Insurance-Generated Ethical Concerns in Civil Litigation

prepared and presented by:

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About the Presenter

For almost three decades, William J. Dyer has been a first-chair jury trial lawyer. His wide-ranging litigation practice has included almost all types of commercial and personal injury disputes — representing both plaintiffs and defendants, individuals and all sizes of businesses — in both the state and federal courts, and at both the trial and appellate level, throughout the State of Texas.

Bill spoke on another ethics topic, "The Use and Abuse of Motions to Disqualify," at the South Texas College of Law's Third Annual Seminar on Advanced Business Litigation in Houston and Dallas.

A native of small-town Lamesa, Texas, Bill was graduated from the Plan II Interdisciplinary Honors Program at the University of Texas at Austin in 1977, and from the University of Texas School of Law in 1980, in both instances with high honors. His law school honors included membership in the Order of the Coif and the Chancellors Society, and he was a published member and then the Book Review Editor of the *Texas Law Review*.

After a judicial clerkship for Judge Carolyn D. King of the U.S. Court of Appeals for the Fifth Circuit, Bill spent six years as an associate in the trial department of Houston-based Baker Botts. He left that firm to join the Houston office of New York-based Weil, Gotshal & Manges, where he became a partner in 1989. And in 1992-1993, he opened the local litigation practice as a shareholder in the then-new Houston office of Dallas-based Thompson & Knight.

Bill has dealt with insurance and insurers of various types throughout his legal career — sometimes representing insureds at the behest of their insurers, and sometimes representing or suing insurers directly:

- While at Baker Botts, his docket included a variety of personal injury defense cases, sometimes for clients who were self-insured, but other times in true third-party insurance defense settings. Even in cases in which Bill's clients were self-insured, there were often co-defendants whose insurance coverage played an important part in the settlement and trial dynamics.

- Bill has also represented both insureds and insurance companies directly in commercial litigation regarding insurance coverage and liability. He defended a major life insurance reinsurer through a favorable Harris County jury verdict against a primary insurer whom the jury found to have colluded with the insured to misrepresent underwriting data in order to secure the reinsurance. And he defended The Prudential, Lincoln National, and other health insurance

companies in both the state and federal courts in a series of "bad faith" claims-denial lawsuits involving high-profile experimental cancer remedies.

- During the late 1980s at Weil Gotshal & Manges, Bill was lead Texas counsel for The Hartford Insurance Group in defending against Texas Attorney General Jim Mattox's multi-defendant antitrust claims, which contended that commercial general liability insurers had conspired to artificially limit coverage and raise prices during the mid-1980s "insurance availability crisis." That case settled on favorable terms shortly after Bill co-argued a key discovery motion on behalf of all of the defendants. Bill also represented The Hartford in a parallel private-party antitrust case alleging conspiracies to restrict competition in the workers compensation insurance market.

- Bill has also represented The Prudential in several other business and investment matters, including landlord-tenant cases relating to their commercial real estate holdings and a major lender liability lawsuit involving a $120 million mortgage on a downtown Houston office building.

Since mid-1993, Bill Dyer has practiced either solo or in an "of counsel" basis with much smaller firms. More details about his credentials, practice experience, reported appeals, and litigation philosophy can be found at www.dyerlegal.com.

For the last five years, Bill has also been the sole perpetrator of "BeldarBlog: The online journal of a crusty, long-winded trial lawyer, bemused observer of politics, and internet dilettante" — which blog, among other purposes, serves as a repository for those of his trial lawyer war stories which may be repeated in a public setting. The blog can be accessed at www.beldar.org.

The views expressed in this paper are, of course, solely the author's own, and ought not be attributed to either South Texas College of Law or its faculty and staff.

Insurance-Generated Ethical Concerns in Civil Litigation

I. Introduction: The "Zealous Pursuit" of Interests "Within the Bounds of the Law" — But *Whose* Interests?

As the modern and local successor to the venerable Canons of Ethics (which celebrated their centennial in 2008), the Texas Disciplinary Rules of Professional Conduct[1] — together with their Commentary and various Texas appellate opinions that have interpreted and applied them — must be the starting place for any Texas lawyer who's concerned about legal ethics. And drawing upon the language of the Canons, the Preamble to the Disciplinary Rules reminds us all, in its third numbered point, that "[i]n all professional functions, a lawyer should zealously pursue [his] client's interests within the bounds of the law." If you're looking for a one-line description of what the practice of law is all about, you could hardly do better than that one.

But of course, in order to "zealously pursue your client's interests within the bounds of the law," you have to be certain who your client *is* before you can begin to determine how best to pursue your client's interests.

In modern commercial litigation, the interests of the litigants are sometimes as simple and as obvious as what's reflected on the clerk's docket records for a given lawsuit: Here's the plaintiff, and he's who's seeking relief from the court. Here's the defendant, and he's who the relief is being sought against. But quite often, there are entities who have very real and powerful interests in the results of any given lawsuit, and yet they're not listed on the docket sheet nor otherwise named as formal parties.

The most obvious and familiar example is that of the liability insurer who may, by contract, owe duties to defend and indemnify the named defendant from claims brought against that named defendant by third parties like the named plaintiff. So does the lawyer who's counsel of record for that named defendant *also* represent that liability insurer? Is the liability insurer *also* that lawyer's client, along with the named defendant? And is any of this automatic, or does it vary from case to case?

Amazingly — despite many decades of litigation in which insurers have been involved in even these comparatively direct, simple, and obvious relationships with

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[1] Tex. Disciplinary R. Prof'l Conduct 1.01-8.05, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtitle G, app. A (Vernon 2008) (Tex. State Bar R. art. X) [hereinafter cited simply as "Disciplinary Rule __"]. It is a sad irony that these crucial rules are among the most awkward to cite and hardest to locate resources in Texas law.

litigants — Texas law still does not, in my judgment, provide conclusive and definitive answers to either of those questions! Indeed, quite arguably it wasn't until March of 2008 that the Texas Supreme Court directly acknowledged those questions in so many words — and when it did, it did so in an odd procedural context which makes the breadth of its holdings unclear, and with caveats that may leave lawyers and their various clients and quasi-clients far from certain about how Texas law actually views their relationships.

How, then, is the practicing lawyer engaged in civil litigation to navigate the maze of relationships and duties that he may or may not owe to named litigants and their various primary insurers, excess insurers, reinsurers, umbrella insurers — and even their opponents?

This is a non-trivial question in an era when disappointed litigants are increasingly eager to look for someone else to blame, make complaint about, and, inevitably, sue. At stake, if the lawyer errs, are not only his self-regard as an ethical professional, but potentially his own license and financial assets — and, oh yes, the assets of his own professional liability insurer. Unfortunately, the only comprehensive answer I can give is not a very clear or satisfactory one: "Behave very carefully, with abundant written disclosures up front, and with a constant willingness to re-think even seemingly familiar relationships and situations."

II. The Starting Place for Identifying Whose Interests Must Be Zealously Represented: Tilley

Joe Tilley and his company, Joe's Rental Tools, were furnishing tools and supervisors for the lifting of casing pipe off of an oil well drilling site on November 25, 1967. A fellow named Douglas Starky was an employee of the company drilling the well, and he was helping with the casing pipe removal. While Tilley's equipment was lifting pipe under the supervision of one of Tilley's employees, one pipe slipped and crushed Starky's arm. Starky sued Tilley for negligence on September 19, 1969, so Tilley called his liability insurer, Employers Casualty Co., figuring they'd handle things from there.

Employers insisted that Tilley sign a "standard non-waiver agreement" before they'd hire an attorney to begin defending him, so Tilley signed. "For a period of nearly 18 months [thereafter]," according to the Texas Supreme Court's later description, "the attorney not only performed such services for Tilley in defending against Starky, but he also performed services for Employers which were adverse to Tilley on the question of [Tilley's insurance] coverage." Employers Casualty Co. v. Tilley, 496 S.W.2d 552, 554 (Tex. 1973). Specifically, the lawyer — who was simultaneously serving as Tilley's defense counsel of record in the Starky lawsuit — proceeded to develop evidence to support Employers' "late notice" defense to coverage, under which Employers could insist that it was excused from its obligation to indemnify

Tilley from any damages awarded to Starky because Tilley had failed to give Employers timely notice of the underlying accident back in 1967.

Sure enough, using that same evidence, Employers sued Tilley for a declaratory judgment that it was off the hook — owing Tilley neither any further duty either to defend him against Starky's lawsuit nor any duty to indemnify Tilley against any damages awarded to Starky. Tilley of course counterclaimed for his own declaratory judgment which would keep Employers firmly on the hook to both defend and indemnify him. Tilley argued that Employers was estopped from denying coverage, notwithstanding the "non-waiver agreement" he'd signed at their insistence, based on Employers' failure to disclose that the attorney it ostensibly hired to defend Tilley from Starky was simultaneously pursuing Employers' very different (indeed, directly conflicting) interests on the coverage issues.

Both sides conceded "that similar situations often confront insurers and attorneys employed by them to represent insureds under comprehensive liability insurance policies," id. at 557-58. And both sides urged that "guidelines from [the Texas Supreme] Court would be welcomed." Tilley apparently made the strategic decision, however, to focus his fire on Employers, rather than on the ethics of the lawyer it hired: "[T]he impeccable reputation of the attorney engaged by Employers to represent Tilley, Mr. Dewey Gonsoulin, and the fact that his conduct may be representative of the customary conduct of counsel employed by insurance companies in similar situations, is *not questioned* by counsel for Tilley nor by this Court." Id. at 558 (emphasis added). Given the procedural context — an appeal from a declaratory judgment action in which only Tilley and Employers, and not Gonsoulin, were parties — that made abundant sense.

But note the artificiality imposed by that context: Tilley's focus on Employers' conduct in his declaratory judgment action in the law courts would *not* have bound a State Bar committee looking into the ethics of Gonsoulin's conduct. Indeed, it's not inconceivable to me that a State Bar committee might not have reached some entirely different answer — perhaps finding facts more favorable to Gonsoulin, or perhaps drawing ethical conclusions more directly critical of him — when and if it was no longer insurance coverage, but Gonsoulin's continued fitness to practice law, at stake. So, too, might a court and jury considering whether Gonsoulin committed malpractice.

Nevertheless, the Texas Supreme Court proceeded to decide the declaratory judgment action based on ethical rules applicable on their face only *to lawyers*:

> Under the policy in question (comprehensive liability) the insurance company's obligation to defend the insurer provides that the attorney to represent the insured is to be selected, employed and paid by the insurance company. Nevertheless, such attorney becomes the attorney

> of record and the legal representative of the insured, and as such he owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured. If a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict.

Id. The court went on to cite the then-governing versions of the Canons of Ethics and Ethical Considerations requiring that lawyers give prospective clients with differing interests "the opportunity to evaluate [the clients'] need for representation free of any potential conflict and to obtain other counsel if he so desires," which in turn requires that "before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent." Id. And then the court made the great leap — holding the insurer responsible for the ethics of the lawyer it has hired — simply by noting that "[c]onduct in violation of the above principles by the insurer through the attorney selected by it to represent the insured has been condemned by the highest courts of several other jurisdictions." Id. at 559 (citations omitted).

The non-waiver agreement was quickly steam-rollered too, based on the court's conclusion that Employers' conduct *after* Tilley had signed it — more specifically, Employers' initial and then continuing failure to ensure that the attorney it hired had properly disclosed to Tilley the attorney's own conflict of interests — was sufficient to estop Employers from enforcing the agreement's terms:

> An attorney employed by an insurer to represent the insured simply cannot take up the cudgels of the insurer against the insured as was done in the Starky case at Employers' behest. The parties concede that nonwaiver agreements are taken as a matter of course in most cases which insurance companies are called upon to defend. To interpret the effect of the nonwaiver agreement as permitting such subsequent action and relieving Employers of the consequences thereof, would completely nullify the above guiding principles which arise from the attorney-client relationship. The obligation of Employers and the attorney to notify Tilley of the specific conflict, and the consequences of their failure to do so are not relieved by the standard non-waiver agreement.

Id. at 560. Since "both Employers and [the attorney it hired] owed an obligation to immediately notify Tilley of the conflict on the specific coverage question," the court had no hesitation in further finding that "their failure to do so for nearly 18 months can be attributed only to Employers' desire to strengthen its position in preparation for the filing of the instant [declaratory judgment] suit," thereby establishing prejudice to Tilley in both lawsuits "as a matter of law." Id. at 561.

III. Post-Tilley, pre-UPLC Sources Indicating Whose Interests Must Be Zealously Represented

Is there ever room, in practice or even in theory, for a Texas attorney to ethically represent both a named defendant/insured and his insurer simultaneously as joint clients?

Even leaving aside conflicts that may arise from coverage disputes, or from Stowers demands (discussed below in Part IV-C), there is at least a potential conflict in *every* insured case between the respective interests of the insured and insurer — based simply on the fact that the insurance policy has specific dollar limits beyond which the insurer is not contractually obligated to indemnify its insured. And it's not infrequent that insureds and insurers have different, and perhaps conflicting, views about long-term consequences of trial-versus-settlement decisions: The same neurosurgeon, for example, who wants his auto liability carrier to promptly offer its full $25,000 policy limit to settle the fender-bender lawsuit against him (and thereby relieve him of the distraction and perceived aggravation he'd incur in cooperating with the auto insurer's defense of him) may nevertheless pound his fist on the table and insist "Millions for defense, not a dime for tribute!" when he's urging his med-mal insurer not to settle an unhappy patient's claim.

And indeed, with the trend in modern policies toward diminishing limit policies — contracts under which the costs of defense are continually subtracted from the policy limits — that potential conflict becomes more complex, more acute, less hypothetical, and more likely to ripen into an open dispute over strategy and tactics: The insured may have a heightened interest in seeing a policy-limits offer, or something close to that, made very early in the case, well before costs of defense have reduced the funds available to offer to the point that the claimant will no longer find such an offer attractive. The presumably deeper-pocketed insurer may, by contrast, be more willing to gamble on developing evidence through expensive pre-trial discovery that might form a basis for summary judgment or otherwise get its insured out of the case at an ultimate net savings to the insurer.

Some analysts who tend to identify with the policyholders' perspective have concluded that true concurrent representation of both insured and insurer is simply impossible. See, e.g., J. Cooper, "Insurer-Appointed Defense Counsel, Independent Counsel Selected by the Insured, and Ethical Considerations (from the Policyholder's Perspective)," South Texas College of Law 13th Annual Texas Insurance Law Symposium (Jan. 22-23, 2009), at pp. S-1 and passim to S-5, who argues persuasively (bold-face and italics in original):

> The unmistakable fact is that the insurance company is not a client, even though it pays for the services rendered to its insured. The person who is the beneficiary of those services, e.g., the insured, and who is owed an

"unqualified loyalty" from the insurer-appointed lawyer is the defense lawyer's client. ***The only client.***

To support this sweeping conclusion, Mr. Cooper points out that in his concurring opinion in Tilley, Justice Sam D. Johnson wrote that "the representation provided by the attorney more appropriately should be construed as representation of a single client [— in this case, Mr.] Tilley." 496 S.W.2d at 563 (Johnson, J., concurring). Mr. Cooper likewise stresses the Tilley majority opinion's reference to an "unqualified loyalty" as implying that joint representations of both insured and insurer as truly joint clients are impossible in practice — the further premise being that a lawyer necessarily must qualify his loyalty to either the insured or the insurer in some respect.

Mr. Cooper relies further on American Physicians Insurance Exchange v. Garcia, 876 S.W.2d 842, 845 n.6 (Tex. 1994) (defense counsel "was Garcia's [the insured's], not APIE's [the insurer's], attorney," and stating that "an attorney retained by an insurer to defend the insured owed the insured a duty of unqualified loyalty"), and on State Farm Mutual Automobile Insurance Co. v. Traver, 980 S.W.2d 625, 627-28 (Tex. 1998) (paraphrasing Tilley as holding that "the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions," but so doing in the course of declining to hold an insurer vicariously liable for the attorney's actions). He also points to Bradt v. West, 892 S.W.2d 56, 57 (Tex. App.—Houston [1st Dist.] 1994, writ denied), which held that "[t]here is no attorney-client relationship between an insurer and an attorney hired by the insured just to provide a defense to one of the insurer's insureds."

And Mr. Cooper cites Texas State Bar Professional Ethics Committee Opinion No. 532, *reprinted at* 63 Tex. B.J. 805 (2000), which opined that an attorney would violate his obligation to keep "client" confidences safe and waive attorney-client privilege by following an insurer's instructions to send his fee statements to a third-party auditor for review (accord, Opinion No. 552, *reprinted at* 67 Tex. B.J. 981 (2004), along with Opinion No. 533, *reprinted at* 63 Tex. B.J. 806 (2000), which opined that a lawyer may not agree with an insurer to restrictions which interfere with the lawyer's exercise of his independent professional judgment.

There are contrary policy arguments, however, advanced not only by insurers themselves but sometimes by tort reformers and/or consumer advocates. They point out the economies of scale and efficiencies of expertise which can accrue when insurers rely on the same "regular counsel" in case after case. By effectively concentrating their purchases of legal talent, they can compete more effectively on price terms — to the ultimate benefit not only of the insurers, but their insureds, who see those savings in the form of lower premiums than they'd have to pay if every insured had an unrestricted choice of his own counsel. Better an efficient and experienced lawyer, even operating under cost restrictions imposed by the insurer, than entirely unaffordable coverage, they say. The vast majority of claims, they insist, are settled

within policy limits, and with no more than theoretical and highly abstract "conflicts of interest" between insurer and insured which never ripen into actual conflicts.

Whoever has the better of these arguments, the undeniable commercial reality is this: More and more insurers are relying to an increasing degree on insurance defense firms so beholden to the insurers who hire them to defend their insureds — whether the firms view those insurers as "clients" or "quasi-clients" or just really close comrades — that those firms' financial reliance on those insurers may at least appear to compromise their independent judgment on behalf of the insureds they serve as counsel of record in claims and lawsuits brought by third parties.

Indeed, many insurers have torn away what some would characterize as the last "fig leaf" of such lawyers' independence: Rather than hiring outside law firms, they either use "captive" firms whose entire income comes from a single insurer, or else they assign staff attorneys employed and directed by the insurer outright. Doing so, they insist, not only helps them level the playing field against the plaintiffs' personal injury contingency-fee bar, but ultimately gives their insureds better legal representation with better results at lower premium rates.

IV. The Texas Supreme Court Declines an Opportunity to Outlaw Insurers' Use of Staff Lawyers to Defend Their Insureds, But Still Leaves Much Unanswered: UPLC v. American Home

A. Hardly a rush to judgment

As the millennium drew near its conclusion in the late summer of 1999, Bill Clinton, having survived an impeachment attempt, was still serving out the balance of his second term as President and had yet to surrender his own law license. Non-lawyer George W. Bush still occupied the Texas Governor's Mansion. Part-time con-law lecturer Barack Obama was still early in his first full term as an Illinois state senator. But it was August of 1999 when the Dallas County subcommittee of the Texas Unauthorized Practice of Law Committee sent a letter to Dallas lawyer Katherine D. Woodruff and her firm, Woodruff & Associates — a firm composed solely of staff attorneys employed by American Home Assurance Co. — to advise them that it was investigating whether they were engaged in the unauthorized practice of law.

Woodruff & Associates, Woodruff herself, and American Home reacted by promptly filing a state-court lawsuit against the Committee seeking a declaratory judgment that "neither the insurance companies' employment of staff counsel nor the attorneys' practice as staff counsel constitutes the unauthorized practice of law." And they were joined in that lawsuit by The Travelers Indemnity Company. The Committee, of course, counterclaimed for reciprocal declaratory and injunctive relief.

The resulting high-stakes court battle didn't end until September 28, 2008, when the Texas Supreme Court denied rehearing in Unauthorized Practice of Law Committee v. American Home Assurance Co., 261 S.W.3d 24 (2008). And by that time, then-President George W. Bush was beginning to pack his bags to return to Texas after his second term in the White House, another Clinton had sought and fallen short of the Democratic presidential nomination, and then-U.S. Senator and Democratic Party Nominee Obama had regained a commanding lead in the 2008 presidential race. Whatever else, the Texas judiciary cannot be accused of acting precipitously or of rushing this decision into print: Fully two years and six months passed just between the oral argument before the Texas Supreme Court on September 28, 2005, and the release of the court's opinion on March 28, 2008.

And indeed, there were ample and long-standing predictors that were at least generally congruent with the UPLC opinion when it was finally released. In addition to a "lingering national debate" among commentators, id. at 28, the Texas Supreme Court pointed to opinions from the ABA Committee on Ethics and Professional Responsibility in 1950 and 2003 approving of the use of staff counsel to defend insureds, along with a 1963 opinion of the State Bar of Texas Committee on Interpretation of the Canons of Ethics. Id. at 28-29. Amicus briefs made clear that the practice has become widespread both in Texas and elsewhere. Id. at 29. But in Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee, 283 F.3d 650, 651, 655 (5th Cir. 2002), the U.S. Court of Appeals for the Fifth Circuit had used the Pullman abstention doctrine to duck the question, concluding that Texas law was "uncertain enough on this issue that [the federal courts] should abstain from ruling on its federal constitutionality." So how well did the UPLC case against American Home tee up the issues for the Texas Supreme Court to decide?

B. Sweeping holding by Eastland Court of Appeals ostensibly cut back, based on limited issues relevant to these non-lawyer litigants

At least two related and hugely significant procedural facts underlying the ultimate appellate decision can be inferred simply from the case's name by the time it reached the Texas Supreme Court: First, before the trial court had ruled on either side's motions for summary judgment, "all claims by and against Woodruff and Woodruff & Associates were nonsuited," leaving only the UPLC and the two insurers as parties thereafter. 261 S.W.3d at 31. Second, the UPLC's mandate does not include general enforcement or supervision of Texas attorneys' ethical responsibilities, but rather is limited to pursuing non-lawyers believed to be engaged in the unauthorized practice of law; different bar committees chase after individual lawyers alleged to have engaged in ethical violations. Thus, no one's law license was at risk as part of this appeal, and no one left in the case had clear standing, strictly speaking, to argue about whether any licensed lawyer had or hadn't done anything unethical.

Nevertheless, as in Tilley, insurers themselves were about to be judged based in large part upon ethical rules and guidelines applicable by their terms only to individual lawyers — with those rules and guidelines arguably being wrenched out of context to determine insurers' potential civil and even criminal liability. Indeed, after the trial court had granted the relief sought by the UPLC and provisionally enjoined American Home and Travelers, the Eastland Court of Appeals had reversed the trial court, 121 S.W.3d 831, 837 (Tex. App.—Eastland 2003), based in part on the following blanket holding:

> Insurance companies' use of staff lawyers does not violate Texas Disciplinary Rules of Professional Conduct 1.05 (Confidentiality of Information); 1.06 (Conflict of Interest: General Rule); 2.02 (Evaluation [of a Client Matter] for Use by Third Persons); 5.04(c) & (d) (Professional Independence of a Lawyer); 5.05 (Unauthorized Practice of Law); 7.06 (Prohibited Employment); 8.03 (Reporting Professional Misconduct); and 8.04 (Misconduct).

Bam-bam-bam! Sweeping conclusions, probably reflecting copious briefing on a variety of broad, complex, and important ethical rules applicable to *individual lawyers* — but without even a hint of the fragrance of a pretense of an excuse for substantive discussion of each of those individual rules elsewhere in its opinion. The fact that no lawyer was still a party in his or her individual capacity didn't slow the court of appeals in the slightest en route to these conclusions. And the court of appeals also declared to have been non-binding dicta the Texas Supreme Court's statement in Traver that an insurance defense lawyer "owes unqualified loyalty to the insured." Instead, the Eastland Court interpreted Texas law to "not preclude the insurer being a client, at least when there is no conflict." Id. at 838. It's fair, I think, to characterize the Eastland Court's opinion as a Flubber-assisted home run for the insurers — one in which the ball not only left the ballpark, but departed Earth orbit.

Perhaps unsurprisingly — given the length of time the case was under post-argument submission and the number and variety of appellate counsel and amicus briefing — Justice Hecht's opinion for the Texas Supreme Court immediately set about to narrow the focus:

> The Committee's appeal thus presents two issues:
>
> > *First:* in using staff attorneys to discharge their contractual duty to defend insureds against liability claims, are American Home and Travelers engaging in the unauthorized practice of law?
> >
> > *Second:* if not, must a staff attorney's affiliation with an insurer be fully disclosed to the insured?

> Several amicus curiae briefs address whether, as a matter of policy, insurers' use of staff attorneys to defend claims against insureds is beneficial or detrimental to consumers, the bar, and the public. The amicus briefs also explore and question the motives insurers and lawyers may have in supporting or opposing the use of staff attorneys. These are all important matters, but they are properly addressed to the Court's administrative function in regulating the practice of law in Texas, not to its adjudicative function in deciding the legal issues presented by this case. **We consider and decide here only what the unauthorized practice of law *is*, under existing law, not what it *should be*, an issue that must be left to another process.**

261 S.W.3d at 32 (italics by Justice Hecht; boldface added).

That careful and emphatic limitation, friends and neighbors, may prove big enough to drive the proverbial Mack truck through in later litigation. What exactly does UPLC v. American Home say about the prospective civil malpractice liability for money damages, if any, of a staff lawyer based on alleged violations of, for example, each of the Disciplinary Rules sweepingly dismissed by the Eastland Court of Appeals? *Nothing.* About whether any of those same Disciplinary Rules could be a proper basis for suspending or even revoking an individual staff lawyer's license to practice law in Texas? *Nothing!* Justice Hecht has insisted that this case is, supposedly, only about the unauthorized practice of law — something which violates a criminal statute, Tex. Penal Code § 38.123 — and even then only in the context of corporate insurers employing staff attorneys who defend the insurer's named insureds against claims from third parties. Justice Hecht has thus tried to stake out the maximum possible wiggle room to permit seemingly contrary results in future cases not exactly on point.

Regarding other supposed non-issues: Regular business corporations, including insurance companies, aren't authorized to engage in the practice of law, but staff attorneys can certainly represent insurers' own interests directly. So say Parts II-A & B of Justice Hecht's majority opinion, id. at 33-36, and he further insists that the parties didn't dispute either of those propositions. But rather — as he re-paraphrases what is under consideration and in dispute —

> [t]he issue, then, is whether an insurer that uses staff attorneys to defend claims against insureds is practicing law or simply defending its own interests in discharging its contractual duty to the insureds and defeating claims it would be required to indemnify.

Id. at 36. I think Justice Hecht would have been better served to use the word "promoting" instead of "defending" in that first clause. But he thereupon plunged immediately into a lengthy discussion of Hexter Title & Abstract Co. v. Grievance Committee, 179 S.W.2d 946 (1944), from which he purported to "distill three factors to

be considered in determining whether a corporation engages in the practice of law by employing staff attorneys to provide legal services to someone other than the corporation, and more particularly, whether a liability insurer is practicing law by using staff attorneys to defend claims against insureds." Unfortunately — and with all due and genuine respect — Justice Hecht's discussion of the first two "factors" is almost impenetrable, a confused and confusing self-contradictory muddle (in my humble opinion). Both of those factors — whether the legal advice was being offered to help attract insurance business, and whether the insurer and insured had at least some distinct and potentially adverse interests — seem to me to cut in favor of reaching the same outcome as in Hexter, i.e., a finding of unauthorized practice of law.

Of the title company's practices in Hexter — inducing customers to purchase its services in helping them detect *and then cure* possible title errors before it would sell them title insurance — Justice Hecht wrote that if this "was not the practice of law, then it was difficult to imagine what would be," id. at 37. So his purported third and "most important" distilled factor from Hexter was whether the insurer's "interest is aligned with that of the person to whom the company is providing legal services." And in answer to *that* question, I respectfully submit that he simply chose (in the words of the old ballad) to accentuate the positive, and to pretty much ignore the negative:

> When the company and its employee or affiliate have common interests, a staff attorney can represent them both because, to quote the 1968 ethics opinion, "there is for all practical purposes only one client involved." Hexter sold services, and its customers bought them. The interests of each were their own. But in the vast majority of cases, a liability insurer and an insured have the same interest in defeating a liability claim, and their interests differ only when there are coverage questions or when the consequences of the manner in which the defense is rendered affect them differently.
>
> Applying these factors, we conclude that a liability insurer does not engage in the practice of law by providing staff attorneys to defend claims against insureds, provided that the insurer's interests and the insured's interests in the defense in the particular case at bar are congruent. In such cases, a staff attorney's representation of the insured and insurer is indistinguishable.

Id. at 38 (footnote omitted).

Okay, let's grant the premise — basically an industry-wide historical and prospective fact-finding made by the Texas Supreme Court on the basis of cross-motions for summary judgment decided without a trial — and assume that more often than not, in the vast majority of cases, the potential conflicts between insured and insurer never ripen into knock-down drag-out fights. Is that grounds for further assuming that none,

or almost none, of those potential conflicts will ever ripen? And even so, how is that conclusion probative at all on what's supposedly the key question of whether an insurer, through its employees acting as its agents, is or isn't "practicing law"?

How, even in future declaratory judgment cases brought by the UPLC against insurers (rather than by, for example, insureds or grievance committees against lawyers) are courts and lawyers to interpret this holding? What exactly is "congruent"? Does that mean "identically aligned (except for issues relating to policy limits)"? I don't think anyone knows — or at this point, *can* know.

C. More hopeful assumptions about reservations of rights, *Stowers*, cost restrictions, and the like — or are they really excuses not to upset a very large insurer-dominated apple-cart?

Justice Hecht's opinion then goes on to discuss in detail, and mostly dismiss, the same broad policy arguments that he earlier insisted were not at issue (since this is a case only about the unauthorized practice of law) — specifically, all the many ways that "the Committee and amici argue that the employment relationship between an insurer and its staff attorney increases and exacerbates these conflicts." Id. at 39. While admitting that "[t]hese arguments raise serious concerns," Justice Hecht's opinion notes the lack of "any empirical evidence — any actual instance — of injury to a private or public interest caused by a staff attorney's representation of an insured." Id. But is that surprising, in a case decided on the pleadings plus cross-motions for summary judgment after limited discovery and with a limited evidentiary record? Isn't the absence of probative evidence either way on such issues and the failure to actually conduct a trial an excellent reason to doubt American Home's and Traveler's entitlement to sweeping and final declaratory relief (as to which they had the burden of persuasion)? Absence of evidence is not evidence of absence; that this record contained no "horror stories" of insureds being poorly represented by insurer staff attorneys who were, for example, closely adhering to cost-saving guidelines or making low-ball settlement evaluations doesn't mean that no policyholders are getting stuck with above-limits judgments as a direct result of such practices!

Similarly, Justice Hecht stressed that the "record reflects that staff attorneys for the insurers in this case usually do not represent insureds when the insurer's adjuster has identified a serious coverage issue, but sometimes do when a reservation-of-rights letter has issued merely as a matter of routine," id. at 40. I have no doubt that these two particular insurers managed to come up with affidavits so stating, and I'll even grant that the affiants' opinions to this effect may have been given in good faith. But since when does "usually" on the part of merely two industry participants become a basis for a sweeping industry-wide legal precedent? Did anyone think to ask, "Hey, what are you doing 'issu[ing reservation-of-rights letters] merely as a matter of routine" — translation, "without a specific factual and legal basis" — anyway?

The Committee and amici also argued persuasively, and apparently with some supporting summary judgment evidence, that staff attorneys "are restricted by their employer in whether they may apprise an insured of the insurer's Stowers obligation and are sometimes required to obtain management approval before making or responding to settlement offers that implicate that duty," id. at 41. See G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved) (insurer has common-law duty to covered insured to accept a reasonable settlement demand within policy limits, failing which it may become liable for any excess judgment).[2]

This is no small or theoretical potential conflict. The whole point of a plaintiff even making a Stowers demand is to deliberately and methodically ramp up the pressure on the insurer to settle within policy limits by creating at least an outside chance that if it refuses, the insurer might later be held liable to its insured for the damages (in the form of an above-policy-limits judgment) occasioned by its unreasonable refusal to settle. Occasionally, however, knowledgeable defense lawyers will encounter a plaintiff's lawyer who, for whatever reasons, doesn't make a Stowers demand. In my considered professional opinion, in that situation, at least when defense counsel believes there is even a *reasonable chance* that a Stowers demand would result in a settlement within policy limits, that defense counsel's ethical duty to represent his client "zealously within the bounds of the law" actually requires him to *solicit a Stowers demand*. I've done exactly that from a position as "standby" or "oversight" independent counsel looking over the shoulder of insurance defense counsel to protect my regular business clients, and I've also done that on at least one occasion when a coverage conflict between my client and its insurer had permitted my client to hire me rather than the insurer's regular counsel of choice. To fail to do so in an appropriate case would be as much a breach of ethical duties — as well as an act of legal malpractice — as failing to explore settlement possibilities altogether.

Justice Hecht doesn't argue that it's a good thing, or even okay, for staff counsel to have their hands tied so that they can't solicit a Stowers demand, or give their insured clients other advice in an appropriate case, to increase the likelihood of a settlement within policy limits. Rather, he dismisses this problem by arguing that purely private counsel merely beholden for future discretionary business may be just as rotten, and also by assuming that a few bad apples haven't spoiled the barrel:

> [A] private defense attorney who fails to follow the insurer's instructions may also fear reprisal — in loss of business and consequent pressure from

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[2] For some other recent cases discussing and applying the modern-day Stowers doctrine without particular focus on lawyers' ethical duties in connection therewith, see generally Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 246 S.W.3d 42 (Tex. 2008); Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 776 (Tex. 2007); and Am. Physicians Ins. Exchange v. Garcia, 876 S.W.2d 842 (Tex. 1994).

> partners and the law firm. As we have noted, defense counsel, whether private or on staff, owes the insured unqualified loyalty. It is possible that counsel will fail to render that loyalty, but we cannot presume that a staff attorney is more likely to do so, especially absent any evidence of a complaint ever having been made.

261 S.W.3d at 41 (footnote omitted). And Justice Hecht makes similar short shrift of arguments that staff attorneys are more likely to have their independence compromised by strict budgets and cost guidelines imposed by insurers:

> There is evidence in the record, however, that American Home and Travelers do not restrict staff attorneys in exercising independent judgment.... Again, we cannot presume that staff attorneys are more likely to act unethically in this respect with no evidence of complaints that they have done so.

Id. (citing and quoting Disciplinary Rule 5.04(c)). This is exactly as logically compelling as it is to argue that Socrates was a man; Socrates was wise; and therefore we may assume that all men are wise.

In fact, both anecdotal examples and expert opinion testimony cutting in *either direction* on every one of these concerns almost certainly could have been obtained in short order, had this case proceeded to trial. That may suggest, in turn, that the overall broadest question presented — not whether it's an "unauthorized practice of law," but whether it's a good thing for society as a whole in the long run for insurers to be permitted to defend insureds through staff counsel — ought to be decided jointly by the legislative and executive branches of government, rather than by the courts. Whatever else may be said for or against it, Justice Hecht's opinion in UPLC v. American Home at least doesn't tie the Texas Legislature's hands in any respect.

D. A rose, or a client, by any other name may smell as sweet

Justice Hecht had no trouble distinguishing the Texas Supreme Court's prior statements that Mr. Cooper (discussed in part III above) relies upon in arguing that insurers cannot be "clients" of the insurance defense counsel they hire to defend their insureds:

> [W]e have never held that an insurance defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer. And we have noted that "an insurer's right of control generally includes the authority to make defense decisions *as if it were the client* 'where no conflict of interest exists.'"

Id. at 42 (citing and briefly quoting Traver, Garcia, and Tilley, 261 S.W.3d at note 75, and Northern County Mutual Insurance Co. v. Davalos, 140 S.W.3d 685, 688 (Tex. 2004), 261 S.W.3d at note 76; italics by Justice Hecht). But significantly, neither did Justice Hecht hold that an insurer is always and necessarily a joint client of its own staff defense counsel along with the insured: "Whether defense counsel also represents the insurer is a matter of contract between them," according to Justice Hecht. Id.

In this statement, no doubt, there is a broad hint to insurers that if they want to use staff attorneys to defend insureds with the least risk of being found to have thereby committed the unauthorized practice of law (and/or perhaps other ethical violations), those companies ought to structure their contracts with their staff counsel in a way that *affirmatively disclaims* any specific attorney-client relationship. As a general proposition, non-officer employees of Texas corporations owe their employers very little by way of common-law duties — and certainly nothing remotely close to the kind of fiduciary duties owed by corporate officers or attorneys. By disclaiming the broad duties of a fiduciary and substituting enumerated contractual duties in their place, and by using such employees solely on one side of a "Chinese wall" — representing only insureds, and never participating in coverage disputes or general corporate advice for the insurer — the insurer would likely somewhat limit both its and its attorney-employees' potential future exposure.

But skeptics will scoff at what they perceive to be merely more fig leaves, and point instead to the eternal truth that "Money talks" (and its less polite corollary about what other substance, by contrast, "walks").

E. Particular risks highlighted — or future lawsuits road-mapped?

Justice Hecht is also not above providing a road-map for how future litigants — presumably including litigants seeking to avoid even its influence as, technically, dictum in either private lawsuits by insureds or licensure actions by disciplinary committees — may frame their disputes to avoid the central holding of UPLC v. American Home:

> The use of staff attorneys comes with risks, as American Home and Travelers themselves acknowledge. If an insurer's interest conflicts with an insured's, or the insurer acquires confidential information that it cannot be permitted to use against the insured, or an insurer attempts to compromise a staff attorney's independent, professional judgment, or in some other way the insurer's and insured's interests do not have the congruence they have in the many cases in which they are united in simple opposition to the claim, then the insurer cannot use a staff attorney to defend the claim without engaging in the practice of law. But there are a great many cases that can be defended by staff attorneys without conflict

> and to the benefit of mutual interests. The use of staff attorneys in those cases does not constitute the unauthorized practice of law.

Id. at 42-43 (footnote omitted). Thus, a corporate insurer may suddenly, remarkably find itself engaged in the practice of law — or it and/or its employee-attorneys may potentially incur civil liability or put the employee-attorneys' licensure at risk — if it uses staff attorneys when there is some sort of sufficiently "serious conflict of interest" (which we're warned in a footnote must be more than a mere "disagreement about how the defense should be conducted"). Or if the corporate insurer somehow twists its staff counsel's arm especially hard. Or if there's some other lack of "congruence" — especially a complicated one — which prevents insured and insurer from being "united in simple opposition to the claim."

This strikes me as a deliberate blurring of any "bright-line effect" from UPLC v. American Home. It would be the poor advocate indeed who could not find some facts from which to argue that his particular case wasn't "routine" — at least enough to forestall summary judgment, anyway, by raising a fact question through opinion testimony from some expert.

There is no small irony, then, that by winning an important ruling which permits them to rely with somewhat greater confidence on staff counsel to defend their insureds, insurers may have actually increased the likelihood of being sued by creative lawyers eager to follow Justice Hecht's road-map. But perhaps they don't much care. They are, after all, professional risk-takers.

F. Sunshine as the best prophylactic

For all its squishiness and willingness to assume only the best of staff lawyers elsewhere, there is one respect in which Justice Hecht's opinion in UPLC v. American Home is direct and prescriptive: Full disclosure is a prophylactic that will prevent many problems, ethical and otherwise, whereas an absence of disclosure may result even in corporate criminal liability.

Justice Hecht points out that "[o]nly the supreme courts of Kentucky and North Carolina, approving ethics opinions in their respective states, have concluded that insurers' use of staff attorneys to defend insureds is prohibited as the corporate practice of law." Id. at 43. But in listing the many other states that have approved insurers' use of staff attorneys, he highlights Florida in particular: "The Florida Supreme Court has reached essentially the same conclusion by approving ethical rules that allow the practice provided the staff attorney determines and discloses whether he or she represents only the insured or the insurer as well." Id. Justice Hecht incorporated this disclosure requirement into the central holding of this decision as well: "We also hold that a staff attorney must fully disclose to an insured his or her affiliation with the insured." Id. at 27. Later in the opinion, he noted:

> Rule 7.02 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from making any false or misleading representations about his or her services, and it goes without saying that a staff lawyer must fully disclose to a represented insured the identify of the lawyer's employer.

Id. at 45-46. Left open for now, however, is the question of how *much* disclosure is needed. Is it adequate for the staff attorney merely to disclose that he's employed by the insurer? Does he also have to point out that he's an "at will" employee, subject to termination by the insurer on a whim, either with or without good cause? Does he have to explain the details of the company guidelines and restrictions that he must follow to keep defense costs to a minimum, on pain of being disciplined or even fired? Is he permitted (or even required) to repeat reassuring platitudes — "Don't worry, under Texas law I'm required to advise you whenever any conflict of interest develops, and I'm required to protect your interests from being compromised by my employer?" And if the insured asks, "Can you give me a specific example of a time you've defied your employer to do just that?" must the attorney answer truthfully (even if the answer is, "Umm, well, actually I've never had to stand up to my employer that way in real life")?

What if a potential conflict ripens to the point that the insured may be entitled to demand independent counsel — selected and directed by him, but with costs of defense still paid by the insurer? Does the staff attorney have to advise the insured not only of the conflict's existence, but of the likelihood that the insured can replace him with a lawyer of unquestioned loyalty while still not having to underwrite the costs of defense himself? And is a "disclosure" which omits any explanation of the Stowers doctrine and its common uses in settlement practice so incomplete that it makes the lesser disclosure of who signs the lawyer's paycheck almost meaningless by comparison?

Insureds dissatisfied by being stuck with judgments above their policy limits may look for both misleading particulars and misrepresentations by omission in trying to shift responsibility back onto their insurers who've chosen to use staff counsel. This strikes me as a fertile, if less well road-mapped, ground for future litigation.

V. Safeguarding Client Confidences and Preservation of Privileges When Insurers Are Involved

Disciplinary Rule 1.05 creates broad obligations upon counsel to preserve the confidentiality of "confidential information" with respect to clients, which includes (but is not limited to) information covered by attorney-client and/or work product privileges. The involvement of insurance adjusters, agents, and other personnel may sometimes complicate these ethical duties, but a recent opinion from the Fourteenth Court of Appeals in Houston offers a fairly comprehensive primer — including more than two dozen keynotes! — for sorting such issues out.

In re General Agents Insurance Co., 224 S.W.3d 806 (Tex. App. — Houston [14th Dist.], no pet'n), was, as its style suggests, a mandamus proceeding reviewing a series of privilege rulings made by the 165th District Court of Harris County. "Gainsco," as the insurer is known, had insured a company called Traxel Construction, Inc. under a $500,000 commercial general liability policy. When Traxel was sued by El Naggar Fine Arts Furniture, Inc. and its principal, alleging negligence by Traxel in the construction of a concrete slab and steel building, Gainsco hired attorney Glen Fahl as Traxel's defense counsel; assigned an adjuster and opened a claims file; and requested and received a coverage opinion from another attorney, Brent Cooper. Id. at 810. Then the story takes a somewhat bizarre twist:

> The first trial in the action ended in a mistrial. Shortly before the second trial was to begin, Gainsco and Traxel entered into a "buy-back agreement," dated October 6, 2004. Under the terms of this agreement, Gainsco repurchased Traxel's $500,000 policy for $50,000, and Traxel released Gainsco from any and all claims or demands arising out of the policy.

Id. The opinion carefully avoids ascribing any particular motivation to Gainsco or Traxel for this action, but in any event, "[t]he lawsuit proceeded to a second trial, which resulted in a $3.5 million judgment in El Naggar's favor." Id. at 810-11. El Naggar then sued Gainsco on a variety of claims including fraudulent transfer, civil conspiracy, and the like. We're told that "[s]ome of the claims are based on an assignment of rights Traxel granted to El Naggar," while others are apparently made by El Naggar in its own right as a judgment creditor. Id. During pretrial discovery in this second suit, El Naggar sought production of documents that Gainsco contended were protected by attorney-client privilege, which led in turn to Gainsco's mandamus proceeding challenging some of the trial court's rulings on its objections.

With respect to a great many challenged documents from the underlying lawsuit, the Fourteenth Court held that under a written assignment from Traxel to El Naggar, El Naggar stood in Traxel's shoes for purposes of choosing to either assert or waive attorney-client privilege. El Naggar insisted that it had chosen to waive Traxel's privileges, and that this decision trumped any effort by Gainsco to assert Traxel's privilege as Traxel's (former) "representative" within the meaning of Tex. R. Evid. 503(a)(2) — that is, someone "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client":

> By assigning Traxel's privileges in the documents held by Gainsco, Bell [Traxel's CEO and sole shareholder] effectively waived the right to assert the privileges. In other words, Traxel (through Bell) has foregone its right to assert the benefits of the attorney-client relationship with Fahl.... Whether the assignment of privileges is viewed more as a waiver in itself

> or as a transfer of the right to waive the privileges, the result is the same: Traxel may no longer assert the privileges. Consequently, Gainsco no longer has grounds on which to assert privileges on Traxel's behalf. A client unquestionably has the right to waive the attorney-client privilege. Tex. R. Evid. 511. Furthermore, Rule 511 contemplates the possibility that privileges can pass from one person or entity to another. *Id.* (referring to the "predecessor ... holder of the privilege"). Accordingly, we find Gainsco's arguments regarding validity of the assignment, and hence its assertion of Traxel's privileges, to be without merit.

Id. at 814 (footnotes omitted). Thus, much of what once was clearly covered under the attorney-client privilege — including communications between and among Traxel, insurance defense counsel Fahl, and Gainsco — was held to have lost its privileged status due to the assignment.

But no waiver was implied merely from the earlier sharing of those materials with Gainsco before the assignment: Even though Gainsco was neither Fahl's client nor Traxel's attorney, the privileged communications between those two entities could properly be shared, without effecting any waiver, with Gainsco because at that time it was still a proper "representative" within the meaning of Tex. R. Evid. 503(a)(2). Others who share that same contractual community of interests with the insured and insurance defense counsel — including excess insurers, umbrella insurers, and reinsurers — may likewise qualify as "representatives" with whom such materials may be safely and appropriately shared without waiver of privilege. And typically those primary and upstream insurers are contractually entitled to share such information — a failure to do so might create grounds for them to argue that the insured had breached its contractual duty of cooperation with its insurer(s) in its own defense, potentially jeopardizing coverage. Obviously, spoiling one's client's insurance coverage is not consistent with representing the client's interests competently and zealously within the bounds of the law.

In response to Gainsco's misguided and faltering attempt to assert attorney-client privilege on its *own* behalf with respect to communications drafted by or addressed to Fahl, however, the Fourteenth Court noted that Gainsco not only had "not established the existence of an attorney-client relationship with Fahl ([but] indeed it ha[d] steadfastly denied it)." Due to the lack of an attorney-client relationship in its own right, then, Gainsco could assert neither attorney-client nor work product privileges on its own behalf as to the Fahl documents. Id. at 815-16.

By contrast, the Fourteenth Court sustained Gainsco's assertion of privilege with respect to invoices for legal services addressed to Gainsco from Cooper, the lawyer Gainsco had hired to render an opinion on coverage, id. at 816, and on both Gainsco's request to Cooper for a coverage opinion and Cooper's resulting opinion letter in response, id. at 818. Those documents were never disclosed to Traxel, and neither

did Traxel have any relationship with Cooper, so El Naggar was unable to use its assignment from Traxel as a basis to effect a waiver of the privilege that belonged to Gainsco as Cooper's client.

Gainsco hit rough waters again, however, with respect to database file notes maintained on its computer systems. "In reviewing many of these notes," said the Fourteenth Court, "it is not clear whether they pertain only to Traxel's defense in the underlying litigation or whether they also involve coverage issues." The court therefore presumed that "the only privilege[s] asserted are Traxel's" — which had been waived under the assignment to El Naggar — "unless the substance of the individual note clearly demonstrate[d] otherwise." Id. at 816. It's thus entirely possible that by failing to strictly segregate its coverage files from its underlying liability defense files, Gainsco may have effectively lost the opportunity to assert attorney-client or work product privileges on notes that actually (but not obviously) related solely to the coverage question.

The moral of the In re Gainsco case for lawyers trying to fulfill their ethical duty to protect client confidences is this, then: When you're defense counsel defending an insured against a third party's lawsuit, don't worry that you're waiving attorney-client privilege simply by sharing materials with your client's insurer while your defense is still on-going. But be aware of at least the outside chance that your client's opponent may someday — as a judgment creditor, as an assignee from your client, or perhaps through the action of a receiver or as beneficiary under the post-judgment turn-over statute — be in a position to compel disclosure of those otherwise privileged documents when that opponent comes to stand in your client's shoes. And if you're separate counsel advising the insurer on coverage issues, insist that your client carefully segregate — and keep confidential from its insured — all communications and files, including database notes, relating to those coverage issues. Otherwise the confidentiality of those materials may end up compromised as well when the proverbial shoe shifts to the other foot.

A final, utterly practical note — from me as a practitioner, not directly from In re Gainsco or any other appellate decision: From time to time as lawyers, our duties to exercise independent judgment and render candid advice to our clients under Disciplinary Rule 2.01 may oblige us to make very subjective evaluations of members of the judiciary — usually of a trial judge, but occasionally of appellate judges too. *Just remember who reviews materials submitted in camera to confirm or reject privilege claims.* There are things that sometimes have to be said, but that doesn't mean that they also have to be written. Accordingly, when I have a harsh or even potentially unflattering appraisal of a judge to share with my client, even if I'm confident that my attorney-client privilege claim ought to be upheld and my client's opponents ought never be able to compel production, my practice is to never put such views in writing of any sort (including hand-written notes or emails) — and to instruct my client to avoid putting what I've said on that subject in writing either.