required to do so.<sup>151</sup> The insured's duty of good faith and fair dealing requires it to select as independent counsel "an experienced attorney qualified to present a meaningful defense" and committed to "ethical billing practices."<sup>152</sup> Courts embracing this approach reason that it fairly balances the insured's interests against the insurer's by guaranteeing to the insured counsel of undivided loyalty while alleviating the insurer's concerns over competence and cost.<sup>153</sup> The current majority rule is perhaps not so different from the second alternative outlined above because an insurer that reasonably believed that independent counsel selected by the insured was unqualified or insisted on unreasonable billing practices or rates, for example, would plainly have the right to refuse that lawyer on the basis that the insured had not exercised good faith in making the selection.

An insured's right to select independent counsel might also be qualified by the insured's contractual duty to cooperate with the insurer. Cooperation clauses in liability insurance policies obligate insureds to cooperate in the defense of suits against them as a condition of receiving policy benefits. An insurer's defense under a reservation of rights does not excuse an insured's duty to cooperate.<sup>154</sup> The duty to cooperate is

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150. *CHI of Alaska, Inc. v. Emp'rs Reinsurance Corp.*, 844 P.2d 1113, 1121 (Alaska 1993).

151. *Nowacki v. Federated Realty Grp., Inc.*, 36 F. Supp. 2d 1099, 1109 (E.D. Wis. 1999) (interpreting Wisconsin law).

152. *Ctr. Found.*, 278 Cal. Rptr. at 21.

153. *CHI of Alaska, Inc.*, 844 P.2d at 1121.

154. *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co.*, 601 F.3d 1143, 1149–50 (11th Cir. 2010) (applying Florida law); *see, e.g., Zurich Am. Ins. Co. v. Frankel Enters., Inc.*,

thus a valid basis for requiring the insured to select competent counsel satisfactory to the insurer even though the insurer does not have the right to control the insured's defense in other respects.

It is important to recognize that all of the foregoing approaches are default mechanisms. An insured may voluntarily waive a conflict of interest<sup>155</sup> and accept defense counsel assigned by the insurer.<sup>156</sup> Insurers and insureds are free to select independent counsel cooperatively or to formulate other approaches to choosing counsel. For example, an insurer might submit a list of lawyers to the insured, who could then select one. Alternatively, the insured might propose a list of lawyers to the insurer, which could then select one. Either approach allows the party making the selection to satisfy itself as to the lawyer's suitability for the independent counsel role. Furthermore, some insurance companies now include selection of counsel clauses in their policies or endorse them on.<sup>157</sup> Such clauses should generally be enforceable.<sup>158</sup>

In addition, cases may sometimes be characterized by facts or circumstances that require specifically crafted approaches. For example, an insurer may decline to defend an insured for legitimate reasons only to later (1) have to change its position based on the revelation of new facts, or (2) have a defense obligation imposed on it by a court. In the meantime, the insured will have engaged defense counsel of its own choosing. Depending on the amount of time that has passed between counsel's retention and the insurer's assumption of the defense, it may be reasonable to permit the insured to retain its chosen counsel given that the insured's lawyer is already immersed in the case and is familiar with all of its aspects.<sup>159</sup>

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509 F. Supp. 2d 1303, 1311 (S.D. Fla. 2007) (finding that insured breached duty to cooperate in case being defended under a reservation of rights), *aff'd*, 287 F. App'x 775 (11th Cir. 2008) (per curiam).

155. Country Mut. Ins. Co. v. Olsak, 908 N.E.2d 1091, 1099 (Ill. App. Ct. 2009) (noting that a conflict of interest "may be resolved by full disclosure and consent of the parties").

156. Brohawn v. Transamerica Ins. Co., 347 A.2d 842, 854 (Md. 1975), *modified on other grounds by* Aetna Cas. & Sur. Co. v. Cochran, 651 A.2d 859 (Md. 1995); *see also* 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 202:35, at 202-89 (2005) (citing *Brohawn*, 347 A.2d 842).

157. *See, e.g.*, JACO Envtl., Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 2:09-cv-0145, 2009 WL 1591340, at \*7 (W.D. Wash. May 19, 2009) (quoting such a clause).

158. *See, e.g.*, N.Y. State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61, 65-66 (2d Cir. 1984) (enforcing such a clause in applying New York law).

159. *See, e.g.*, Purcigliotti v. Risk Enter. Mgmt. Ltd., 658 N.Y.S.2d 296, 297-98 (App. Div. 1997); Sturt v. Grange Mut. Cas. Co., 761 N.E.2d 1108, 1112 (Ohio Ct. App. 2001) (affirming trial court fee award where defense counsel hired by the insurer asked the insured's lawyer to remain in the case because of the lawyer's long involvement in it and a looming trial date).

### III. THE PRICE OF INDEPENDENCE

A principal concern for insurers required to provide independent counsel of an insured's choosing is the cost of those legal services. This is a recurring source of controversy because lawyers who are selected by insureds often charge much higher hourly rates than those an insurer pays its panel counsel.<sup>160</sup> An insurer's obligation to pay independent counsel clearly does not transform its policy into a blank check.<sup>161</sup> Even when independent counsel control the defense, an insurer is only obligated to pay reasonable defense costs.<sup>162</sup> This requirement protects insurers against "runaway legal fees."<sup>163</sup> The clear challenge for courts is defining *reasonable* in this context.

#### A. Reasonableness Under Rules of Professional Conduct

Model Rule of Professional Conduct 1.5(a) provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."<sup>164</sup> The rule applies regardless of who pays the lawyer's fees. Rule 1.5(a) lists eight factors to consider when weighing the reasonableness of a lawyer's fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;

160. See, e.g., *Photomedex, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 07-0025, 2008 WL 324025, at \*19 (E.D. Pa. Feb. 6, 2008) (involving independent counsel who charged hourly rates for two partners at \$685 and \$360, respectively, compared with insurer's regular rate of \$175 per hour).

161. William T. Barker, *Insurer Control of Defense: Reservations of Rights and Right to Independent Counsel*, 71 DEF. COUNS. J. 16, 26 (2004); see also *United Pac. Ins. Co. v. Hall*, 245 Cal. Rptr. 99, 102 (Ct. App. 1988) (stating that insured's right to independent counsel at insurer's expense "does not delegate to [independent] counsel a meal ticket immunized from judicial review for reasonableness").

162. *Chi. Title Ins. Co. v. FDIC*, 172 F.3d 601, 605 (8th Cir. 1999); *Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.*, 200 F. Supp. 2d 84, 93 (D.R.I. 2002) (citing *Magoun v. Liberty Mut. Ins. Co.*, 195 N.E.2d 514, 519 (Mass. 1964)); *MetLife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 2d 90, 96 (D.P.R. 2000); *CHI of Alaska, Inc. v. Emp'rs Reinsurance Corp.*, 844 P.2d 1113, 1121 (Alaska 1993); *IMC Global v. Cont'l Ins. Co.*, 883 N.E.2d 68, 80 (Ill. App. Ct. 2007); *Nisson v. Am. Home Assurance Co.*, 917 P.2d 488, 490-91 (Okla. Civ. App. 1996).

163. *MetLife Capital Corp.*, 100 F. Supp. 2d at 96.

164. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2010).

- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.<sup>165</sup>

No single factor controls the reasonableness of a lawyer's fee,<sup>166</sup> and not all factors are relevant in all cases.<sup>167</sup> The weight to be assigned to any given factor depends on the facts of the particular case.<sup>168</sup> Moreover, the Rule 1.5(a) factors are not exclusive.<sup>169</sup> Additionally, in analyzing the reasonableness of legal fees, courts should consider the engagement as a whole.<sup>170</sup> Regardless, the burden of establishing the reasonableness of a fee rests with the lawyer.<sup>171</sup>

Most liability insurers employ outside counsel guidelines to which their panel counsel are required to adhere.<sup>172</sup> These guidelines typically address defense counsel's billing practices and may provide, for example, that the insurer will not pay for intraoffice conferences, legal research in excess of two or three hours absent prior approval, or tasks that the insurer considers clerical, or the guidelines may limit the number of lawyers for which the insurer will pay to appear at depositions and hearings.<sup>173</sup> Whatever the merits of such requirements, an insurer's preemptive refusal to pay for activities in whole or part does not alone render the legal fees charged for those activities unreasonable. Independent counsel may perform activities contrary to insurers' billing guidelines if they believe them necessary, and an insurer may decline to pay for those

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165. *Id.*

166. *Rodriguez v. Ancona*, 868 A.2d 807, 814 (Conn. App. Ct. 2005); *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 30, 720 N.W.2d 54, 65.

167. *Twp. of W. Orange v. 769 Assocs., LLC*, 969 A.2d 1080, 1088 (N.J. 2009).

168. *McCabe v. Arcidy*, 635 A.2d 446, 452 (N.H. 1993); *In re Malone*, 886 A.2d 181, 185 (N.J. Super. Ct. App. Div. 2005).

169. *See, e.g.*, *Nunn Law Office v. Rosenthal*, 905 N.E.2d 513, 520–21 (Ind. Ct. App. 2009); *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 929 A.2d 932, 955 (Md. 2007); *Twp. of W. Orange*, 969 A.2d at 1088.

170. *See Weatherford v. Price*, 532 S.E.2d 310, 315 (S.C. Ct. App. 2000); *Alexander v. Inman*, 903 S.W.2d 686, 695 (Tenn. Ct. App. 1995); *Lawyer Disciplinary Bd. v. Morton*, 569 S.E.2d 412, 417 (W. Va. 2002).

171. *Kovitz Shifrin Nesbit, P.C. v. Rossiello*, 911 N.E.2d 1180, 1187 (Ill. App. Ct. 2009); *Gold, Weems, Bruser, Sues & Rundell v. Granger*, 2006-859, p. 7 (La. App. 3 Cir. 12/29/06); 947 So. 2d 835, 842; *In re Dawson*, 2000-NMSC-024, ¶ 12, 129 N.M. 369, 8 P.3d 856; *Bass v. Rose*, 609 S.E.2d 848, 853 (W. Va. 2004).

172. Ian A. Stewart & Gregory K. Lee, *Considerations Presented by Litigation Management Guidelines*, FOR DEF., June 2009, at 70, 70 (stating that such guidelines improve "quality, uniformity and cost control").

173. Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts To Manage Legal Care*, 28 U. MEM. L. REV. 57, 95 (1997); Amy S. Moats, Note, *A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemmas Raised by Insurers' Billing and Litigation Management Guidelines*, 105 W. VA. L. REV. 525, 538 (2003).

activities or pay under protest, thus framing a dispute for resolution by a court or other neutral third party. The mere fact that an insurer does not want to pay for independent counsel's activities, however, does not alone determine the reasonableness of the associated fees.

*B. The Crux of the Reasonableness Issue: Fee Comparisons*

As noted above, a key factor when evaluating the reasonableness of legal fees is "the fee customarily charged in the locality for similar legal services."<sup>174</sup> As frequent and sophisticated purchasers of legal services that tend to supply their panel firms with respectable volumes of business, insurance companies generally negotiate hourly rates below what those law firms typically charge their other commercial clients. Thus, an insurer usually considers the fee customarily charged in the locality for similar services to be the discounted hourly rates to which its panel counsel have agreed. After all, that is the hourly rate the insurer would pay to defend the insured but for the conflict of interest requiring independent counsel.

Insurers often negotiate steep discounts with their panel counsel. Proposed independent counsel may consider the insurer's discounted hourly rate to be acceptable, but it is equally likely they will not. Lawyers proposed as independent counsel are generally not receiving sufficient work from the insurer to justify a substantial rate reduction, if any. They may have full workloads at their regular rates and thus feel no need to accept a new engagement on less favorable terms. They may also consider themselves to be more capable than the insurer's panel counsel. From their standpoint, the fee customarily charged in the locality for similar services is either the hourly rate they would normally charge commercial clients to defend similar cases or the hourly rate charged by lawyers at their level at peer law firms for similar representations. One way or another, it is certainly not an "insurance defense" rate.

The fact that an insurer's panel counsel are compensated at a lower rate does not compel the conclusion that higher rates proposed by independent counsel are unreasonable.<sup>175</sup> At least one court has held that the reasonableness of independent counsel's fees cannot be measured

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174. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3) (2010).

175. *See Mobil Oil Corp. v. Md. Cas. Co.*, 681 N.E.2d 552, 563 (Ill. App. Ct. 1997).

solely by reference to an insurer's panel counsel rates.<sup>176</sup> Other courts that have considered the issue, however, have been sympathetic to insurers' arguments that the reasonableness of legal fees charged or proposed by independent counsel is appropriately measured by comparing independent counsel's fees with the fees the insurers would otherwise pay panel counsel.<sup>177</sup> That is the statutory approach employed in Alaska and California.<sup>178</sup> Although lawyers may never charge unreasonable fees and clients cannot consent to unreasonable charges, insureds may have reasons for paying their lawyers more generously than an objective observer would conclude is appropriate under the circumstances.<sup>179</sup> However valid those reasons may be, they do not control the analysis where the fees are to be paid not by the insured but by a third party. The third-party payor's reasonable expectations must be taken into account even if they are not fully satisfied. In any event, insureds do not have the right to dictate to insurers the hourly rates they must pay independent counsel.<sup>180</sup>

### C. Analysis

Insureds clearly cannot dictate to insurers the rate at which they compensate independent counsel. Insurers are bound only to pay reasonable fees for independent counsel.<sup>181</sup> In most cases, the insurer and independent counsel selected by the insured will be able to negotiate a reasonable fee agreement. After all, the lawyers proposed as independent counsel surely want to represent the insured in the matter, and the insurer just as certainly recognizes that if it acts unreasonably in engaging independent counsel, it risks breaching its duty to defend the insured.<sup>182</sup> But what of the occasional case in which the insurer and the lawyers offered as independent counsel are unable to agree on compensation?

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176. *N. Sec. Ins. Co. v. R.H. Realty Trust*, 941 N.E.2d 688, 691–93 & n.13 (Mass. App. Ct. 2011) (explaining why panel counsel rates may not be reasonable both in theory and as a matter of proof in this case).

177. *See, e.g., Lone Star Indus., Inc. v. Liberty Mut. Ins. Co.*, No. 89C-SE-187-1-CV, 1990 WL 127826, at \*2–3 n.3 (Del. Super. Ct. Aug. 28, 1990) (requiring independent counsel chosen by insured to accept insurer's hourly rate caps); *Aquino v. State Farm Ins. Cos.*, 793 A.2d 824, 832 (N.J. Super. Ct. App. Div. 2002) (noting that independent counsel might be required to accept less than the standard hourly rate given discounted rates normally paid by insurers, which may be determined by the court).

178. ALASKA STAT. § 21.96.100(d) (2008); CAL. CIV. CODE § 2860(c) (West 2009).

179. *Ctr. Found. v. Chi. Ins. Co.*, 278 Cal. Rptr. 13, 21 n.11 (Ct. App. 1991).

180. *Aquino*, 793 A.2d at 832.

181. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2010).

182. *See, e.g., Rector of St. Peter's Church in Phila. v. Am. Nat'l Fire Ins. Co.*, 97 F. App'x 374, 378 (3d Cir. 2004) (finding that insurer's offer to engage law firm on terms that the firm was unwilling to accept breached duty to defend).

Ultimately, a court or other neutral third party will have to determine if the legal fees sought by independent counsel are reasonable and thus whether the insurer must pay them.<sup>183</sup> In this context, as elsewhere, the reasonableness of lawyers' fees should be determined principally by the factors specified in Rule 1.5(a). Which factors apply, and the weights to be assigned them, will depend on the case.

In examining the Rule 1.5(a) factors, several require elaboration, starting with "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly."<sup>184</sup> In short, not all cases are alike. The "novelty and difficulty" of a matter may be either factual or legal.<sup>185</sup> A catastrophic injury, wrongful death, or professional liability case, for instance, is much different from a slip-and-fall or automobile case involving minor injuries. Insurers obligated to engage independent counsel chosen by an insured must acknowledge that the defense of difficult matters generally requires experienced and skilled lawyers and that such lawyers can command greater rates than lawyers who handle relatively minor or simple cases.<sup>186</sup> Fortunately for all concerned, liability insurers, as professional litigants, understand this quite well. Most insurers factor the nature of a case into their defense assignments, and they typically have strata of law firms on their panels. Thus, and by way of example, although firms *A* and *B* on an insurer's panel may receive simple cases to defend at very low hourly rates, firms *C* and *D* are assigned complex matters or large losses and are compensated at higher hourly rates.

This leads smoothly into the next important factor, which is "the fee customarily charged in the locality for similar legal services."<sup>187</sup> The "locality" is the geographic area from which it would be reasonable to obtain counsel, and it is not necessarily limited to a particular city,

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183. *See generally* *Cunard Line Co. v. Datrex, Inc.*, 2009-656, p. 8 (La. App. 3 Cir. 12/9/09); 26 So. 3d 886, 892-93 (finding that trial court did not abuse its discretion in refusing insurer's request to impose a fee cap on independent counsel but stated instead that, if needed, it would determine reasonableness of fees based on evidence presented at an adversary hearing).

184. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(1).

185. *West v. Club at Spanish Peaks, LLC*, 2008 MT 183, ¶ 100, 343 Mont. 434, 186 P.3d 1228.

186. *See Cont'l Corp. v. Aetna Cas. & Sur. Co.*, No. 85-C-1165, 1987 U.S. Dist. LEXIS 16133, at \*19-20 (E.D. Wis. Oct. 30, 1987) (justifying higher fees for counsel selected by the insured based on the complexity and difficulty of the litigation).

187. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3) (2010).

judicial district, or even a state.<sup>188</sup> The baseline should be the rate the insurer would pay one of its panel firms that it regularly uses in the jurisdiction to defend a similar case. That rate may vary by the nature of the litigation as explained above, but it still should be the insurer's customary rate that principally governs because that is the rate the insurer would pay one of its panel firms were it allowed to appoint counsel. Despite the conflict of interest, the case remains an insurance defense representation when pricing similar legal services. The obvious opposing argument—that a court should focus on the substantive nature of the litigation when evaluating the cost of legal services rather than the nature of the entity bearing the cost—is unpersuasive because liability insurers defend cases involving most every substantive area of the law. In any event, when evaluating the reasonableness of independent counsel's fees, the fact that lawyers picked as independent counsel normally charge more for their services is immaterial,<sup>189</sup> as is the fact that the insured agreed to pay independent counsel's higher rate.<sup>190</sup>

On the other side of the coin, independent counsel who believe themselves due an hourly rate higher than the rate the insurer normally pays should be prepared to establish why that is so according to the Rule 1.5(a) factors. The best argument for independent counsel is that unlike the insurer's panel counsel, they neither maintain nor desire a continuing relationship with the insurer that would justify a substantial downward departure from their standard rates.<sup>191</sup> In fact, they might understandably argue, it is precisely that professional separation that qualifies them to serve as independent counsel. Furthermore, independent counsel might contend that asking them to accept a discounted hourly rate is unreasonable because the “nature and length of [their] professional relationship” with the insured enable them to defend the insured more effectively and efficiently than the insurer's panel counsel, who do not

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188. *Lettunich v. Lettunich*, 185 P.3d 258, 262–63 (Idaho 2008).

189. *See Stokes v. Norwich Taxi, LLC*, 958 A.2d 1195, 1214 (Conn. 2008) (discussing the use of local market rates generally, despite what lawyers typically charge for their services).

190. *In re Malone*, 886 A.2d 181, 185 (N.J. Super. Ct. App. Div. 2005) (stating that a claimant seeking attorney's fees from government agency was not entitled to be reimbursed for her lawyer's high hourly rate “merely because she signed a retainer agreement to that effect”).

191. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(6) (2010) (listing as a factor “the nature and length of the professional relationship with the client”); *see, e.g.*, *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 845 F. Supp. 458, 462 (W.D. Mich. 1993) (comparing insurance defense rates with higher hourly rates “for legal services provided to a corporate client on a temporary or ad hoc basis” and awarding rates higher than those the insurer normally would have paid to defense counsel), *aff'd*, 64 F.3d 1010 (6th Cir. 1995); *N. Sec. Ins. Co. v. R.H. Realty Trust*, 941 N.E.2d 688, 692 (Mass. App. Ct. 2011) (explaining why hourly rate greater than insurer's panel counsel rate was reasonable).

enjoy the same familiarity.<sup>192</sup> The familiarity argument will seldom be compelling, however, because in most cases any efficiency that might be achieved through an ongoing relationship will not materially affect or benefit the defense as a whole and therefore will be minor when compared with the savings achieved through the insurer's typical hourly rate discount.

All parties must accept certain realities here. From the insured's perspective, it may not be able to be represented by its chosen counsel if those lawyers and the insurer cannot agree on reasonable compensation. The insured should be willing to accept substitute counsel as long as those lawyers are capable and loyal. An insured denied its first choice of counsel has not been denied the right to select counsel altogether. If the insured insists on representation by its chosen counsel, it may be required to pay the difference between what the insurer is willing to pay and what the lawyers are willing to accept as fees. Independent counsel must understand that an insurance policy is not a blank check.<sup>193</sup> If they want to represent the insured, they may have to compromise on compensation. There is no requirement that they do so, of course, because they can decline the representation if they think it will be unprofitable. Their willingness to bend may depend on their desire to establish or maintain a relationship with the insured, or on practice-related benefits that attend the representation. Finally, from the insurer's standpoint, it is free to negotiate the best deal it can achieve with the lawyers selected by the insured. If those lawyers are unreasonable or are simply unwilling to compromise and the insurer cannot come to terms with them, the insurer may ask the insured to propose different counsel. The insurer must be flexible in its expectations with respect to independent counsel's fees, however, lest its stubbornness cause it to breach its duty to defend.<sup>194</sup>

One solution if the parties cannot agree on independent counsel's compensation is for the insurer to initially pay independent counsel what it considers to be a reasonable hourly rate to defend the insured, with the understanding that the insured or independent counsel will later seek to recover the difference between that rate and the higher rate sought by

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192. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(6).

193. See sources cited *supra* note 161.

194. Rector of St. Peter's Church in Phila. v. Am. Nat'l Fire Ins. Co., 97 F. App'x 374, 378 (3d Cir. 2004).

independent counsel.<sup>195</sup> The parties could also agree that the insurer will initially pay the rate demanded by independent counsel and later seek to recoup the difference between that rate and the lower rate offered by the insurer through arbitration or separate litigation. Arbitration would seem to be the logical forum for resolving such a dispute, but litigation is an option. Both approaches allow the insurance company to satisfy its duty to defend without being exploited in the process. The second alternative is arguably preferable because it places responsibility for the defense on the insurer, which is consistent with its contractual duty to defend, but both are generally fair. Regardless, the burden of establishing the reasonableness of independent counsel's fees rests with either the insured or independent counsel.<sup>196</sup> This allocation of responsibility is consistent with the resolution of attorney's fees controversies in other areas of the law. It is certainly not the insurer's burden to prove that independent counsel's fees are unreasonable.<sup>197</sup> The insurer must, however, state its objections to independent counsel's fees "with particularity and clarity."<sup>198</sup>

#### IV. INDEPENDENT COUNSEL'S RELATIONSHIP WITH THE INSURER

Once independent counsel are engaged, it is natural to examine their relationship with the insurers paying their fees. In most cases in which insurers defend insureds with panel counsel and control the defense, the defense lawyer has two clients—the insurer and the insured.<sup>199</sup> This is the well-known "dual client doctrine," under which the defense lawyer owes fiduciary duties to both the insurer and insured.<sup>200</sup> For example, a defense lawyer in a dual client relationship owes the insured and the insurer equal duties of loyalty. Understandably, then, a defense lawyer in a dual client relationship cannot be involved in disagreements or

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195. *See* *Chi. Title Ins. Co. v. FDIC*, 172 F.3d 601, 605–06 (8th Cir. 1999) (discussing a similar approach where the court required the insurer to reimburse the insured).

196. *Liberty Mut. Ins. Co. v. Cont'l Cas. Co.*, 771 F.2d 579, 582 (1st Cir. 1985) (calling it "obvious that the party claiming such expenditures has the burden of proving them, including the burden of proving whether the fees were in fact reasonable"); *see, e.g., Photomedex, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 07-0025, 2008 WL 324025, at \*20 (E.D. Pa. Feb. 6, 2008) (denying insured summary judgment on reasonableness of independent counsel's fees where insured provided no supporting evidence).

197. *See Liberty Mut. Ins. Co.*, 771 F.2d at 582 (assigning the burden of persuasion to the insured).

198. *Pfeifer v. Sentry Ins.*, 745 F. Supp. 1434, 1443 (E.D. Wis. 1990).

199. *JERRY & RICHMOND*, *supra* note 17, § 114, at 887 (describing this view as the majority rule).

200. *Id.* (quoting *Nat'l Union Fire Ins. Co. v. Stites Prof'l Law Corp.*, 1 Cal. Rptr. 2d 570, 575 (Ct. App. 1991)).

disputes between the insured and insurer, regardless of whether those controversies involve coverage, settlement, or any other issue. An insurer that shares an attorney-client relationship with a defense lawyer has all the privileges and rights and is owed all the duties that come with client status. But that is not the independent counsel model, which establishes the insured as the defense lawyer's sole client. The independent counsel model requires that the defense lawyer be loyal only to the insured and mandates that the defense lawyer be free from the insurer's control and influence.<sup>201</sup>

So what, then, of the relationship, if any, between the insurer and independent counsel? Is the insurer anything other than a third-party payor of independent counsel's legal fees? The answers to those questions broadly encompasses four issues: (1) independent counsel's duty to communicate, consult, and cooperate with the insurer in defending the insured, (2) independent counsel's ability to take the insured's side in disagreements between the insured and the insurer, (3) independent counsel's potential malpractice liability to the insurer should counsel's conduct of the defense fall below the standard of care and the insurer be damaged as a result, and (4) the insurer's potential vicarious liability for independent counsel's misconduct.

*A. Independent Counsel's Duty To Communicate, Consult, and Cooperate with the Insurer in the Defense*

An insurer divorced from its right to control an insured's defense by a conflict of interest remains heavily invested in the case. The insurer is certainly interested in having independent counsel defend the insured effectively and efficiently because the insurer (1) remains responsible for defense costs and (2) may ultimately be required to pay any settlement or judgment, the amount of which will almost certainly be influenced by the quality of the defense effort. The insurer retains the right to settle the case at its expense and to refuse payment of any settlement struck by the insured or independent counsel without its approval.<sup>202</sup> An insurer

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201. *See* Hartford Cas. Ins. Co. v. A & M Assocs., Ltd., 200 F. Supp. 2d 84, 90 (D.R.I. 2002) (explaining the independent counsel construct); Mosier v. S. Cal. Physicians Ins. Exch., 74 Cal. Rptr. 2d 550, 564 (Ct. App. 1998) (quoting several cases in explaining this principle).

202. *See, e.g.*, Low v. Golden Eagle Ins. Co., 2 Cal. Rptr. 3d 761, 772 (Ct. App. 2003) (enforcing "no voluntary payments" provision where insured settled after tendering defense and insurer did not refuse to defend); Dynamic Concepts, Inc. v. Truck Ins.

that attempts to negotiate the settlement of a case defended by independent counsel does not thereby assume control of the defense.<sup>203</sup> An insurer may decide to withdraw its reservation of rights, assume control of the insured's defense, and indemnify the insured. Indeed, the insurer may be required to change position and defend and indemnify the insured without qualification based on facts revealed in the course of the litigation. In summary, the insurer's exercise of its own rights, as well as its fulfillment of its duties to its insured, all depend on the insurer's receiving "full and timely information" from independent counsel.<sup>204</sup>

Despite the insurer's reservation of rights, the insured is generally obligated to cooperate with the insurer in its defense.<sup>205</sup> Independent counsel, as the insured's agents,<sup>206</sup> must carry out the insured's duty to cooperate to the extent they are called upon to do so.

For these reasons, an insurer can reasonably insist that independent counsel fully inform it of factual and legal developments related to the defense, consult with it on defense strategy and tactics,<sup>207</sup> and consult with it before incurring major expenses in the course of the defense.<sup>208</sup> The insurer's advice, insight, or suggestions may prove valuable to the insured. As long as the consultations do not reveal confidential information

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Exch., 71 Cal. Rptr. 2d 882, 891 (Ct. App. 1998) (concluding that insurer that appointed independent counsel for insured and surrendered control of the defense was not obligated to fund settlement to which insured unilaterally agreed); *W. Polymer Tech., Inc. v. Reliance Ins. Co.*, 38 Cal. Rptr. 2d 78, 82 (Ct. App. 1995) (affirming insurer's right to settle case defended by independent counsel).

203. *Nat'l Union Fire Ins. Co. v. CNA Ins. Cos.*, 28 F.3d 29, 33 (5th Cir. 1994); *Mut. Ins. Co. v. Murphy*, 630 F. Supp. 2d 158, 169 (D. Mass. 2009).

204. *Barker*, *supra* note 161, at 25.

205. An insurer's reservation of rights does not eliminate the insured's duty to cooperate because a defense under reservation is not a breach of contract that would excuse the insured's performance. That essential principle remains true where a conflict of interest necessitates the appointment of independent counsel. James M. Fischer, *The Professional Obligations of Cumis Counsel Retained for the Policyholder but Not Subject to Insurer Control*, 43 TORT TRIAL & INS. PRAC. L.J. 173, 185-86 (2008). The insured remains obligated to cooperate in its defense in all respects, except that in this context, the duty to cooperate cannot require the insured to share with the insurer information that the insurer could use to defeat coverage. *But see Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 327-31 (Ill. 1991) (holding that cooperation clause in policy overrides the insured's attorney-client privilege and work product immunity).

206. *Vreeken v. Lockwood Eng'g, B.V.*, 218 P.3d 1150, 1170 (Idaho 2009) ("[T]he relationship between an attorney and client is one of agency in which the client is the principal and the attorney is the agent."); *Spees v. Ky. Legal Aid*, 274 S.W.3d 447, 448 (Ky. 2009) ("An attorney acts as an agent of his client." (citing *Clark v. Burden*, 917 S.W.2d 574, 575 (Ky. 1996))).

207. *Barker*, *supra* note 161, at 25; *cf. In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures*, 2000 MT 110, ¶¶ 38-39, 299 Mont. 321, 2 P.3d 806 (requiring consultation where insured is sole client of defense lawyer hired by insurer).

208. 1 WINDT, *supra* note 27, § 4:22, at 4-190.

held by the insured that might be used to defeat coverage, allowing the insurer to consult on the defense cannot harm the insured. If the insurer's suggestions and advice are not advantageous, the insured and independent counsel are free to ignore them. Having lost the right to control the defense, the insurer cannot demand that the insured or independent counsel heed its advice or suggestions.<sup>209</sup> As for consultation on major expenses, an insurer has no obligation to pay for services or items that "are overpriced or inappropriate," and no matter how well-intentioned independent counsel may be, they are not the sole arbiter of the reasonableness of all defense expenditures.<sup>210</sup> In addition, advance notice of substantial expenses may cause an insurer to explore settlement on a cost of defense basis or withdraw its reservation of rights in order to regain control of the defense, both of which benefit the insured. At the same time, insurers must be reasonable when evaluating the desirability or worth of major defense expenditures on which they are consulted.

In many cases, a defense lawyer will be deemed to share an attorney-client relationship with an insurer not because they expressly so agreed but because the defense lawyer gave the insurer legal advice relating to the defense on which the insurer relied, thus creating a de facto attorney-client relationship.<sup>211</sup> That is not the situation, however, where independent counsel consult with an insurer.<sup>212</sup> First, and as a practical matter, the insurer clearly understands that independent counsel cannot represent it in the matter because of the underlying conflict of interest.<sup>213</sup> Any communication or consultation between independent counsel and the insurer is purely informational.<sup>214</sup> Second, in some jurisdictions the

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209. See *Hartford Cas. Ins. Co. v. A & M Assocs., Ltd.*, 200 F. Supp. 2d 84, 90 (D.R.I. 2002) (explaining that the insurer cannot control the litigation); *Jacob v. W. Bend Mut. Ins. Co.*, 553 N.W.2d 800, 805 (Wis. Ct. App. 1996) (explaining that unless the insurer is willing to accept coverage, it has no authority to affect independent counsel's defense of the insured).

210. *Barker*, *supra* note 161, at 26.

211. *JERRY & RICHMOND*, *supra* note 17, at 888.

212. *Mosier v. S. Cal. Physicians Ins. Exch.*, 74 Cal. Rptr. 2d 550, 564 (Ct. App. 1998) (quoting *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574, 579 (N.D. Cal. 1995)).

213. *Bell Lavalin, Inc. v. Simcoe & Erie Gen. Ins. Co.*, 61 F.3d 742, 748 (9th Cir. 1995). Similarly, the fact that a lawyer serving as independent counsel furnishes an insurer with status reports or confidential information in furtherance of the insured's defense does not create a duty of loyalty owed by the lawyer to the insurer, nor does such activity create a conflict of interest for the lawyer. *Id.*

214. *Mosier*, 74 Cal. Rptr. 2d at 564 (quoting *First Pac. Networks, Inc.*, 163 F.R.D. at 579).

conflict justifying the appointment of independent counsel prevents the formation of an attorney-client relationship between independent counsel and the insurer as a matter of law.<sup>215</sup>

Most insurers have litigation management guidelines—commonly referred to as “outside counsel guidelines”—that they expect defense counsel to follow when defending their insureds.<sup>216</sup> Insurers’ outside counsel guidelines call for case budgets, set reporting intervals or requirements, mandate preapproval of certain activities or expenses, and the like.<sup>217</sup> Even in cases in which the insurer controls the defense, however, defense lawyers cannot allow an insurer’s guidelines to interfere with their own professional judgment about how to best represent the insured.<sup>218</sup> That is doubly true where the insurer has lost the right to control the defense and the insured is defended by independent counsel. Still, there is nothing improper about an insurer’s requiring independent counsel to adhere to its outside counsel guidelines as long as the guidelines do not interfere with or unreasonably restrict independent counsel’s professional judgment or otherwise prejudice the insured’s defense.<sup>219</sup> In the event that adherence to an insurer’s outside counsel guidelines might impair the insured’s defense, then obviously independent counsel need not follow them unless instructed by the insured to do so.<sup>220</sup> That instruction will likely never come.

It is critically important that whether required by outside counsel guidelines or simply requested by the insurer, independent counsel keep the insurer informed of the status of the case being defended and developments in that litigation. Independent counsel should not resist insurers’ requests for information as long as they do not seek information relevant to coverage. The insurer is entitled to information relevant to the defense by virtue of the insured’s duty to cooperate.<sup>221</sup> Except for information relating to coverage, independent counsel cannot invoke work product immunity or the attorney-client privilege to deny the insurer information it needs to analyze or evaluate the insured’s

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215. *See id.*; *see also* *Swiss Reinsurance Am. Corp. v. Roetzel & Andress*, 163 Ohio App. 3d 336, 2005-Ohio-4799, 837 N.E.2d 1215, at ¶¶ 15–25 (concluding that conflict of interest precluded existence of attorney-client relationship between the insurer and the lawyer it hired to defend the insured).

216. *Richmond*, *supra* note 173, at 95.

217. *Id.*; *Moats*, *supra* note 173, at 538.

218. *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 71 Cal. Rptr. 2d 882, 889 & n.9 (Ct. App. 1998); *In re Rules of Prof’l Conduct & Insurer Imposed Billing Rules & Procedures*, 2000 MT 110, ¶¶ 44–51, 299 Mont. 321, 2 P.3d 806; *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627–28 (Tex. 1998); *Barefield v. DPIC Cos.*, 600 S.E.2d 256, 269–70 (W. Va. 2004).

219. *See Richmond*, *supra* note 173, at 95.

220. *Dynamic Concepts, Inc.*, 71 Cal. Rptr. 2d at 889 n.9.

221. 4 MALLEN & SMITH, *supra* note 20, § 30:21, at 368, 372.

defense.<sup>222</sup> Independent counsel should not be concerned that sharing information with the insurer will be discoverable by the plaintiff because even though the insurer is not a client, communications between them are immune from discovery under the work product doctrine. Although the insurer and insured are adversarial with respect to the insurer's indemnity obligation, they are united in interest insofar as defeating the plaintiff's suit against the insured is concerned. Thus, independent counsel's communications with the insurer, although made to a third party, are not made to an adversary or a conduit to an adversary and accordingly retain their work product immunity.<sup>223</sup> Depending on the facts and the jurisdiction, the communications may also be shielded from discovery by the plaintiff by the attorney-client privilege and any insurer-insured privilege.<sup>224</sup> If nothing else, the attorney-client privilege certainly should extend to independent counsel's communications with the insurer under the "common interest" doctrine.<sup>225</sup>

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222. *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1365–66 (D.D.C. 1986); *Northwood Nursing & Convalescent Home, Inc. v. Cont'l Ins. Co.*, 161 F.R.D. 293, 297–99 (E.D. Pa. 1995); 4 MALLEN & SMITH, *supra* note 20, § 30:21, at 372.

223. *See* DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 290 (2011) (discussing waiver of work product immunity); 1 DAVID M. GREENWALD ET AL., TESTIMONIAL PRIVILEGES § 2:20, at 2-62, -63 (3d ed. 2005) (explaining waiver of work product immunity through disclosure to a third party).

224. *See* *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) (discussing attorney-client privilege); *Pietro v. Marriott Senior Living Servs., Inc.*, 810 N.E.2d 217, 226 (Ill. App. Ct. 2004) (extending attorney-client privilege to include insurer-insured privilege); *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134, 136 (Mo. Ct. App. 1985) (recognizing insurer-insured privilege); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (2000) (stating that regardless of whether an insurer and defense lawyer share an attorney-client relationship, their communications "concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding").

225. *Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 571–73 (E.D. Cal. 2002) (discussing federal law and applying common interest doctrine).

*B. Independent Counsel's Ability To Side with the Insured  
Against the Insurer*

When an insurer appoints counsel for its insured in a case in which there is no conflict of interest and the insurer controls the defense, the lawyer hired by the insurer has a single role—defending the insured against the allegations made by plaintiff.<sup>226</sup> That is the sole purpose for which the lawyer is representing the insured. An insurer has no authority, duty, or desire to provide a lawyer to advise the insured on coverage.<sup>227</sup> If defense lawyers competent to advise insureds on coverage did so, and the insurer was also a client, they would plainly suffer a conflict of interest.<sup>228</sup> If lawyers had thought to structure the representation so that insureds were their sole client, they would probably still be reluctant to advise insureds on coverage because they would have to know that the insurer would not pay them for that time on the basis that the services were beyond the scope of the representation. Thus, if insureds want coverage advice in a typical case, they must engage coverage counsel at their own expense.

Understandably, an insured in a case tinged by a conflict may require coverage advice. As in any case, the insured is free to engage counsel at its expense to provide such advice. But may independent counsel advise the insured on coverage? Assuming that independent counsel do not share an attorney-client relationship with the insurer in unrelated matters—as they well might in jurisdictions that allow insurers to appoint independent counsel—ethics rules are no impediment to independent counsel's advising insureds on coverage.<sup>229</sup> Some cases state that lawyers serving as independent counsel cannot be “involved in coverage disputes,”<sup>230</sup> but it is unclear whether these courts mean that independent counsel are prohibited from advising the *insurer* on coverage, as is unquestionably true, or whether they must avoid coverage questions altogether. Or perhaps these courts mean that independent counsel can advise the insured on coverage questions but cannot represent the insured in actual or threatened coverage litigation with the insurer arising out of the same case they are defending.

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226. 1 WINDT, *supra* note 27, § 4:19, at 4-168; Leo P. Martinez, *Coverage Advice: The Missing Piece of the Cumis Puzzle*, 44 TORT TRIAL & INS. PRAC. L.J. 63, 74 (2008).

227. Martinez, *supra* note 226, at 74.

228. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2010) (stating that a lawyer has a concurrent conflict of interest where the representation of one client is directly adverse to another client).

229. See *id.* R. 1.7(a) (governing concurrent client conflicts of interest).

230. Hartford Cas. Ins. Co. v. A & M Assocs., Ltd., 200 F. Supp. 2d 84, 90 (D.R.I. 2002).

Although there is no ethical prohibition on independent counsel's advising insureds on coverage issues, that does not mean that insurers must accept such arrangements. Coverage advice is clearly beyond the scope of the insurer's duty to defend, which of course underpins independent counsel's involvement in the case, and it is outside the scope of the representation for which the insurer has agreed to pay.<sup>231</sup> For these reasons, the insurer can have no obligation to compensate independent counsel for any time spent on coverage issues. Moreover, an insurer is within its rights to insist that lawyers serving as independent counsel not advise insureds on coverage. An insurer required to accept independent counsel "is under a duty to provide only an impartial defense—not to sacrifice its own interests."<sup>232</sup> If independent counsel were to go beyond rendering advice or opinions and perhaps represent the insured in a coverage or bad faith dispute with the insurer or attempt to slant coverage in the insured's favor in the course of the defense, the insurer would be within its rights to reject those lawyers or demand that the insured swiftly replace them.<sup>233</sup> An insurer cannot reasonably be expected to tolerate antagonistic behavior by the same lawyers with whom it must interact in their capacity as defense counsel.<sup>234</sup> This is true even when the insurer's interactions with independent counsel are limited.<sup>235</sup>

### *C. Independent Counsel's Potential Malpractice Liability to the Insurer*

Insurance defense counsel are increasingly the target of legal malpractice lawsuits by the insurers that hire them to defend their

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231. *But see* James A. Brown & Shannon S. Holtzman, *When the Carrier and Insured Part Ways: The Insured's Right to Independent Counsel*, LA. B.J., June/July 2005, at 16, 18 (arguing that barring independent counsel from advising insureds on coverage deprives insureds of adequate and complete defenses).

232. *N.Y. State Urban Dev. Corp. v. VSL Corp.*, 563 F. Supp. 187, 190 n.1 (S.D.N.Y. 1983), *aff'd*, 738 F.2d 61 (2d Cir. 1984).

233. *See, e.g.*, *Maddox v. St. Paul Fire & Marine Ins. Co.*, No. 01-1264, 2002 U.S. Dist. LEXIS 26686, at \*10 (W.D. Pa. May 29, 2002) (allowing insurer to reject insured's chosen independent counsel where those lawyers intended to represent the insured in a bad faith claim against the insurer and fostered an "extremely high level of acrimony" with the insurer in the case they were defending); *N.Y. State Urban Dev. Corp.*, 563 F. Supp. at 190 n.1 (noting that insurer acted reasonably in refusing to approve independent counsel who were hostile to it).

234. *Maddox*, 2002 U.S. Dist. LEXIS, at \*10 n.6.

235. *Id.* (discussing interactions confined to billing).

insureds. Most states that have considered the issue permit a liability insurer to sue defense counsel for professional negligence in representing an insured in an underlying action.<sup>236</sup> Very few cases, however, involve independent counsel.

Most suits against lawyers allege legal malpractice, professional negligence, or breach of fiduciary duty. Legal malpractice plaintiffs must prove that (1) their lawyers owed them a duty, (2) the lawyers breached that duty, and (3) the breach proximately caused (4) actual damages.<sup>237</sup> Because a lawyer's duty of care flows from the attorney-client relationship, lawyers are generally liable for professional negligence only to clients. This is the "strict privity rule."<sup>238</sup> A lawyer's liability for breach of fiduciary duty similarly requires proof of an attorney-client relationship giving rise to a fiduciary duty, breach of that duty, and actual damages proximately caused by the breach.<sup>239</sup> Inasmuch as a lawyer's fiduciary duties flow from the attorney-client relationship, a lawyer is generally liable exclusively to clients under this theory.

Courts are reluctant to expand a lawyer's potential liability for malpractice or breach of fiduciary duty to nonclients because doing so could create potential conflicts of interest for lawyers and compromise the attorney-client relationship with all of its attendant duties. Nonetheless, lawyers may owe duties to nonclients in limited circumstances, as where the nonclient is the direct and intended beneficiary of the lawyer's services.<sup>240</sup> Incidental beneficiary status, on the other hand, will not support liability.<sup>241</sup> Determining whether a nonclient is a direct and intended beneficiary of a lawyer's services is a fact-dependent inquiry.

In a typical insurance defense representation in which defense counsel represent both the insured and the insurer, the insurer may be able to sue

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236. William H. Black Jr. & Sean O. Mahoney, *Legal Bases for Claims by Liability Insurers Against Defense Counsel for Malpractice*, BRIEF, Winter 2006, at 33.

237. *Radiology Servs., P.C. v. Hall*, 780 N.W.2d 17, 23 (Neb. 2010) (citing *Wolski v. Wandel*, 746 N.W.2d 143 (Neb. 2008)); *Davis v. Enget*, 2010 ND 34, ¶ 7, 779 N.W.2d 126, 129 (citing *Minn-Kota Ag Prods., Inc. v. Carlson*, 2004 ND 145, ¶ 7, 684 N.W.2d 60).

238. *Shoemaker v. Gindlesberger*, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, at ¶ 14; *Friske v. Hogan*, 2005 SD 70, ¶ 10, 698 N.W.2d 526, 529 (citing *Chem-Age Indus., Inc. v. Glover*, 2002 SD 122, ¶ 30, 652 N.W.2d 756, 769); *Johnson v. Hart*, 692 S.E.2d 239, 243 (Va. 2010).

239. *Slovensky v. Friedman*, 49 Cal. Rptr. 3d 60, 72 (Ct. App. 2006) (quoting *Stanley v. Richmond*, 41 Cal. Rptr. 2d 768 (Ct. App. 1995)); *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶¶ 8–9, 194 P.3d 931 (quoting *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996)).

240. *Perez v. Stern*, 777 N.W.2d 545, 551 (Neb. 2010); *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262, 1272–73 (R.I. 2009).

241. *Zenith Ins. Co. v. Cozen O'Connor*, 55 Cal. Rptr. 3d 911, 918 (Ct. App. 2007); *In re Estate of Drwenski*, 2004 WY 5, ¶ 19, 83 P.3d 457, 462 (Wyo. 2004).

the defense counsel directly based on their attorney-client relationship.<sup>242</sup> The insurer will generally be able to demonstrate actual damages caused by defense counsel's malpractice because it will have paid the resulting loss pursuant to its contractual duty to indemnify the insured. In the independent counsel context, however, the insurer and defense lawyer do not have an attorney-client relationship.<sup>243</sup> An insurer's ability to sue independent counsel for legal malpractice is therefore restricted.

Although it was decided under California's statutory scheme for regulating independent counsel, *Assurance Co. of America v. Haven*<sup>244</sup> is an illustrative case. There, Assurance Company of America (ACA) sued its insured's independent counsel, Ronald Haven, for failing to timely or satisfactorily raise valid legal defenses to the plaintiff's claims against the insured, forcing ACA to accept an unfavorable settlement offer on the insured's behalf.<sup>245</sup> The *Haven* court found that the conflict of interest necessitating Haven's appointment as independent counsel prohibited him from owing ACA a duty to "investigate, prepare, assert, establish, or perform similar functions regarding a defense or position in ACA's favor."<sup>246</sup> ACA thus had no cause of action against Haven for failing to assert the defenses at issue.<sup>247</sup> As the court would later explain:

The need for [independent] counsel arises only when there is a *conflict or potential conflict* of interest between the insured and the insurer. Ethical dilemmas . . . preclude joint representation . . . (unless the insured waives its right to independent counsel). For these reasons, there is no attorney-client relationship between [independent] counsel and the insurer. To allow an insurer to sue . . . [independent] counsel for negligence for failing to *pursue or establish* a complete defense would undermine the very foundation of the [independent counsel] doctrine, which contemplates a counsel independent of the insurer.<sup>248</sup>

ACA argued that its nonclient status did not bar recovery because lawyers can be liable to nonclients if the harm caused by the lawyer's negligence is reasonably foreseeable.<sup>249</sup> In the California cases recognizing a lawyer's duties to nonclients, however, the nonclients were either

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242. *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 956–57 (E.D. Va. 2005) (surveying cases from numerous jurisdictions and predicting Virginia law).

243. *Assurance Co. of Am. v. Haven*, 38 Cal. Rptr. 2d 25 (Ct. App. 1995).

244. *Id.*

245. *Id.* at 28.

246. *Id.* at 31.

247. *Id.* at 31–32.

248. *Id.* at 33 (citations omitted).

249. *Id.* at 34.

third-party beneficiaries of the lawyer's services, relying on the lawyer's work, or to be influenced by it in some fashion.<sup>250</sup> This was a material distinction:

In contrast to the cases finding [a] duty in the nonclient situation, [independent] counsel . . . is present in the litigation *only* because there is a conflict or potential conflict of interest between the . . . client (the insured) and the nonclient (the insurer). [Independent] counsel is present, in other words, because *independence* from the nonclient (i.e., from the insurer) is needed. In determining whether an attorney can be held negligently liable to a person other than the attorney's client, "the adverseness [between the person and the client] is the key variable in [the] decision about whether a cause of action should be allowed." By definition, there is an element of adverseness between the [independent] counsel's client (the insured) and the nonclient (the insurer). These factors weigh heavily against holding [independent] counsel negligently liable to an insurer for failing to investigate, prepare, assert, establish or perform similar functions regarding a defense or position in the insurer's favor.<sup>251</sup>

In summary, the *Haven* court rejected ACA's direct liability and third-party beneficiary theories against Haven for his negligence in failing to raise the key defenses at issue.<sup>252</sup> The court found for ACA on other issues not relevant here.<sup>253</sup>

If the *Haven* court's reasoning concerning ACA's direct liability theory is sound—there being no attorney-client relationship between ACA and Haven—its rejection of ACA's third-party beneficiary theory is suspect. ACA was certainly relying on Haven to competently defend its insured. Haven's defense of the insured was bound to influence ACA's potential indemnity obligation. Any adversity between the insured and ACA concerned coverage, but that issue would never have to be reached if the plaintiff were defeated. Rather than being adverse, at the relevant time and in the relevant aspect of the case, the insured and ACA were aligned in interest; they both were vitally interested in defeating the plaintiff. Even the adversity over coverage was potential rather than actual. Indeed, despite its reservation of rights, ACA paid \$1 million to settle the plaintiff's claims against the insured.<sup>254</sup> Furthermore, and counterbalancing any adversity between Haven and ACA, recognizing ACA's legal malpractice claim against Haven would have promoted the enforcement of Haven's obligations to the insured.

Courts have permitted insurers to sue defense lawyers for malpractice based on a third-party beneficiary theory in cases in which the insurer

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250. *Id.*

251. *Id.* (fourth and fifth alterations in original) (citations omitted).

252. *Id.* at 35.

253. *Id.*

254. *Id.* at 28.

retained the defense lawyer.<sup>255</sup> With respect to lawyers' potential liability to nonclients, section 51 of the *Restatement (Third) of the Law Governing Lawyers* provides that a lawyer owes a duty of care

- (2) to a nonclient when and to the extent that:
  - (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
  - (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
- (3) to a nonclient when and to the extent that:
  - (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
  - (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
  - (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.<sup>256</sup>

Section 51(2) seems to recognize an insurer's right to sue independent counsel as a third-party beneficiary of a lawyer's services in a case in which the insurer ultimately indemnified the insured notwithstanding its initial reservation of rights. Proceeding through the section 51(2) elements, the client (the insured) invited a nonclient (the insurer) to rely on the lawyer's (independent counsel's) provision of legal services by insisting on independent counsel. The insurer's potential duty to indemnify the insured and actual indemnity payment both draw the insurer close enough to the insured to be entitled to protection. The potential adversity between the insured and insurer over coverage does not alter the section 51(2) calculus.

In contrast, section 51(3), which courts often cite or quote when evaluating insurers' legal malpractice claims against defense counsel,<sup>257</sup> is a tough sell in this context. This is because the lawyer hired as independent counsel did not know that the client (the insured) primarily

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255. See, e.g., *Hartford Ins. Co. of the Midwest v. Koepfel*, 629 F. Supp. 2d 1293, 1301 (M.D. Fla. 2009) (predicting Florida law and recognizing both direct liability and third-party beneficiary theories); *State & Cnty. Mut. Fire Ins. Co. v. Young*, 490 F. Supp. 2d 741, 743–47 (N.D. W. Va. 2007) (applying West Virginia law and recognizing direct duty and third-party beneficiary theories); *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 957–58 (E.D. Va. 2005) (predicting Virginia law); *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 599–602 (Ariz. 2001).

256. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).

257. See, e.g., *State & Cnty. Mut. Fire Ins. Co.*, 490 F. Supp. 2d at 743; *Gen. Sec. Ins. Co.*, 357 F. Supp. 2d at 958; *Paradigm Ins. Co.*, 24 P.3d at 600.

intended the lawyer's services to benefit the nonclient (the insurer). As a matter of fact, the insured intended no such thing—it intended independent counsel's services to benefit the insured alone.

Even if indemnifying insurers cannot sue independent counsel for legal malpractice on a third-party beneficiary theory—as they should be permitted to do—they may be able to pursue equitable subrogation claims against the lawyers.<sup>258</sup> Equitable subrogation reflects the principle that one who is obligated to indemnify another “is entitled to the means of redress held by the party indemnified against the person causing the loss.”<sup>259</sup> Equitable subrogation promotes justice by assigning the consequences of tortious conduct to the legally responsible party. In this context, equitable subrogation allows the insurer to step into the insured's shoes to assert the insured's rights against its allegedly negligent lawyers.

Courts commonly invoke equitable subrogation to allow insurers to sue defense counsel for legal malpractice,<sup>260</sup> and there is no reason to deviate from that course in the independent counsel context. Where an insurer providing independent counsel indemnifies an insured for the contested loss, negligent independent counsel may escape responsibility for their conduct unless the insurer can pursue recovery from them through equitable subrogation.<sup>261</sup> The insured, having been indemnified by the insurer, is neither inclined nor positioned to sue defense counsel. The former observation is especially true where the insured selected independent counsel and has an ongoing relationship with them. There is no injustice in allowing an insurer allegedly damaged by independent counsel's negligence to sue those lawyers. In contrast, effectively immunizing independent counsel for their negligence serves no one except the errant lawyers, who receive a free pass purely by happenstance. Looking at the bigger picture, ultimately forcing insured consumers to absorb the cost of independent counsel's malpractice by denying insurers a right of equitable subrogation would be unwise public policy.

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258. See, e.g., *Kumar v. Am. Transit Ins. Co.*, 854 N.Y.S.2d 274, 275–76 (App. Div. 2008) (permitting insurer to sue defense lawyers with whom it did not have an attorney-client relationship on an equitable subrogation theory).

259. *Black & Mahoney*, *supra* note 236, at 35.

260. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 379 F. Supp. 2d 183, 192–96 (D. Mass. 2005) (interpreting Massachusetts law); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 299 (Mich. 1991); *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 787 N.Y.S.2d 15, 17–18 (App. Div. 2004).

261. See *St. Paul Fire & Marine Ins. Co.*, 379 F. Supp. 2d at 195 (explaining the reasoning behind recognizing equitable subrogation in the context of insurers suing defense lawyers).

As for potential breach of fiduciary duty claims by insurers against independent counsel,<sup>262</sup> those are understandably dead on arrival. The lack of an attorney-client relationship between the insurer and independent counsel dooms this cause of action.

Interestingly, independent counsel might request that the insurance company agree not to sue them for malpractice as a condition of accepting the insured's representation. Although in some states lawyers cannot enter into agreements prospectively limiting their liability to clients<sup>263</sup> or at least cannot require clients to make such agreements, in the independent counsel context the insurance company is not the defense lawyer's client.<sup>264</sup> As a result, there is no prohibition against a lawyer tabbed as independent counsel's requesting a malpractice waiver. On the other hand, an insurer is not required to agree to such a waiver, and nothing in a standard liability insurance policy obligates an insurer to do so. The insurer's duty of good faith and fair dealing also does not compel it to agree to a malpractice waiver, first because the insurer's duty flows only to its insured, and second because the duty of good faith and fair dealing cannot create duties or rights not already provided for in an insurance policy.<sup>265</sup>

#### *D. Insurers' Vicarious Liability for Independent Counsel's Misconduct*

Insureds who claim to have been harmed by their defense lawyers' alleged negligence or other misconduct may sue those lawyers. In addition, they often sue their insurers on the theory that an insurer is vicariously liable for the acts of defense lawyers it hires. Insurers are attractive litigation targets. Courts are split on insureds' ability to sue insurers for defense lawyers' errors—although some are willing to recognize vicarious

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262. See *Long v. Century Indem. Co.*, 78 Cal. Rptr. 3d 483, 490 n.8 (Ct. App. 2008) (noting that independent counsel do not owe fiduciary duties to insurers).

263. Compare RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (2000) (establishing this approach), with MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2010) (permitting such an agreement where the client is independently represented).

264. *Assurance Co. of Am. v. Haven*, 38 Cal. Rptr. 2d 25, 33 (Ct. App. 1995).

265. See *Blondell v. Littlepage*, 991 A.2d 80, 90–91 (Md. 2010) (quoting *E. Shore Mkts., Inc. v. J.D. Assocs., Ltd. P'ship*, 213 F.3d 175, 182–84 (4th Cir. 2000)); *Uno Rests., Inc. v. Bos. Kenmore Realty Corp.*, 805 N.E.2d 957, 964 (Mass. 2004) (stating that the duty of good faith and fair dealing does not “create rights and duties not otherwise provided for in the existing contractual relationship”).

liability,<sup>266</sup> others are not.<sup>267</sup> This is an agency law question. Courts recognizing vicarious liability reason that a defense lawyer is the insurer's agent when conducting the defense.<sup>268</sup> The insurer's control of the defense subjects it to vicarious liability.<sup>269</sup> Even if a defense lawyer is an independent contractor, the insurer's duty of good faith and fair dealing and duty to defend are nondelegable, and the insurer cannot escape those duties by delegating its performance to defense counsel.<sup>270</sup>

Courts rejecting vicarious liability, on the other hand, reason that a defense lawyer is an independent contractor who controls the conduct and details of the insured's defense.<sup>271</sup> The defense lawyer's ethical duties to the insured prevent the insurer from exercising the degree of control over the litigation necessary for vicarious liability.<sup>272</sup> As a result, the defense lawyer's independent contractor status insulates the insurer from vicarious liability for the lawyer's conduct.<sup>273</sup>

Whatever the merits of these competing approaches, an insurer cannot be held vicariously liable for independent counsel's negligence in a typical case.<sup>274</sup> In a typical independent counsel case, the insurer has no

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266. See, e.g., *Boyd Bros. Transp. Co. v. Fireman's Fund Ins. Co.*, 729 F.2d 1407, 1409–11 (11th Cir. 1984); *Pac. Emp'rs Ins. Co. v. P.B. Hoidale Co.*, 789 F. Supp. 1117, 1122–23 (D. Kan. 1992); *Cont'l Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 294 (Alaska 1980); *Stumpf v. Cont'l Cas. Co.*, 794 P.2d 1228, 1232 (Or. Ct. App. 1990); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 475–77 (Wis. Ct. App. 1997).

267. See, e.g., *Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 455 (M.D. Pa. 1997); *Lifestar Response of Ala., Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 218 (Ala. 2009); *Marlin v. State Farm Mut. Auto. Ins. Co.*, 761 So. 2d 380, 381 (Fla. Dist. Ct. App. 2000); *Gibson v. Casto*, 504 S.E.2d 705, 708 (Ga. Ct. App. 1998), *aff'd in part and rev'd in part*, 523 S.E.2d 564 (Ga. 1999); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 540 (Mass. 2003); *Hawkins, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, No. A07-1529, 2008 WL 4552683, at \*8 (Minn. Ct. App. Oct. 14, 2008); *Transcare N.Y., Inc. v. Finkelstein, Levine & Gittelsohn & Partners*, 804 N.Y.S.2d 63, 64 (App. Div. 2005) (quoting *Feliberty v. Damon*, 527 N.E.2d 261, 263 (N.Y. 1988)); *Brown v. Lumbermens Mut. Cas. Co.*, 369 S.E.2d 367, 372 (N.C. Ct. App. 1988), *aff'd*, 390 S.E.2d 150 (N.C. 1990); *Mentor Chiropractic Ctr., Inc. v. State Farm Fire & Cas. Co.*, 744 N.E.2d 207, 211 (Ohio Ct. App. 2000); *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 628 (Tex. 1998).

268. See, e.g., *Pac. Emp'rs Ins. Co.*, 789 F. Supp. at 1122.

269. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 697–98 (Tenn. 2002).

270. *Majorowicz*, 569 N.W.2d at 477.

271. *Herbert A. Sullivan, Inc.*, 788 N.E.2d at 540.

272. *Ingersoll-Rand Equip. Corp.*, 963 F. Supp. at 454; *Lifestar*, 17 So. 3d at 218.

273. *Ingersoll-Rand Equip. Corp.*, 963 F. Supp. at 454; *Lifestar*, 17 So. 3d at 218.

274. See, e.g., *Maister Assocs. v. State Farm Fire & Cas. Co.*, No. 09-30453, 2009 WL 3461520, at \*1 (5th Cir. Oct. 28, 2009) (applying Louisiana law); *Republic W. Ins. Co. v. Spierer, Woodward, Willens, Denis & Furstman*, 68 F.3d 347, 351 (9th Cir. 1995) (quoting *Merritt v. Reserve Ins. Co.*, 110 Cal. Rptr. 511, 526 (Ct. App. 1973)); see also 14 RUSS & SEGALLA, *supra* note 156, § 202:37, at 202-94 (“The insurer is not . . . responsible to the insured for the competence or lack thereof of an appointed counsel who is, in fact, independent.”).

right to control the defense, and it has no attorney-client relationship with the lawyers serving as independent counsel. Because they are not subject to the insurer's control and do not represent it, independent counsel cannot be characterized as the insurer's agents.<sup>275</sup> Even where the insurer is allowed to appoint independent counsel, the lawyers' relationship with the insurer in that case is merely contractual—it is not an agency relationship. There is, quite simply, no basis for imposing vicarious liability.

In *Jacobs v. West Bend Mutual Insurance Co.*, for example, plaintiffs Leonard and Janet Jacobs sued West Bend and its insured, Michael Limbach Construction Company (MLCC), a sole proprietorship owned by Michael Limbach, and others, for the defective construction of their home.<sup>276</sup> West Bend agreed to defend MLCC under a reservation of rights and also agreed that MLCC should be defended by independent counsel at West Bend's expense.<sup>277</sup> Limbach died and his widow, Betty Limbach, as the administrator of his estate, hired Carol Beverly to defend MLCC.<sup>278</sup> Unfortunately, for reasons apparently linked to her representation of Limbach's estate, Beverly formulated a passive defense strategy that resulted in a default judgment against MLCC.<sup>279</sup> This led the trial court to rule that West Bend had breached its duty to defend MLCC by affording it an ineffective defense.<sup>280</sup> The court then

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275. The principal's right to control the agent's actions is "the *sine qua non* of agency." *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1096 (9th Cir. 2009), *vacated*, 603 F.3d 1141 (9th Cir. 2010). In a case in which there is no conflict of interest and the insurer controls the defense, the defense lawyer is sometimes thought to be the insurer's agent. *See, e.g.*, *Vulgamott v. Perry*, 154 S.W.3d 382, 392 (Mo. Ct. App. 2004) (stating this position in dicta). But that is not necessarily true. *See Fletcher v. Anderson*, 3 P.3d 558, 567 (Kan. Ct. App. 2000) (quoting *Bell v. Tilton*, 674 P.2d 468, 472–73 (Kan. 1983)); *Bar Plan v. Cooper*, 290 S.W.3d 788, 792–93 (Mo. Ct. App. 2009). In a jurisdiction that rejects the dual client doctrine and treats the insured as the defense lawyer's sole client as a matter of law, for example, the elimination of the attorney-client relationship between the insurer and defense lawyer erases the only clear basis for calling the defense lawyer the insurer's agent. The same is true where the defense lawyer and insurer agree that the insured will be the defense lawyer's sole client. In such cases, there is likely no other basis for recognizing an agency relationship between the insurer and defense lawyer. The insurer's retention of the defense lawyer for the insured, without more, certainly does not create an agency relationship, nor does the insurer's mere payment of defense counsel's legal fees.

276. 553 N.W.2d 800, 800–02 (Wis. Ct. App. 1996).

277. *Id.* at 802.

278. *Id.*

279. *Id.* at 802–04.

280. *Id.* at 804.

held that West Bend was obligated to indemnify MLCC for the default judgment.<sup>281</sup>

West Bend appealed to the Wisconsin Court of Appeals, contending that it discharged its duty to defend MLCC by allowing MLCC to retain independent counsel of its choice.<sup>282</sup> The court of appeals agreed, observing further that Wisconsin law did not bind West Bend to Beverly's strategy and tactics, thereby depriving it of its coverage defense if Beverly's judgments proved to be wrong.<sup>283</sup> The defense of the Jacobs's lawsuit was properly left to the attorney, Beverly, and the client, Betty Limbach.<sup>284</sup> Unless it abandoned its coverage defense, "West Bend had no authority to intervene in, or interfere with, that relationship."<sup>285</sup> The tactical decisions leading to the default judgment against MLCC were Beverly and Betty Limbach's to make, not West Bend's.<sup>286</sup> Accordingly, the court of appeals reversed the trial court ruling regarding West Bend's duty to defend.<sup>287</sup>

## V. CONCLUSION

Liability insurers fund the defense of most civil litigation. If a case is tinged by a conflict of interest between the insured and insurer, both will commonly rely on independent counsel to conduct the defense. Independent counsel play an important role in insurance-related litigation. Despite the importance, however, independent counsel's roles and responsibilities are often not fully understood by courts. There are few published decisions to guide courts presented with independent counsel controversies, and courts that turn to professional literature in efforts to inform their decisions quickly realize that the subject of independent counsel has not received the scholarly attention it deserves. Lawyers selected to serve as independent counsel suffer from the same informational deficiency as they attempt to understand their duties and rights.

The means by which independent counsel are selected is sure to remain a point of considerable disagreement between insurers and insureds. Equally likely to persist going forward are disagreements over independent counsel's compensation and insurers' ability to enforce consultation and reporting requirements where, admittedly, they do not

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281. *Id.*

282. *Id.* at 805.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

control the defense but nonetheless are heavily invested in the litigation. Lawyers selected as independent counsel may not be willing to represent insureds on terms that insurers routinely obtain from panel counsel. Although insurers recognize the need to be flexible in negotiating compensation arrangements with independent counsel and often pay more than they otherwise would for an insured's representation, insurers have a right to insist on reasonable fees.

To the extent that parties can compromise and negotiate appropriate solutions to their problems, they are wise to do so. This area of insurance law has been murky for some while and is unlikely to clear in the near future.

