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Insurance Companies Use of Captive or In-House Counsel to Represent Insured Constitutes the Unauthorized Practice of Law: Is American Home the Right Decision for Texas Comment.

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COMMENT

INSURANCE COMPANIES USE OF "CAPTIVE" OR IN-HOUSE COUNSEL TO REPRESENT INSUREDS CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW: IS *AMERICAN HOME* THE RIGHT DECISION FOR TEXAS?

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I. INTRODUCTION

For several years, "clients and law firms alike have scrutinized the process and manner in which legal services [should be] provided in an effort to reduce the costs associated with such services."[1] As a result, many organizations have turned to in-house legal departments or captive firms for their legal needs.[2] Among the organizations trying to reduce costs are insurance companies, which seek to use in-house or "captive" firms not only to represent and advise the corporation, but also to defend insureds when an insurance contract obligates the insurer to provide the insured with a defense.[3]

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1. Grace M. Giesel, *The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds*, 225 N. KY. L. REV. 365, 365 (1998); *see also* State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 633 (Tex. 1998) (stating that insurance companies are always trying to keep defense costs down); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001) (discussing the increased use of "cost reduction" measures by insurance companies that place defense lawyers in compromising ethical situations).

2. Grace M. Giesel, *The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds*, 25 N. KY. L. REV. 365, 365 (1998); *see also In re* Youngblood, 895 S.W.2d 322, 327 n.2 (Tenn. 1995) (listing the amici curiae interested in the ethical propriety of having a lawyer-employee defend insureds); Jonathan Foreman, *In-House Counsel: Banking on Lawyers to Play by the Rules*, NAT'L L.J., Sept. 22, 1997, at B1 (discussing Michael E. Bleier's role as General Counsel of Mellon Bank Corp.); Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12; Neal Solomon, *That In-House Attraction Is Just a Mirage*, NAT'L L.J., May 12, 1997, at A21 (noticing the rise in the use of in-house counsel as a result of attempts to cut costs). "[A]n attorney in a law firm whose expenses and salary are paid by the insurer" is called captive counsel and is considered an employee of the insurer. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 152 n.5 (2000).

3. Ronald E. Mallen, *Defense by Salaried Counsel: A Bane or a Blessing?*, 61 DEF. COUNS. J. 518, 518 (1994); *see also* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 152 (2000) (noting that there has been an increase in the usage of in-house attorneys by insurance companies to represent insureds); Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 292 (1997) (discussing the expanding use of in-house counsel to include insurance companies and the increased attacks on this practice); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 351 (2001) (indicating that the use of in-house or captive counsel by insurance companies to defend their insureds is part of an ongoing debate); Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I–Excess Exposure Cases*, 78 TEX. L. REV. 599, 615 (2000) (discussing increased efforts by insurance companies to cut costs by utilizing billing guidelines, using fee arrangements, using fewer law firms, and sending billing statements to outside auditors); William W. Hurst et al., *Can Insurance Defense Firms Be Ethically Replaced by Staff Counsel? Ruling Says Use of Staff Counsel Constitutes UPL*, RES GESTAE, Aug. 1998, at 42

When an insurer receives a claim and provides an attorney to defend its insured per the insurance contract, a unique relationship emerges, which is often termed the tripartite or triangular relationship.[4] The relationship between the insurer, insured, and the defense counsel creates complex ethical issues for the defense counsel who must serve the interests of two clients—the insured and the insurer.[5] As a result, the tripartite relationship has garnered a substantial amount of interest and has been found to be a source of ethical, legal, and economic tension in case law and ethics opinions.[6] States that have addressed this practice have allowed this type

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(stating that some insurers have dispensed with the use of traditional defense law firms and are now utilizing in-house counsel to whom they can assign cases).

4. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 354 (2001); Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 270 (1994); Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 211 (1998); Allison M. Mizuo, Casenote, Finley v. Home Insurance Co.: *Hawai'i's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675, 675 (2000), WL 22 UHILR 675.

5. Allison M. Mizuo, Casenote, Finley v. Home Insurance Co.: *Hawai'i's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675, 675 (2000), WL 22 UHILR 675. "Courts have traditionally disfavored the representation of two clients in the same matter by a single attorney since conflicting allegiances can arise" and an attorney may be influenced to act detrimentally to one client or the situation might present an appearance of misconduct. Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 204 (1999), WL 602 PLI/Lit 199 (quoting Kelly v. Greason, 456 N.E.2d 256 (N.Y. 1968)).

6. *E.g.*, San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494, 500 (Cal. Ct. App. 1984); King v. Guiliani, No. CV92 0290370 S, 1993 WL 284462, at *1-2 (Conn. Super. Ct. July 27, 1993); *In re* Rules Governing Conduct of Attorneys in Fla., 220 So. 2d 6, 7 (Fla. 1969); Coscia v. Cunningham, 299 S.E.2d 880, 882 (Ga. 1983); Kittay v. Allstate Ins. Co., 397 N.E.2d 200, 202 (Ill. App. Ct. 1979); Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 569 (Ky. 1996); *In re* Allstate Ins. Co., 722 S.W.2d 947, 950 (Mo. 1987) (en banc); Gardner v. N.C. State Bar, 341 S.E.2d 517, 520 (N.C. 1986); *In re* Youngblood, 895 S.W.2d at 324; *Traver*, 980 S.W.2d at 633 (Gonzalez, J., concurring in part and dissenting in part); Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1987-91 (1987), 1987 WL 109707; N.J. Sup. Ct. Comm. on Unauthorized Practice, Supp. to Op. 23 (1996), 1996 WL 520891; N.J. Sup. Ct. Comm. on Unauthorized Practice, Op. 23 (1984), 1984 WL 140950; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 519 (1980), 1980 WL 19218; Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 95-14 (1995), 1995 WL 813802; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 96-196 (1997), 1997 WL 188817; ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 282 (1950); *see also* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 152 (2000) (finding that both ethics opinions and case law show an increased interest in the tripartite relationship); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Prac-*

of representation; they found that the practice did not constitute the unauthorized practice of law and no impermissible conflict of interest.[7] However, there are other state court decisions and ethics opinions, which indicate that while there is no legal violation per se, the use of an employee counsel could create an ethically impermissible situation.[8]

In Texas, the use of in-house or captive counsel by insurance companies recently yielded two ethics opinions[9] and a district court decision addressing this tripartite relationship.[10] In *American Home Assurance*

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tice, 53 BAYLOR L. REV. 349, 351-52 (2001) (discussing the various jurisdictions that have made decisions on the issue); Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 211 (1998) (affirming that the numerous jurisdictional interpretations of these duties have complicated an attorney's approach to these responsibilities); Allison M. Mizuo, Casenote, Finley v. Home Insurance Co.: *Hawai'i's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675, 675 (2000), WL 22 UHILR 675 (advancing that the complexity of this relationship is evidenced by the amount of litigation and commentary discussion it has received).

7. *Guiliani*, 1993 WL 284462, at *2-6; *In re* Rules Governing, 220 So. 2d at 9; *Coscia*, 299 S.E.2d at 883; *Kittay*, 397 N.E.2d at 202; *In re* Allstate Ins. Co., 722 S.W.2d at 951; *In re* Youngblood, 895 S.W.2d at 330-31. States that have upheld the use of in-house counsel by insurers include Indiana, Florida, Tennessee, Illinois, Ohio, Connecticut, Georgia, and Missouri. Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 14 n.1. The ABA promulgated Formal Opinion No. 282 in 1950 and Informal Opinion No. 1402 in 1997, which approved the use of in-house counsel by an insurance company. *Id.* at 12.

8. *E.g.*, *Guiliani*, 1993 WL 284462 at *6; *In re* Rules Governing, 220 So. 2d. at 7; *Coscia*, 299 S.E.2d at 883; *Kittay*, 397 N.E.2d at 200; *In re* Allstate Ins. Co., 722 S.W.2d at 950; *In re* Youngblood, 895 S.W.2d at 324; Cal St. Bar Standing Comm. on Prof'l Responsibility and Conduct, Ethics Op. 1987-91 (1987), 1987 WL 109701; N.J. Sup. Ct. Comm. on Unauthorized Practice, Op. 23 (1984), 1984 WL 140950; N.J. Sup. Ct. Comm. on Unauthorized Practice, Supp. to Op. 23 (1996), 1996 WL 520891; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 519 (1980), 1980 WL 19218; Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 95-14 (1995), 1995 WL 813802; Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 96-196 (1997), 1997 WL 188817; ABA Comm. on Ethics & Grievances, Formal Op. 282 (1950); Sherry L. Anderson, *Ethical Issues Presented by the "Tripartite Relationship," in* AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION 447, 449 (2002), WL SG081 ALI-ABA 447.

9. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001); *see also* Texas Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 805-06 (2000) (addressing the use of third-party auditors to review billing statements of defense lawyers employed by insurers hired to represent the insureds of the insurance companies); Texas Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 806 (2000) (examining the use of litigation guidelines imposed by insurance companies on defense counsel who are retained to defend the insureds of the insurance companies).

10. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002). Two other Texas cases addressing the use of captive firms by insurance companies have been filed in this state. *See*

Co. v. Unauthorized Practice of Law Committee,[11] Judge Gary Hall of the 68th District Court in Dallas disagreed with almost all of the courts and ethics committees who have addressed the issue of representation of insureds by employee attorneys of insurers by ruling that the insurance company's practice of using "captive firms" to defend policy holders constitutes the unauthorized practice of law.[12] The Unauthorized Practice of Law Committee (UPLC) argued that the use of staff counsel violated the long-held position that a corporation cannot practice law in the State of Texas.[13] In addition, the UPLC argued the representation was in violation of several Texas Disciplinary rules of Professional Conduct,[14] however, the court did not comment on this issue in the final judgment.[15]

Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 652 (5th Cir. 2002) (seeking a determination that Texas law, as interpreted by the Unauthorized Practice of Law Committee, unconstitutionally prohibited an insurer from employing staff attorneys to represent insureds). The Fifth Circuit Court of Appeals dismissed the case and refused to certify the controlling question, whether the use of salaried staff attorneys to represent insureds constitutes the unauthorized practice of law, to the Texas Supreme Court because the same question was being litigated in state court. *Id.* at 656-57.

11. No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002).

12. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002); *see also* Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 13 (concluding that "[t]he overwhelming majority of jurisdictions which have examined the issue . . . have found the process to be neither a conflict of interest, nor the unauthorized practice of law"). Under the unauthorized practice of law doctrine, when a captive counsel attorney represents a third-party, in essence the corporation is practicing law through that attorney, and thus violating the doctrine that corporations cannot practice law. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 151 (2000).

13. *See* Defendant's Original Counterclaim at 3, *Am. Home* (No. DV-99-08673-C) (stating the UPLC's claim); *see also* Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996) (upholding a state statute prohibiting the practice of law by corporations); Gardner v. N.C. State Bar, 341 S.E.2d 517, 519 (N.C. 1986) (prohibiting the use of in-house counsel to represent insureds because it violates the state's ban on the practice of law by corporations); William K. Edwards, *The Unauthorized Practice of Law by Corporations: North Carolina Holds the Line*, 65 N.C. L. REV. 1422, 1426 (1987) (discussing the decision by the North Carolina Supreme Court in *Gardner*); Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 151 (2000) (stating that historically, a corporation cannot be licensed to practice law under the unauthorized practice of law doctrine and therefore cannot legally engage in the practice of law).

14. Defendant's Original Counterclaim at 4, *Am. Home* (No. DV-99-08673-C). The majority of challenges to the use of captive counsel or in-house lawyers by insurance companies to defend insureds raises a conflict of interest or unauthorized practice of law issues. Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12.

15. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. V-99-08673-C (68th Dist Ct., Dallas County, Tex. May 20, 2002).

This Comment is devoted to an analysis of the application of the unauthorized practice of law doctrine to the practice of using in-house or captive counsel in the defense of insureds. Part II of this Comment provides a background to the tripartite relationship and discusses the potential conflict of interests and the related duties between the attorney and the client or clients. Part III provides a brief review of the use of captive or in-house counsel in the insurance industry and a discussion of the unauthorized practice of law and the conflict of interest issues presented in *American Home*. Part III also provides a discussion of the arguments for and against application of the unauthorized practice of law doctrine to the use of in-house or captive counsel representation by insurers to defend their insureds. Part IV of this Comment proposes that the opinion in *American Home*, although well-intended, is flawed in that it does not provide an adequate answer to the debate. This Comment concludes by suggesting that the state legislature provide clarity on this issue through legislation.

II. BACKGROUND

A. *The Tripartite Relationship Among the Insurer, Insured, and Defense Counsel*

The tripartite relationship in the insurance context is the triangle created by "(1) an insured who is covered by a liability insurance policy, (2) the insurer who has the duty to indemnify the insured and to provide a defense under the policy, and (3) the defense lawyer who is employed by the insurer" either as an in-house counsel or captive counsel to defend against a claim, which is covered by the insurance policy.[16] The numer-

16. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001); *see also* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 23.3 (3d ed. 1989) (defining the tripartite system); Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 203 (1999), WL 602 PLI/Lit 199 (exploring the attorney-client privilege in the context of the tripartite relationship); Robert B. Gilbreath, *Caught in a Crossfire, Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 142 (1996) (explaining the tripartite system); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 476 (1996) (referring to the tripartite relationship as the "eternal triangle" of insurance defense); Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 733 (1992) (describing the elements of the tripartite system); Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 652 (2000) (noting that the tripartite rela-

ous duties running between the insured, insurer, and defense counsel create a problematic association.[17] Personal interests naturally motivate each player to challenge the limitations of their respective duties.[18] While the defense counsel owes duties to the client insured, the perpetual economic linkage between the insurers and defense counsel is a source of concern for the courts and numerous scholars.[19] Nevertheless, the insured must comply with the provisions of the insurance contract; the insurer must defend and indemnify in good faith; and defense counsel must balance respect for the terms of the policy with the duty to remain within the bounds of ethical conduct as governed by the professional rules.[20] Under a typical liability insurance policy, "an insurance company retains an attorney to represent its insured against a liability claim, the insurer typically pays for the representation of the client and has a contractual right to control the defense," which places defense counsel in a dilemma by forcing her to "balance the contractual responsibilities to the insurer against the ethical responsibilities to the insured."[21] "[T]he 'ethical dilemma imposed upon the carrier-employed defense attorney' by the rela-

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tionship is ripe with potential conflicts of interest that can lead to unsatisfactory coverage expectations by the policy holder if left unchecked).

17. *See* Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 181 (Ind. 1999) (Dickson, J., dissenting) (explaining that the use of insurer-employed counsel to represent insureds is "fraught with danger"); Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 207-08 (1999), WL 602 PLI/Lit 199 (recognizing the adversarial position that is sometimes created between an insurer and defense counsel in a tripartite relationship).

18. *See* Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 207 (1999), WL 602 PLI/Lit 199 (discussing the different economic interests of the parties in the tripartite model); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 482 (1996) (discussing the inherent conflict of interests between the parties).

19. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 482 (1996); *see also* Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1587 (1994) (characterizing the relationship as "deeply and unavoidably vexing").

20. Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 205-06 (1999), WL 602 PLI/Lit 199; *see also* Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 477 (1996) (describing how liability insurers owe their insureds "twin" contractual duties of defense and indemnity).

21. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 355 (2001); *see also* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494, 498 n.4 (Cal. Ct. App. 1984) (stating that "[a]n attorney having dual agency status is subject to the rule a '[c]onflict of interest between jointly

tionship between insurer, insured, and insurance defense counsel creates problems that would 'tax Socrates.'"[22]

The tripartite relationship, also described as an "ethical minefield," has long been a source of substantial debate because the "relationship puts the attorney in a situation where he or she effectively has two clients whose interests can be in conflict."[23] This debate also involves determining whether there are actually two clients (the insurer and insured), or one client (the insured) being represented by the defense attorney.[24] "The majority of courts and commentators conclude that the defense counsel has two clients—the insured and the insurer."[25] This dual repre-

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represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other'").

22. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 477 (1996) (citing Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255, 273 (Miss. 1988)); Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 762 (1992). The dual representation model is a source of perceived conflicts of interest that can present problems and risks for defense counsel. *Id.* at 734.

23. Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 203-04 (1999), WL 602 PLI/Lit 199; *see also* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494, 499 (Cal. Ct. App. 1984) (stating that in the tripartite relationship, it has been recognized that the insurer's attorneys may have closer ties to the insurer and a more compelling interest to protect the insurer's interests versus the insured); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 477 (1996) (asserting that a conflict in the tripartite relationship occurs when the attorney's representation of both the insured and insurer is less effective to one of the clients because of the representation of the other); Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 211 (1998) (noting that a conflict of interest may arise whenever representation rendered between the two parties differs). One commentator suggests that there is a perception that staff counsel remains loyal to the insurer, who is also their employer, versus the insured. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 514 (1996). Further, in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, the court acknowledged that in the tripartite relationship, it has been recognized that the insurer's attorneys may have closer ties to the insurer, and thus a more compelling interest to protect the insurer's interests over the insured's interests. *San Diego Navy*, 208 Cal. Rptr. at 498 n.4.

24. Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 14 n.18; *see also* Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 261-62 (1997) (analyzing the tripartite relationship and the historical debate to determine who the insurance defense attorney actually represents—one client or two).

25. Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 734 (1992); *see also* Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 161 (Ind. 1999) (commenting that there is an ongoing debate as to whether both the insured and the insurer are clients); Michael D. Morrison & James

sentation poses threats to both the insured and insurer since there is both motive and opportunity for improper influence.[26] Other jurisdictions, including Texas, adhere to the single client view that the insured is the only client.[27]

B. *Ethical Principles and Professional Responsibilities of Defense Counsel*

An examination of the conflicts of interest that arise out of the tripartite relationship must begin with a review of the ethical principles that

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R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 356 (2001) (discussing that different jurisdictions have developed two separate conclusions on the issue of the identity of the client); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 482 (1996) (describing the "dual client doctrine" that has been recognized by various courts); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 273 (1995) (suggesting that a dual client status exists). Under the dual client doctrine, "So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney." Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts to Manage Legal Care*, 28 U. MEM. L. REV. 57, 81 (1997) (quoting Nat'l Union Fire Ins. Co. v. Stites Prof'l Law Corp., 1 Cal. Rptr. 2d 570, 575 (Cal. Ct. App. 1991).

26. *See* Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996) (describing how conflicts of interest can detrimentally affect the representation of both parties). Because an insurer retains counsel for the insured and pays the lawyer's bills in the tripartite relationship, the insurer has both the opportunity and motive to exert improper influence over that attorney. Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 652 (2000).

27. *See* State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 628 (Tex. 1998) (stating that the defense counsel "must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions"); Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973) (finding that defense counsel owes the insured the same type of loyalty as if the insured had originally hired him); Letter Brief of Amici Curiae of Tex. Ass'n of Defense Counsel, at 2, Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002) (stating that Texas follows the "sole representation" model); Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 660 (2000) (acknowledging that Texas follows the single client view, but maintains that insurers should be able to recognize a contractual relationship). Under the Model Code of Professional Responsibility, if both clients cannot be represented when their interests diverge, the insured is the sole client and must be represented with undivided fidelity. Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 734 (1992) (citing the ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 282 (1950)).

govern the attorney's representation of a client. The cost cutting measures employed by insurance companies impermissibly interfere with the attorney-client relationship; therefore, it must be recognized that the tripartite relationship is an example of an exception to the general ethical principles against allowing outside influences or third-party interference with the attorney-client relationship.[28] Under Texas Disciplinary Rule of Professional Conduct 1.06(b)(2), "[A] lawyer shall not represent a person" where that engagement "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."[29] This rule also prohibits a defense attorney from accepting an engagement when payment for the defense is provided by a third-person.[30]

If an attorney accepts compensation from a third-party for representing a client, the defense counsel must follow Rule 1.08(e) of the Texas Disciplinary Rules of Professional Conduct, which provides that an attorney must: (1) obtain the client's fully informed consent, (2) protect against outside interference with the attorney's "independence of professional judgment or with the client-lawyer relationship[,] and" (3) follow the confidentiality requirements imposed by Rule 1.05 of the Texas Rules of Professional Conduct, which prohibits any disclosure without the client's consent.[31] Under Rule 1.06(c) of the Texas Rules of Professional Con-

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28. *See* Gardner v. N.C. State Bar, 341 S.E.2d 517, 519-20 (N.C. 1986) (declaring that the primary rational for prohibiting corporations from practicing law is to prevent interference with the attorney-client relationship by nonlawyers and to prevent limitations on an attorney's independent judgment when representing a client); Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 13 (discussing the Indiana Supreme Court's recognition that conflicts may arise when an insured is represented by house counsel). "The structural economic realities of the tripartite relationship" prevent insurance companies from pressuring defense attorneys and therefore, are a prime example of an exception to the rule that there can be no outside influence on an attorney. Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 671 (2000).

29. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 354-55 (2001) (paraphrasing the disciplinary rule).

30. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 355 (2001) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2)).

31. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(e); *see also* Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 557-58 (Tex. 1973) (stating that an attorney must notify an insured immediately if a conflict arises between the interests of the insured and the insurer because the attorney owes the insured unqualified loyalty); Sherry L. Anderson, *Ethical Issues*

duct, the attorney must obtain the client's consent "after full disclosure of the existence, nature, implications, and possible adverse consequences of the" situation, if an opportunity for the representation to be materially affected exists.[32] Without satisfying all of these ethical requirements, an attorney cannot accept payment from an insurer to represent an insured.[33] As previously discussed, because the insurer pays for the representation of the insured against a liability claim, the insurer maintains a contractual right to control the defense, which places the defense counsel in a peculiar position of having to balance the contractual responsibilities to the insurer against the ethical responsibilities to the insured.[34]

Under the tripartite relationship, whether the view is one of a single client or multiple clients, the defense counsel owes the highest obligation of loyalty to the insured.[35] The duty of loyalty is absolute and is essential to the maintenance of the integrity of the legal profession.[36] The duty of

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Presented by the "Tripartite Relationship," in AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION 447, 449 (2002), WL SG081 ALI-ABA 447 (outlining Model Rule 1.8(f) of the 1983 Model Rules of Professional Conduct).

32. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c); Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 752 (1992).

33. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 355 (2001).

34. *See* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494, 498 (Cal. Ct. App. 1984) (discussing how a common lawyer's representation may be rendered ineffective); G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved) (describing difficulties arising from a relationship where the insurer retains control of the litigation); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 355 (2001) (recognizing the difficulty that defense counsel may encounter in balancing responsibilities to both the insurer and the insured); Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 269 (1994) (discussing the right of insurers to control the insured's defense).

35. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 1; Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973); Am. Employers Ins. Co. v. Med. Protective Co., 419 N.W.2d 447, 448 (Mich. Ct. App. 1988); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1476 (1981) (stating that when an insurer retains a lawyer to defend an insured, the insured is the attorney's client); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 519 (1996) (indicating that an essential element of the attorney-client relationship is loyalty). Some "authorities take the position that policyholders are defense lawyers' 'primary clients.'" Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I–Excess Exposure Cases*, 78 TEX. L. REV. 599, 615 (2000) (quoting Montanez v. Irizarry-Rodriguez, 641 A.2d 1079, 1084 (N.J. Super. Ct. App. Div. 1999)).

36. *In re* Youngblood, 895 S.W.2d 322, 329 (Tenn. 1995); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and*

loyalty established between the attorney and the insured requires that counsel appreciate their confidential relationship.[37] In addition, a defense lawyer must represent the insured as if the attorney was selected and hired by the client, and thus must provide a competent representation with dedication and zeal in advocacy upon the client's behalf.[38] "These duties require that 'the lawyer must at all times protect the interests of the insured if those interests would be compromised by insurer's instructions.'"[39] If a situation arises "where the insured . . . confide[s] to the attorney information that, if known by the insurer, the other client, would permit it to deny coverage and withdraw from the defense[,] [t]he attorney is prohibited from disclosing this information from the insured, to the insurer."[40]

Commentary to Texas Disciplinary Rule of Professional Conduct 1.06 states that an attorney's "[l]oyalty to a client is impaired . . . in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others."[41] Even though the obligation to defend is defined by the insurance policy (a contract) between the insured and the insurer, the contract cannot alter the attorney-client relationship and has no bearing on the defense attorney's duty to abide by the ethical requirements under the Texas Disciplinary Rules of Professional Conduct.[42] Again, this poses a dilemma for the defense attorney

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Issues in Texas Insurance Defense Practice, 53 BAYLOR L. REV. 349, 368 (2001); *see also* Robert B. Gilbreath, *Caught in a Crossfire, Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 145 (1996) (commenting that when conflicts of interest arise between the insurer and the insured, defense counsel should remain loyal to the insured).

37. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 536 (1996); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1) (stating that a lawyer is prohibited from knowingly revealing confidential information).

38. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 6; State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 627-28 (Tex. 1998); *Tilley*, 496 S.W.2d at 558.

39. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 359 (2001) (quoting *Traver*, 980 S.W.2d. at 628).

40. Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 209 (1999), WL 602 PLI/Lit 199; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1476 (1981) (opining that when a conflict of interest arises the "lawyer shall not knowingly reveal a confidence or secret of his client").

41. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 4.

42. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt. 5 (noting that agreements regarding the scope of representation must still be in accord with the Rules of Professional Conduct); 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 23.3 (3d

who must balance the duty of loyalty and the duty to provide a zealous representation in an adequate and ethical defense for the insured, while owing responsibilities to the insurer under the language of the insurance policy and the attorney's retainer agreement.[43]

In the tripartite relationship, the attorney is placed in a conflicting situation when he obtains information that may limit an insured's coverage defense.[44] While an attorney must keep the client (insurer) informed, he is also required to maintain the duty of confidentiality to the dual client, the insured.[45] Preservation of client confidentiality is governed by the Texas Disciplinary Rule of Professional Conduct 1.05.[46] The confidential-

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ed. 1989) (recognizing that the intrusion of an insurance contract does not alter the duty under the attorney-client relationship that defense counsel owes the insured); Robert B. Gilbreath, *Caught in a Crossfire, Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 141-42 (1996) (commenting that the existence of an insurance contract does not change the attorney-client relationship between the insurer and the insured).

43. William W. Hurst et al., *Can Insurance Defense Firms Be Ethically Replaced by Staff Counsel? Ruling Says Use of Staff Counsel Constitutes UPL*, RES GESTAE, Aug. 1998, at 42, 44; *see also L.E.I. 99-01: Ethical Propriety of Insurance Company Captive Law Firms*, W. VA. LAW., Sept. 1999, at 20, 20 (describing a defense lawyer's dual loyalties); Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 732-33 (1992) (finding that the defense attorney's duty to defend arises from the insurer's contractual obligation to defend the insured, which is found in the language of the insurance policy).

44. Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 219 (1998); *see also* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 342 (1995) (describing the dilemma that confidentiality creates for a defense attorney).

45. *See* Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 219-20 (1998) (recognizing that "[a] conflict arises if the ethical obligations of the attorney require that the information be disclosed to the *other* client") (emphasis added); *see also* MODEL RULES OF PROF'L. CONDUCT R. 1.4 cmt. 1 (2002) (stating that an attorney is required to "promptly inform the client"); MODEL RULES OF PROF'L. CONDUCT R. 1.6 (2002) (mandating that an attorney must not divulge information related to the representation of a client without informed consent). If this conflict arises, an attorney cannot represent both the insured and the insurer without full disclosure and a consenting waiver from the insured. Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 220 (1998).

46. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b). This rule provides in part:

> Except as permitted by paragraphs (c) and (d) . . . a lawyer shall not knowingly:
> (1) Reveal confidential information of a client or a former client to:
> (i) a person that the client has instructed is not to receive the information; or
> (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
> (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

ity dilemma is more prevalent in the in-house counsel arrangement since the third-party payer is the insurer and the employee-attorneys of the insurer tend to favor shared communications.[47] However, lawyers are still expected to comply with their duty of confidentiality and refrain from disclosing information regarding an engagement, even when held under pressure from third-party payers.[48]

C. *How Conflicts Arise in the Insurance Context*

An understanding of how the interests of the insured and insurance company may be adverse is critical in determining whether a defense lawyer has a conflict of interest in the tripartite relationship. The fiscal relationship between the insurer and the insurer-retained defense counsel creates enormous pressure because the insurer retains the control of preparing a defense. Further, the cost containment measures established by the relationship do not allow defense counsel to provide a vigorous defense free from outside influence.[49] This conflict easily compromises an

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(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

Id.

47. *See* Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 531 (1998) (concluding that lawyers must withstand third-party-payer pressures for information and comply with their duty of confidentiality); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2002) (mandating that a third party may pay for representation if the client consents, but that information regarding such representation is still privileged to the third party).

48. *See* Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 531 (1998) (stating that lawyers must balance their duty of confidentiality with pressures from the third-party payer); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2002) (explaining the prohibited transactions where there is a third-party payer).

49. *See* Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996) (urging that a lawyer cannot loyally represent the insured where there is a conflict of interest between the insurer and the insured). *See generally* Robert B. Gilbreath, *Caught in a Crossfire, Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 142-44 (1996) (outlining conflicts that arise for insurance defense counsel).

attorney's duty of unqualified loyalty[50] along with the preservation of the client's confidentiality.[51]

Opposing interests creates the possibility of conflict between the insurer and the insured, which has the potential to affect the insured's defense.[52] Another concern is that the insured may be robbed of the indemnity promised under her policy.[53] Likewise, insurers are concerned that a conflict of interest may expose them to a claim of bad faith by its insured.[54] "Conflicts of interest also may strip insurers of important cov-

50. *See* Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973) (expressing that when a conflict arises, the attorney, as the insured's legal representative, owes the insured unqualified loyalty). *See generally* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 177 (2000) (discussing the rationale of protecting attorney independence because of the assumption that the trust and confidence in the attorney-client relationship cannot exist when the corporate employer controls the attorney); *L.E.I. 99-01: Ethical Propriety of Insurance Company Captive Law Firms*, W. VA. LAW., Sept. 1999, at 20, 20 (stating that the qualities of trust and confidence in the attorney-client relationship cannot exist if the insurance company controls the lawyer).

51. *See* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 360 (2001) (noting that twenty-eight states have rules that require client consent before records can be sent to the insurer); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 519 (1996) (opining that defense counsel's files should be confidential). In addition, the attorney's confidentiality means that the insurer's staff should not have access to them. *Id.*

52. *See* Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996) (explaining the opposing interests of the insured and the insurer in detail). *See generally* Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585, 593-94 (1997) (discussing ethical issues that arise when a third-party provides payment for legal fees).

53. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996). If an insurer attempts to refuse to indemnify an insured by proving the claim is not covered under contract and the insured demands indemnity, a conflict of interest occurs. Allison M. Mizuo, Casenote, Finley v. Home Insurance Co.: *Hawai'i's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675, 676 (2000), WL 22 UHILR 675. "The current standard liability policy obligates the insurer to indemnify an insured 'up to the coverage limits, for sums that insureds are legally obligated to pay as damages' to third parties for acts within the policy's coverage." Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 732 (1992) (quoting Alan I. Widiss, *Abrogating the Right and Duty of Liability Insurers to Defend Their Insureds: the Case for Separating the Obligation to Indemnify from the Defense of Insureds*, 51 OHIO ST. L.J. 917, 917 (1990)).

54. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996); *see also L.E.I. 00-01: Ethical Propriety of Insurance Company Captive Law Firms*, W. VA. LAW., Sept. 1999, at 20, 22 (noting that in some cases, insurers may be subject to bad faith claims under both common law and legislation).

erage defenses."[55] Further, the defense counsel may be exposed to a malpractice claim by insureds who might allege that defense counsel did not vigorously defend the insured's interest, and their interest was compromised to the insurer's benefit.[56] An insurer might also sue defense counsel by alleging that the attorney's negligence exposed it to liability beyond its contractual requirements.[57]

1. Ethics Opinion 532

The Texas State Ethics Committee issued Opinion 532 to address the duty of confidentiality and the effect of an insurer's use of independent auditors to review client-billing statements of defense lawyers defending their insureds.[58] This opinion followed a multitude of jurisdictions that have case law, ethics rulings, or opinions addressing whether client statements may be released to auditors without the consent of the client and whether it is ethically permissible to seek that consent.[59] The crux of the opinion is that a lawyer must adhere to Rules 1.05 and 1.08(e) of the

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55. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996); *see also* Allison M. Mizuo, Casenote, Finley v. Home Insurance Co.: *Hawai'i's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675, 675-76 (2000), WL 22 UHILR 675 (finding that an insurer's focus is to deny coverage to the insured).

56. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 483 (1996); Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 272 (1994); *see also L.E.I. 99-01: Ethical Propriety of Insurance Company Captive Law Firms*, W. VA. LAW., Sept. 1999, at 20, 22 (finding that lawyers who work in captive firms face the risk of losing their jobs or employment benefits if they side with the insured over the insurer).

57. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 484 (1996). *See generally L.E.I. 99-01: Ethical Propriety of Insurance Company Captive Law Firms*, W. VA. LAW., Sept. 1999, at 20, 22 (explaining how an attorney, who represents an insured, writes a letter to the insurance company in a case where damages may be in excess of the policy limits, and that attorneys in captive law firms have to be willing to write to their own employer).

58. Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 805-06 (2000).

59. *See* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 360 n.50 (2001) (listing the various jurisdictions that have held that client consent is necessary before auditors may view confidential information); *see also* S.C. Bar Ass'n Ethics Advisory Comm., Op. 97-22 (1997), 1997 WL 861963 (finding that a lawyer is required to obtain the insured's informed consent before releasing any billing information); Utah State Bar Ethics Advisory Op. Comm., Op. 98-03 (1998), 1998 WL 199533 (concluding that a client's consent is required prior to the attorney's release of billing statements to the insurance company).

Texas Disciplinary Rules of Professional Conduct.[60] Therefore, lawyers must maintain the client's confidentiality despite the fact that a third party is paying the insured's legal expenses.[61] A defense attorney must uphold her duties to the client under the Texas Disciplinary Rules of Professional Conduct before disclosing confidential billing information, even though the insurance contract might contain a privilege to provide the insurer access to such information.[62]

The opinion falls back on the attorney's duty of unqualified loyalty and confidentiality to his or her sole client, the insured.[63] The opinion preserves client confidentiality and the attorney-client privilege, which may be jeopardized when an insurer submits billing statements to outside auditors.[64] If the information could be harmful to the insured's defense such as to deny coverage, the defense attorney cannot disclose the information to the insurer without the insured's fully informed consent.[65] Opinion 532 specifically addresses the attempt by insurance companies to claim consent through the language of the insurance contract by stating, "[A]greements between the insured and the insurer cannot affect or di-

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60. *See* Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 805-06 (2000) (discussing a lawyer's obligations under Rules 1.05 and 1.08 of the Texas Disciplinary Rules of Professional Conduct); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001) (discussing Ethics Opinion 532).

61. Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 806 (2000); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001) (stating that Opinion 532 prohibits attorneys, who have not obtained client consent, from allowing insurance companies to employ third-parties to audit billing invoices).

62. *See* Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 806 (2000) (finding that a lawyer's ethical obligations to the insured cannot be affected or diminished by agreements between the insurer and the insured); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 374 (2001) (indicating that under the Texas Disciplinary Rules of Professional Conduct, an attorney must obtain client consent regardless of prior agreements between the insured and the insurer).

63. Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 806 (2000).

64. *Id.*; Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 367 (2001).

65. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 365 (2001). In addition, in their concurring and dissenting opinion in *Traver*, Justices Gonzalez and Abbott emphasized that disclosure of billing documents to auditors threatens the attorney-client privilege. *See* State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 633 (Tex. 1998) (Gonzalez, J., concurring in part, and dissenting in part).

minish a lawyer's ethical responsibilities to the insured under the Texas Disciplinary Rules once the insured becomes the client of the lawyer."[66]

In addition to the duty of loyalty and the duty of confidentiality, the tripartite relationship infringes on the defense counsel's duty to represent the insured free from outside influence.[67] A lawyer carries an unqualified duty of loyalty to the insured and "the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions."[68] This duty is codified in Texas Disciplinary Rule of Professional Conduct 1.08(e), which provides that a lawyer shall not allow "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."[69] Similarly, Texas Disciplinary Rule of Professional Conduct 5.04(c) states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[70] The defense counsel's independence is compromised in the tripartite relationship because liability insurers have begun imposing litigation/billing guidelines on lawyers they have retained to defend their insureds.[71] A goal of these guidelines is to allow the insurer to control the insured's defense by requiring the defense attorney to obtain approval before taking a course of action on behalf of the insured.[72] These guidelines often interfere with the attorney's

66. Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 806 (2000).

67. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 367 (2001); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 (stating that "a lawyer shall exercise independent professional judgment and render candid advice"); TEX. DISCIPLINARY R. PROF'L CONDUCT 5.04(c) (mandating that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services").

68. *Traver*, 980 S.W.2d at 628.

69. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(e)(2).

70. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.04(c).

71. *See* Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000) (concluding that such guidelines violate rules directing that lawyers must maintain independence in their representation); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 382 (2001) (suggesting how a lawyer might be able to ethically comply with guidelines).

72. *See* Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000) (concluding that imposing restrictive litigation guidelines that control legal services leads to violations of rules by lawyers); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 391 (2001) (discussing Ethics Opinion 533 and the practice of imposing litigation guidelines).

representation of the client, which is ethically impermissible.[73]

2. Ethics Opinion 533

The Texas Ethics Committee later released Opinion 533. The opinion states that "'a lawyer shall not permit a person [the insurer] who recommends, employs, or pays the lawyer to render legal services for another [the insured] to direct or regulate the lawyer's professional judgment in rendering such legal services,'" nor allow "interference with the lawyer's independence of professional judgment."[74] The committee does permit an attorney "to enter into an agreement with the insurer regarding his fee" or a restriction limiting representation "to matters related to insurance coverage."[75] However, restrictions cannot "direct or regulate the lawyer's professional judgment . . . or affect the lawyer's responsibility to the insured/client."[76] Similarly, the insurer and the insured can come to any kind of reasonable agreement regarding the insurance policy, but the restriction cannot reduce the "lawyer's ethical responsibilities to the insured," and no restriction or requirement can interfere with the attorney's professional judgment under Texas Disciplinary Rule of Professional Conduct 5.04.[77] From the opinion, it is clear that the Com-

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73. *See* Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000) (asserting that any agreements between insurer and lawyer must not supercede the lawyer's ethical responsibilities); Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 572-73 (Ky. 1996) (concluding that fee arrangements create ethical problems by interfering with the lawyer's independence).

74. Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 5.04(c)(e), 1.08(2)); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 cmt. 4 (providing that the scope of representation can be limited by agreement under limited circumstances); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 350 (2001) (discussing the opinion that attorneys retained by insurance companies to defend their insureds allow their exercise of independent judgment to be limited by the implementation of litigation guidelines offered by the insurance company).

75. Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 383 (2001) (noting that only agreements that do not interfere with independent judgment or client confidentiality may be ethically imposed upon lawyers).

76. Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 392 (2001).

77. Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 5.04 cmt. 6 (commenting that where there is an agreement between a corporation and a lawyer it should "provide[ ] for the lawyer's professional independence").

mittee's intent was to convey its concern that a defense lawyer might allow her duties to the client (insured) to be materially and adversely affected by its obligations to the insurer (employer).[78]

III. THE PROBLEM

A. *"Captive" or In-House Counsel*

The use of "captive" or in-house counsel is becoming a common practice among major insurance companies.[79] It is appealing and increasing among insurers because they believe that bringing litigation expenses in-house allows the insurance company to manage the defense of claims more closely, and it is more cost effective than the use of independent attorneys who charge by the hour.[80] In addition, the high level of specialization and expertise of in-house counsel along with the repeated exposure to cases based on the products of these companies offers efficiency and allows the insurer to provide the insured with a competent defense at

78. *See* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 394 (2001) (concluding that the opinion's bottom line is that a lawyer's duties to the insured cannot be compromised by his obligations to the insurer); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06 cmt. 4 (expressing a concern that a lawyer's loyalty to his client may be impaired by representing both parties).

79. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 392 (2001); *see also* William W. Hurst et al., *Can Insurance Defense Firms Be Ethically Replaced by Staff Counsel? Ruling Says Use of Staff Counsel Constitutes UPL*, RES GESTAE, Aug. 1998, at 42, 44 (stating that this increasingly common practice is the subject of substantial discussion in the legal community).

80. *See* Paula-Jane Seidman & John S. (Jack) Pierce, *A Continuing Crisis: Casualties on Both Sides in the Unholy War Between Insurers and the Defense Bar over Issues of Staff Counsel, Legal Audits and Billing Guidelines, in* 629 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 479, 485-86 (2000), WL 629 PLI/Lit 479 (acknowledging that use of staff counsel to defend insureds results in lower overall litigation costs); Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 152 (2000) (discussing that the use of in-house counsel may be due to cost-reduction efforts by the insurer); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 481 (1996) (explaining why it is in the best interests of the insurer to control the insured's defense); Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 652 (2000) (implying that the defense counsel is controlled by the insurer); William W. Hurst et al., *Can Insurance Defense Firms Be Ethically Replaced by Staff Counsel? Ruling Says Use of Staff Counsel Constitutes UPL*, RES GESTAE, Aug. 1998, at 42, 42 (concluding that the insurer's goals are to eliminate the costs associated with outside counsel and the ability to have more control over the lawyer).

a lower cost.[81] Insurers argue that having the contractual right to control the insured's defense allows the insurer to control costs by taking advantage of settlement opportunities, limiting defense expenses, and providing better defense strategies.[82]

Although attempts at cost-reduction would hopefully result in lower premiums for the consumer, this cost-saving measure impermissibly interferes with the attorney-client relationship, which has an impact on insureds.[83] In addition, critics of this practice argue that the financial interests of the insurance company and defense counsel create increased pressure to please the insurer/employer because the attorney is dependent upon the insurance company for future assignments and a long term relationship, which all results in less effective representation of the insured.[84] Therefore, because the interest of the insured might be in con-

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81. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 513 (1996); *see also* Sherry L. Anderson, *Ethical Issues Presented by the "Tripartite Relationship," in* AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION 447, 455-56 (2002), WL SG081 ALI-ABA 447 (finding that the use of in-house counsel does not harm the insured's defense); Ronald E. Mallen, *Defense by Salaried Counsel: A Bane or a Blessing?*, 61 DEF. COUNS. J. 518, 522 (1994) (commenting that salaried counsel do not have to worry about economic pressures).

82. *See* Robert B. Gilbreath, *Caught in a Crossfire, Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L. REV. 139, 141 (1996) (describing the benefits to the insured when the insurer is in control); *see also* Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 733 (1992) (stating that dual representation is often beneficial).

83. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 352 (2001).

84. *See* State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 634 (Tex. 1998) (Gonzalez, J., dissenting) (emphasizing that cost containment measures by insurance companies compromise a lawyer's autonomy and interfere with an attorney's independent judgment in making decisions to provide the best defense for the insureds); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 481 (1996) (suggesting that most insurance defense attorneys lower their hourly rates to increase their business volume); Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 661 (2000) (comparing the attorney's relationship with the insurer to that of the attorney for the insured); William W. Hurst et al., *Can Insurance Defense Firms Be Ethically Replaced by Staff Counsel? Ruling Says Use of Staff Counsel Constitutes UPL*, RES GESTAE, Aug. 1998, at 42, 44 (contending that if there were to be an argument, the defense attorney would favor the interests of the insurer since the attorney is the insurer's employee). Further, Hurst suggests that defense firms rarely challenge this practice because they have hopes of obtaining assignments from insurers in the future. *Id.*

flict with the interest of the carrier, the defense counsel is forced to walk an "ethical tightrope."[85]

The use of captive firms or in-house counsel by insurance companies to defend policy-holders has been addressed in numerous states through court decisions and ethics opinions.[86] The key issues addressed in these jurisdictions are

> (1) whether [the] use of [captive or in-house] counsel constitutes the unauthorized practice of law, (2) whether a inherent conflict of interest in the representation violates the Rules of Professional Conduct, and (3) whether a failure to disclose this employment relationship to the client/insured, or the manner of disclosure, violates the Rules of Professional Conduct and/or constitutes fraud or misrepresentation independent of any ethical concerns.[87]

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85. Eric Mills Holmes, *A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net*, 26 WILLAMETTE L. REV. 1, 3 (1989); *see also* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 178-79 (2000) (suggesting that an employee-attorney's ethical duty to maintain independent judgment and the duty of loyalty are threatened in the captive counsel or in-house situation); Sharon K. Hall, Note, *Confusion over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 733 (1992) (stating that conflicts of interest are inherent to a dual representation system).

86. Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12.

87. Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 395, 396 (2001) (citations omitted); *see also* Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 651 (5th Cir. 2002) (addressing the interpretation of the unauthorized practice of law statute in Texas); *In re* Rules Governing the Conduct of Attorneys in Fla., 220 So. 2d 6, 7 (Fla. 1969) (pointing out that conflicts of interest arise when attorneys represent dual clients); Gardner v. N.C. State Bar, 341 S.E.2d 517, 523 (N.C. 1986) (holding the use of in-house counsel constitutes the unauthorized practice of law); *In re* Youngblood, 895 S.W.2d. 322, 331 (Tenn. 1995) (finding that the failure to disclose the employment relationship of the defense attorney with the insurer constituted misrepresentation, which is in violation of the Model Rules). A discussion of the insurer's deceptive disclosure of the employment of captive firms is not included in this Comment because this issue has not been addressed in Texas. However, it appears that this practice would be prohibited based on the precedent established in other jurisdictions. *See, e.g.*, Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996) (prohibiting the deceptive use of captive firm names); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 164 (Ind. 1999) (using firm name of a liability insurer as the captive firm name violated the professional conduct rule prohibiting the practice of law under a misleading name); *In re* Youngblood, 895 S.W.2d at 332 (finding that "the holding out of an in-house attorney-employee as a separate and independent law firm constitutes an unethical and deceptive practice").

B. *The Use of Captive Firms or In-House Counsel to Defend Insureds Constitutes the Unauthorized Practice of Law in Texas*

"The Supreme Court of Texas has inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as a whole."[88] The Unauthorized Practice of Law Committee (UPLC) is a state agency appointed by the Supreme Court of Texas to police against the unauthorized practice of law in Texas.[89] The Committee has been involved in suits against major insurance companies alleging that the use of staff counsel, who are employees of the insurers, to defend insureds constitutes the unauthorized practice of law.[90] The UPLC recently received its first victory when Judge Hall of the 68th District Court issued a declaratory judgment in its favor.[91]

In its claim, the UPLC set out to demonstrate that the business arrangement established by the counterdefendants, American Home Assurance Corporation (AHAC) and Travelers Indemnity Insurance Corporation (Travelers), utilized staff counsel offices and attorneys that reported directly to supervisors that were not persons licensed to practice law in the state of Texas, but who were in charge of the staff counsel offices.[92] These captive counsel offices and attorneys were engaged in the practice of law by rendering legal advice and appearing in court on behalf of third-parties.[93] Admittedly, staff counsel are paid employees of counterdefendants, AHAC, and Travelers, and they are subject to com-

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88. *In re* Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 769 (Tex. 1999); Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 160 (2000) (stating that traditionally, the primary purpose "for the regulation of the unauthorized practice of law is to protect the public from nonlawyers who are incompetent, unskilled, and unethical"). The ABA also supports the idea that limiting the practice of law is to protect the public. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (2002) (providing that although the definition of the practice of law can vary by jurisdiction, the definition ultimately protects the public from the practice of law by unqualified individuals).

89. TEX. GOV'T CODE ANN. § 81.104 (Vernon 1998); *see also* Defendant's Original Counterclaim at 1, Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002) (asserting that the committee is charged with enforcing the law and guarding against the unauthorized practice of law).

90. *See generally Nationwide*, 283 F.3d at 651 & n.2 (stating that the UPLC committee had previously sued Allstate for the unauthorized practice of law); Defendant's Original Counterclaim at 2, *Am. Home* (contending that the use of captive counsel by the insurance company to represent its insureds constitutes the unauthorized practice of law).

91. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002).

92. Defendant's Original Counterclaim at 3, *Am. Home* (No. DV-99-08673-C).

93. *Id.* These activities are included in the definition of the practice of law in the State Bar Act. *See* TEX. GOV'T CODE ANN. § 81.101 (Vernon Supp. 2003) (defining the "prac-

pany policies and procedures and are under the direct control of the counterdefendants.[94] While under this control, defense counsel provide legal advice and defend "third parties in claims, litigation, and other legal matters."[95]

Therefore, the UPLC claimed that based on this practice, AHAC and Travelers, as corporations, were practicing law in this state through their captive counsel/staff attorneys.[96] The UPLC supported this claim by arguing that in Texas, corporations are not permitted to practice law under chapter 81 of the Texas Government Code (State Bar Act).[97] Additionally, UPLC contended that the defendant's use of staff counsel violated Rules 1.05, 1.06, 2.02, 5.04(c) and (d), 7.06, 8.03, and 8.04 of the Texas Disciplinary Rules of Professional Conduct.[98] These rules regulate several general duties that maintain the integrity of the legal profession, including the duty to maintain confidentiality and independent professional judgment and the duty to refrain from conflicts of interest.[99] Ultimately,

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tice of law" as the preparation of documents or management of an action or proceeding on behalf of a client before the court).

94. Defendant's Original Counterclaim at 3, *Am. Home* (No. DV-99-08673-C).

95. *Id.*

96. *Id.*

97. *Id.*; *see also* TEX. GOV'T CODE ANN. § 81.102 cmt. 5 (Vernon 1998) (stating that a corporation may be restrained from performing acts that constitute the practice of law). Other states have similar statutes that prohibit the practice of law by corporations. ARK. CODE ANN. § 16-22-211 (Michie 1997); GA. CODE ANN. § 15-19-51 (1999); HAW. REV. STAT. ANN. § 605-14 (Michie 1998); LA. REV. STAT. ANN. § 37:213 (West 1999); MICH. COMP. LAWS ANN. § 450.681 (West 1998); N.C. GEN. STAT. § 84-5 (1995).

98. Defendant's Original Counterclaim at 4, *Am. Home* (No. DV-99-08673-C).

99. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 (defining confidential information and stating that a lawyer shall not reveal confidential information to anyone that the client has instructed not receive that information); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2) (governing an attorney's course of conduct when a conflict of interest arises); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(e) (prohibiting interference with a lawyer's independent professional judgment or with the attorney-client relationship); TEX. DISCIPLINARY R. PROF'L CONDUCT 2.02 (prohibiting a lawyer from evaluating the affect of a matter for a client for which the evaluation will be used for a third person); TEX. DISCIPLINARY R. PROF'L CONDUCT 5.04 (sharing legal fees with a nonlawyer is prohibited); TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05 (assisting a non-bar member in the performance of an activity that constitutes the unauthorized practice of law is prohibited); TEX. DISCIPLINARY R. PROF'L CONDUCT 7.06 (accepting or continuing employment when the lawyer knows or reasonably knows "that the person who seeks the lawyer's services does so as a result of conduct prohibited by" the professional rules); TEX. DISCIPLINARY R. PROF'L CONDUCT 8.03 (requiring the lawyer to inform the appropriate disciplinary authority when a lawyer has knowledge that another lawyer has committed a violation of the applicable rules of professional conduct); TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04 (engaging in conduct or knowingly assisting another to violate the rules of professional conduct is prohibited).

a declaratory judgment was issued in UPLC's favor.[100]

IV. Is *American Home* Right for Texas?

A. *Opponents' Arguments*

1. The State Bar Act and Common Law Precedent

In *American Home*, the UPLC fervently argued that the counterdefendants, as corporations, were engaged in the practice of law, and therefore they were in violation of the State Bar Act.[101] Although the court ultimately agreed that American Home and Travelers were engaged in the unauthorized practice of law as corporations, a literal interpretation of the statute could provide a basis for future conflicts with decisions by other jurisdictions.[102]

The State Bar Act provides that membership in the State Bar be "composed of those persons licensed to practice law in this state."[103] The Act defines the "practice of law" as:

> The preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as [a] service rendered out of court, including [the] giving [of] advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[104]

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100. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002).

101. *See id.* (holding that the use of staff counsel was "the unauthorized practice of law by such company [American Home]"); *see also* Defendant's Original Counterclaim at 4, *Am. Home* (No. DV-99-08673-C) (arguing that the counter defendants were in violation of section 81.101 of the Texas Government Code).

102. *See* Answer of the Travelers Indemnity Co. to Defendant's First Amended Counterclaim at 2, *Am. Home* (claiming that "[t]he State Bar Act . . . does not forbid insurance companies from employing staff counsel to represent insureds"); *see also* Amended Response of the Travelers Indemnity Co. at 6-7, *Am. Home* (No. DV-99-08673-C) (emphasizing that the State Bar Act does not expressly prohibit insurance companies from employing staff counsel to defend its insureds, and the practice of law as defined by the act does not say that employing staff counsel or outside counsel to defend an insured as required by contract constitutes the unauthorized practice of law). A criticism of the unauthorized practice of law regulation is that most states do not have a workable definition of the practice of law or that their statutory definitions are overly broad. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 Mo. L. Rev. 151, 166-67 (2000).

103. Tex. Gov't Code Ann. § 81.051 (Vernon 1998).

104. *Id.* § 81.101.

Considering the claims made by the UPLC, along with an interpretation of the definition of the practice of law provided in the State Bar Act, it appears that AHAC and Travelers are engaged in the unauthorized practice of law.[105] Case law and ethical opinions support this conclusion.[106]

Opponents of the practice of using in-house or captive counsel by insurance companies to defend their insureds argue that in Texas, common law precedent and statutes prohibit the corporate practice of law.[107] The issue of whether a nonlawyer corporation can provide and profit from legal services provided by its own legal staff was challenged in Texas in 1939.[108] The prohibition of this practice was provided by the decision of the court in *Stewart Abstract Co. v. Judicial Commission*,[109] which stated that a corporation could employ and maintain a legal staff for its own purposes, but it "may not furnish legal services to others and collect fees or profits . . . directly or indirectly, and it may be enjoined from doing so."[110] Texas courts have provided similar results in other cases.[111] For

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105. Defendant's Counterclaim at 2-3, *Am. Home* (No. DV-99-08673-C).

106. *See, e.g.*, Stewart Abstract Co. v. Judicial Comm'n, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ) (prohibiting title companies from providing legal services, including preparation of mortgages, mechanic's liens, and notes); Bar Ass'n v. Hexter Title & Abstract Co., 175 S.W.2d 108, 115 (Tex. Civ. App.—Fort Worth 1943, writ granted) (prohibiting a title company from employing licensed attorneys to practice law on its behalf); Tex. Comm. on Prof'l Ethics, Op. 531, 62 TEX. B.J. 1123, 1124-25 (1999) (stating that charging market based fees for the services of employee-attorneys to wholly owned subsidiaries is prohibited in this state under Texas Disciplinary Rule of Professional Conduct 5.04(a)); Tex. Comm. on Prof'l Ethics, Op. 490, 57 TEX. B.J. 563, 563 (1994) (prohibiting banks from providing legal services by employee-attorneys); Tex. Comm. on Prof'l Ethics, Op. 498, 57 TEX. B.J. 38, 38-39 (1995) (determining that salaried corporate attorneys could not prepare estate planning documents).

107. Letter Brief of Amici Curiae of Tex. Ass'n of Defense Counsel, Inc. at 2, *Am. Home* (No. DV-99-08673-C); Similarly, in Kentucky, the court upheld the decision based on the state law that prohibits the practice of law by corporations. Am. Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 569 (Ky. 1996); *see also* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 151 (2000) (citing *American Insurance Ass'n v. Kentucky Bar Ass'n* to support the doctrine in "the area of unauthorized practice of law regulation" holding that a corporation cannot practice law).

108. *Stewart*, 131 S.W.2d at 690.

109. 131 S.W.2d 686 (Tex. Civ. App.—Beaumont 1939, no writ).

110. Stewart Abstract Co. v. Judicial Comm'n, 131 S.W.2d 686, 690 (Tex. Civ. App.—Beaumont 1939, no writ).

111. *See Hexter Title*, 175 S.W.2d at 115 (prohibiting a title company from employing licensed attorneys to practice law on its behalf); *see also* Unauthorized Practice of Law Comm. v. Parsons Tech., No. Civ. A. 3:97CV-2859H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1969) (ruling that the sale of legal software constituted the unauthorized practice of law), *rev'd*, 179 F.3d 956 (5th Cir. 1999); Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162, 164 (Tex. App.—Dallas 1992, no writ) (reviewing the distribution of will manuals); Palmer v. Unauthorized Practice Comm. of the State Bar, 438 S.W.2d 374, 377

example, in *Bar Ass'n v. Hexter Title & Abstract Co.*,[112] the court found that a title company could not utilize licensed employee-attorneys to draft conveyances and other legal documents for the benefit of its clients (third-parties).[113]

2. Texas Ethics Opinions

Over time, certain conduct and various acts by corporations or entities have been scrutinized for violating Texas ethics rules regarding fee sharing with nonlawyers or establishing business arrangements that might provide a conflict of interest or interfere with an attorney's independent judgment.[114] These acts have yielded ethics opinions that have interpreted Texas rules and found these arrangements to constitute the unauthorized practice of law.[115] For example, in applying Texas Disciplinary Rule of Professional Conduct 5.04(a), which prohibits a lawyer from sharing legal fees with a nonlawyer, the Ethics Committee stated that when a bank offers various legal services for its customers through its licensed employee-attorneys, the employee-attorney may not let the bank retain the legal fees.[116] Therefore, in Opinion 490, the Ethics Committee refused to allow a bank to use a licensed employee-attorney to assist bank customers in filling out loan applications.[117] Similarly in Opinion 177, the committee addressed the impropriety of a bank utilizing an employee-

(Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (deciding that the sale of will forms also constitutes the unauthorized practice of law).

112. 175 S.W.2d 108 (Tex. Civ. App.—Fort Worth 1943, writ granted).

113. Bar Ass'n v. Hexter Title & Abstract Co., 175 S.W.2d 108, 115 (Tex. Civ. App.—Fort Worth 1943, writ granted).

114. *See* Tex. Comm. on Prof'l Ethics, Op. 481, 57 TEX. B.J. 87, 87 (1994) (discussing fee arrangement between a law firm and a for-profit finance corporation and its implications on a lawyer's independent judgment); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 399 (2001) (reviewing several opinions issued by the Texas Committee on Professional Ethics).

115. *See, e.g.*, Tex. Comm. on Prof'l Ethics, Op. 531, 62 TEX. B.J. 1123, 1124 (1999) (stating that charging market based fees for the services of employee-attorneys to wholly owned subsidiaries constitutes the unauthorized practice of law); Tex. Comm. on Prof'l Ethics, Op. 490, 57 TEX. B.J. 563, 563 (1994) (prohibiting banks from providing legal services by employee-attorneys); Tex. Comm. on Prof'l Ethics, Op. 498, 58 TEX. B.J. 38, 39 (1995) (determining that salaried corporate attorneys could not prepare estate planning documents).

116. *See, e.g.*, Tex. Comm. on Prof'l Ethics, Op. 490, 57 TEX. B.J. 38, 39 (1995) (prohibiting banks from providing legal services by employee-attorneys, including loan applications); Tex. Comm. on Prof'l Ethics, Op. 177, 18 BAYLOR L. REV. 274, 274 (1966) (opining that a bank could not provide will preparation services to its customers through employee-attorneys).

117. Tex. Comm. on Prof'l Ethics, Op. 490, 57 TEX. B.J. 563, 563 (1994).

attorney to charge fees for the preparation of will documents.[118] The committee justified these conclusions by reasoning that the bank's income derived from the fees that were charged to these customers were fees for legal services which is contrary to Rule 5.04(a), which prohibits the sharing of fees with a layperson.[119] In Opinion 498, the committee reiterated this reasoning in economic terms and declared that salaried corporate attorneys could not prepare estate-planning documents for its customers of the corporation if the corporation received fees for their services.[120] Opinion 498 also states that it is a violation for a corporation to establish an economic arrangement where it charges for legal services by its employee-attorneys and receives compensation or income since this would be in violation of Rule 5.04(a).[121]

In 1995, the Ethics Committee considered an arrangement involving loaned in-house counsel by a corporation to one of its joint ventures.[122] The concern addressed by Opinion 512 was the potential for a conflict of interest under Rule 1.06(b)(2), which prohibited a lawyer from representing a person if the representation "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person. . . ."[123] In the opinion, the committee noted that the simultaneous representation of the joint venture and the corporation presented a potential conflict under Rule 1.06(b)(2).[124] This ethical opinion is another example of the dilemmas that in-house counsel must be wary of since the in-house counsel or captive counsel arrangement presents an opportunity for undue influence.[125]

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118. Tex. Comm. on Prof'l Ethics, Op. 177, 18 BAYLOR L. REV. 274, 274 (1966); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 399 (2001).

119. Tex. Comm. on Prof'l Ethics, Op. 490, 57 TEX. B.J. 563, 563 (1994).

120. Tex. Comm. on Prof'l Ethics, Op. 498, 58 TEX. B.J. 38, 39 (1995); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 399 (2001) (discussing Opinion 498's findings).

121. Tex. Comm. on Prof'l Ethics, Op. 498, 58 TEX. B.J. 38, 38 (1995).

122. Tex. Comm. on Prof'l Ethics, Op. 512, 58 TEX. B.J. 1147, 1147 (1995).

123. *Id.* (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2)).

124. *See id.* (discussing the Texas Disciplinary Rule of Professional Conduct 1.06 and its implications on representation of joint ventures).

125. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 (addressing client confidentiality); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(e)(2) (providing that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); TEX. DISCIPLINARY R. PROF'L CONDUCT 5.04(c) (stating in part that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's pro-

3. Other Jurisdictions

Across the country, there is a growing trend toward prohibiting the practice of insurers using company owned law firms or in-house counsel to defend insureds.[126] For example, the North Carolina Supreme Court prohibited the use of in-house counsel to represent insureds, holding that it violates the state's ban on the practice of law by corporations.[127] In Kentucky, the state supreme court upheld a state statute prohibiting corporations from engaging in the practice of law when the court failed to find a "community of interest" between an insurer and insured in defending a claim, which would justify the overriding of ethical restrictions against the use of in-house counsel.[128] The court further stated that the prohibition against the use of in-house counsel "acts as a prophylactic device to eliminate the potential for a conflict of interest or the compromise of an attorney's ethical and professional duties."[129]

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fessional judgment in rendering such legal services"); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 401 (2001) (stating that Texas ethics opinions discuss employment relationship scenarios that provide the opportunity for undue influence).

126. Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 211 (1999), WL 602 PLI/Lit 199.

127. Gardner v. N.C. State Bar, 341 S.E.2d 517, 518 (N.C. 1986); *see also* William K. Edwards, *The Unauthorized Practice of Law by Corporations: North Carolina Holds the Line*, 65 N.C. L. REV. 1422, 1423 (1987) (discussing *Gardner*'s holding); Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12 (discussing the rationale for the holding in *Gardner*).

128. Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 570-71 (Ky. 1996); *see also* Grace M. Giesel, *The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds*, 225 N. KY. L. REV. 365, 372 (1998) (discussing *Kentucky Bar Association*'s holding). The captive counsel arrangement is a prime illustration of the inherent conflicts that occur when the attorney defending the insured is on the payroll of the insurer. *See* Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 13 (quoting *Kentucky Bar Association*).

129. *Ky. Bar Ass'n*, 917 S.W.2d at 573; *see also* Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 181 (Ind. 1999) (Dickson, J., dissenting) (contending that the use of in-house counsel is inherently problematic); William W. Hurst et al., *Can Insurance Defense Firms Be Ethically Replaced by Staff Counsel? Ruling Says Use of Staff Counsel Constitutes UPL*, RES GESTAE, Aug. 1998, at 42, 43 (describing Judge Milligan's opinion in *Wills*). *But see* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 179 (2000) (criticizing this reasoning by pointing out that courts are assuming that employee-attorneys will sacrifice the interest of the client and not adhere to ethical rules and fiduciary responsibilities).

B. *Proponents' Arguments*

Based on these ethical opinions, it appears that the conflicts posed by the tripartite relationship and the use of in-house counsel are an area of concern; thus, the Ethics Committee is attempting to protect the consumer (insureds) from these conflicts with the adoption of these guidelines.[130] In addition, the decisions promulgated by the state courts also compel the conclusion that this practice constitutes the unauthorized practice of law.[131] However, proponents of the use of in-house or captive counsel, including the insurance companies, argue that the attorneys engaged in this practice have no problem adhering to ethical guidelines, nor do they have less regard for the Rules of Professional Conduct than private practitioners.[132] In addition, the insurance companies contend the Texas State Bar Act and the reliance on current Texas precedent does not support the prohibition of this practice.[133]

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130. *See, e.g.*, Tex. Comm. on Prof'l Ethics, Op. 531, 62 TEX. B.J. 1123, 1124 (1999) (finding that charging market based fees for the services of employee-attorneys to wholly owned subsidiaries constitutes the unauthorized practice of law); Tex. Comm. on Prof'l Ethics, Op. 498, 58 TEX. B.J. 38, 38-39 (1995) (determining that salaried corporate attorneys could not prepare estate planning documents); Tex. Comm. on Prof'l Ethics, Op. 490, 57 TEX. B.J. 563, 563 (1994) (prohibiting banks from providing legal services through employee-attorneys).

131. *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., No. Civ. A. 3:97CV-2859H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1969) (ruling that the sale of software constituted the unauthorized practice of law), *rev'd*, 179 F.3d 956 (5th Cir. 1999); Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162, 164 (Tex. App.—Dallas 1992, no writ) (reviewing the distribution of will manuals); Palmer v. Unauthorized Practice Comm. of the State Bar, 438 S.W.2d 374, 377 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (deciding that the sale of will forms also constitutes the unauthorized practice of law); Bar Ass'n v. Hexter Title & Abstract Co., 175 S.W.2d 108, 109 (Tex. Civ. App.—Fort Worth 1943, writ granted) (prohibiting a title company from employing licensed attorneys to practice law on its behalf); Stewart Abstract Co. v. Judicial Comm'n, 131 S.W.2d 686, 690 (Tex. Civ. App.—Beaumont 1939, no writ) (restricting title companies from providing legal services, including preparation of mortgages, mechanic's liens, and notes).

132. *See In re* Allstate Ins. Co, 722 S.W.2d. 947, 953 (Mo. 1987) (en banc) (stating that "[t]here is no basis for a conclusion that employed lawyers have less regard for the Rules of Professional Conduct than private practitioners"); Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 179 (2000); Brief of the Travelers Indemnity Co. in Support of Motion to Reconsider at 13-14, Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002) (arguing that claims against the integrity of staff counsel are groundless).

133. *See* Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 654 (5th Cir. 2002) (finding that no Texas cases have addressed whether an insurance company can employ "staff attorneys to defend its insureds"); Supplemental Brief of the Travelers Indemnity Co. at 4, *Am. Home* (No. DV-99-08673-C) (asserting that Texas law

1. Liberal Interpretation of the State Bar Act and Common Law Precedent

A liberal interpretation of the language in the Texas State Bar Act does not expressly prohibit insurance companies from employing staff counsel to represent its insureds.[134] Section 81.101(a) provides a list of activities constituting the "practice of law," including drafting and filing court documents, making court appearances before a judge on behalf of a client, and giving legal advice out of court.[135] However, the State Bar Act does not expressly define what constitutes the "unauthorized practice of law."[136] Section 81.102(a) merely limits the practice of law to state bar members.[137] "Furthermore, the word 'person,' as used in § 81.102(a), presumptively includes corporations. The Texas Code of Construction Act, which applies to the State Bar Act, instructs courts to read the word 'person' as including corporations, partnerships, and other legal entities."[138] Other Texas statutes provide additional nonexhaustive lists of activities qualifying as the unauthorized practice of law, but the statutes do not clarify whether an insurance company may employ staff attorneys to represent its insureds.[139]

Additionally, the use of *Hexter Title* as precedent is debatable because the holding did not address section 81.102(a), but it relied on a repealed Texas penal statute that expressly prohibited corporations from practicing law on behalf of third-parties.[140] *Hexter Title* can also be factually distinguished from the present case because it involved a title company "incor-

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"does not make [the] use of staff counsel to defend insureds the unauthorized practice of law").

134. *See Nationwide*, 283 F.3d at 653 (stating that the State Bar Act is open to interpretation); Amended Response of the Travelers Indemnity Co. at 10, *Am. Home* (No. DV-99-08673-C) (urging that the State Bar Act is "vague, indefinite, and overly broad").

135. TEX. GOV'T CODE ANN. § 81.101(a) (Vernon 1998).

136. *See Nationwide*, 283 F.3d at 653 (finding that nothing in the State Bar Act prohibits the employment of staff counsel); *see also* TEX. GOV'T CODE ANN. §§ 81.101-.102 (Vernon 1998) (defining the practice of law and who may not practice the law).

137. TEX. GOV'T CODE ANN. § 81.102 (Vernon 1998); *see also Nationwide*, 283 F.3d at 653 (quoting section 81.102 of the Government Code).

138. *Nationwide*, 283 F.3d at 653-54 (citations omitted).

139. TEX. GOV'T CODE ANN. §§ 83.001-.006 (Vernon 1998) (listing the acts that constitute the unauthorized practice of law).

140. Bar Ass'n v. Hexter Title & Abstract Co., 175 S.W.2d 108, 116 (Tex. Civ. App.—Fort Worth 1943, writ granted); *see also Nationwide*, 283 F.3d at 654 (discussing *Hexter Title*'s reasoning); Brief of the Travelers Indemnity Co. in Support of Motion to Reconsider at 4, Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002) (arguing that *Hexter Title* supports the general rule "that a corporation does not engage in the unauthorized practice of law by using staff counsel to handle matters in which the corporation itself has a direct interest").

porated for the purpose of making abstracts of title to land" and employed lawyers for the purpose of drafting the conveyances and other legal documents.[141] The court held that preparing conveyances and other instruments "is not the business of the title insurance company."[142] "Since Hexter Title had no present interest in the legal documents that it was drafting, it could not perform that service."[143] Although the Texas Government Code was amended to specifically prohibit title companies from drafting legal documents for third parties, the legislature remains silent on the issue of whether insurance companies can employ staff attorneys to represent those they insure.[144] Hence, it is possible that the *Hexter Title* court's reasoning in justifying the prohibition of the use of licensed in-house counsel by the title companies might provide for a different application to insurance companies because insurers have a direct financial interest in the outcome of the policy-related cases involving their insureds.[145]

Captive counsel proponents also suggest that Texas courts' liberal application of the corporate practice of law doctrine does not provide support for an express prohibition of certain in-house counsel arrangements.[146] For example, the appellate court in *Scruggs v. Houston Legal Foundation*[147] applied a more liberal approach that allows corporations to employ licensed attorneys to represent third-parties, and it held that a charitable, nonprofit corporation could employ attorneys to represent indigents accused of committing crimes.[148] The court found that

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141. *Hexter Title*, 179 S.W.2d at 952; *see also* Brief of the Travelers Indemnity Co. in Support of Motion to Reconsider at 5, *Am. Home* (No. DV-99-08673-C) (quoting *Hexter Title*).

142. *Hexter Title*, 179 S.W.2d at 952; *see also Nationwide*, 283 F.3d at 654 (clarifying *Hexter Title*'s holding).

143. *Nationwide*, 283 F.3d at 654.

144. *Nationwide*, 283 F.3d at 654 n.20; *see also* TEX. GOV'T CODE ANN. § 83.001 (Vernon 1998) (prohibiting title companies from drafting legal documents for third parties).

145. *Nationwide*, 283 F.3d at 654.

146. *See Nationwide*, 283 F.3d at 655 (stating that in *Scruggs v. Houston Legal Foundation*, 475 S.W.2d 604 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd), the court applied a liberal approach); Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 169 (2000) (criticizing the Texas courts' liberal application of the definition of the unauthorized practice of law and analyzing case law that gives a broad definition to the unauthorized practice of law by including a wide variety of activities as part of the prohibited practice).

147. 475 S.W.2d 604 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd).

148. Scruggs v. Houston Legal Found., 475 S.W.2d 604, 606-07 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd); *see also* Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 655 (5th Cir. 2002) (discussing *Scruggs*' decision).

the Legal Foundation did not attempt to control the way the attorneys it employed would represent the indigent clients, and since the Foundation's policies were not demeaning to the legal profession, this practice provided no proof that it was engaging in the unauthorized practice of law by employing these lawyers to represent third parties.[149] Despite the Texas legislature's amendment of the Insurance Code that prohibits "non-profit legal service corporations from employing staff counsel to represent third parties," one federal court has suggested that "the *Scruggs* opinion demonstrates a willingness . . . to allow certain corporate staff counsel arrangements, rather than a predisposition to outlaw the practice entirely."[150]

2. The Minority View and Protectionism

Several jurisdictions have ruled that the use of in-house counsel did not constitute the unauthorized practice of law.[151] For example, in Indiana, the state supreme court applied a narrow view to the issue.[152] The court did not look at the corporation's practice of law through its employees, but instead looked at the attorneys themselves.[153] The court held that as long as the activity is conducted through licensed attorneys, and not by a

149. *Scruggs*, 475 S.W.2d at 606-07.

150. *Nationwide*, 283 F.3d at 655 (citing TEX. INS. CODE ANN. § 961.303 (Vernon 2002)).

151. *See* Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 155 (Ind. 1999) (stating that eight of the ten state courts, along with one federal circuit court, permit attorneys employed by insurance companies to represent insureds); *In re* Allstate Ins. Co., 722 S.W.2d. 947, 954 (Mo. 1987) (en banc) (listing the various authorities that support the use of in-house counsel); Brief of the Travelers Indemnity Co. in Support of Motion to Reconsider at 4, Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002) (contending that the overwhelming majority rule for utilization of staff counsel in matters where a corporation has a direct interest is not an unauthorized practice of law); Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1398 (2000) (noting that a majority of the courts across the country have addressed "the issue either through judicial decision or bar association ethics opinions"); Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12 (restating that eight state courts and one federal court allow attorneys employed by the insurance company to represent their insureds).

152. *See Wills*, 717 N.E.2d at 160 (stating the issue is "whether a non-lawyer is performing tasks requiring a lawyer, or a lawyer not admitted in this State is practicing in Indiana"); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 404 (2001) (contrasting the authorities in Texas with the *Wills* court's narrow view of the unauthorized practice of law).

153. *See Wills*, 717 N.E.2d at 160; *see also* Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12 (stating that the Indiana Supreme Court answered the issue by focusing on the attorneys involved).

nonattorney performing tasks requiring a lawyer, a corporation was not deemed to be unlawfully practicing law.[154] The court also focused on the interest of economics with the hopes that the captive counsel arrangement would provide better benefits at a lower cost.[155] According to the court, the use of in-house counsel should continue and any abuses should be handled on a case-by-case basis.[156] Missouri and Georgia also have rejected challenges to the practice of using in-house counsel based on the conflict of interest argument.[157]

A common defense utilized by captive counsel proponents is that a lawyer must follow the Rules of Professional Conduct, regardless of whether the attorney is employed in-house or in a captive counsel relationship with the insurer.[158] In-house counsel proponents also argue that in-house counsel are under no more economic pressure than outside defense counsel because in-house lawyers do not have to worry about bill collection or generating business volume.[159] Critics also suggest that the unauthorized practice of law doctrine is a self-protective way to control

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154. *Wills*, 717 N.E.2d at 155; *see also* Stephen F. Smith, *Insurance Company Captive Law Firm—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 12 (stating that as long as the attorneys were licensed, there was no unauthorized practice of law).

155. *See Wills*, 717 N.E.2d at 161 (providing that "[i]nterests of economy and simplicity dictate that this be permitted to continue"); Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1397 (2000) (noting that the public will benefit through the use of in-house counsel in the form of lower costs and better service).

156. Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 13; *see also Wills*, 717 N.E.2d at 160 (finding that the potential for conflicts are not inherent to the use of in-house counsel).

157. Coscia v. Cunningham, 299 S.E.2d 880, 883 (Ga. 1983); *In re* Allstate Ins. Co., 722 S.W.2d 947, 953 (Mo. 1987) (en banc); *see also* Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 13 (discussing the *Coscia* and *In re Allstate* decisions).

158. Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1397 (2000); *see also* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 206 (2000) (implying that the ethical principal and fear that an attorney will not maintain his or her independent judgment can no longer validate the unauthorized practice of law doctrine since the Model Rules protect against any impermissible infringement); Stephen F. Smith, *Insurance Company Captive Law Firms—Ethical or Not?*, NEV. LAW., Sept. 8, 2000, at 12, 14 (arguing that the best approach to analyze the captive counsel situation is on a case-by-case basis since lawyers are bound by the ethical constraints imposed by the Model Rules of Professional Conduct). Giesel argues that the unauthorized practice of law is redundant in this area. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 158-59 (2000).

159. Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475, 519 (1996).

competition by corporations.[160] Lastly, the argument that the corporation is only out to make a profit and therefore will influence and "direct an attorney toward an unethical path is not necessarily logical . . . [since] [p]rofit and ethics may not always diverge."[161]

V. PROPOSAL

The arguments for and against the use of in-house counsel or captive firms pose a great dilemma. While *American Home* decided that this practice constitutes the unauthorized practice of law, the decision is still ripe for debate as the court failed to share its reasoning for its holding.[162] The defendants, AHAC and Travelers have already appealed the judgment.[163] Since resolution to this debate will have a significant impact on the insurance industry and the legal profession in Texas,[164] the Texas Supreme Court or the Texas Legislature must ultimately provide a clear answer.

The State Commission on Ethics furthered the dilemma for insurers who employ captive or in-house counsel to represent their insureds in Opinions 532 and 533, which regulate the use of outside auditors to review billing statements and the propriety of litigation guidelines.[165]

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160. *See* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 158 (2000) (commenting that the corporate practice of law doctrine is no longer valid); Grace M. Giesel, *The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds*, 225 N. KY. L. REV. 365, 379 (1998) (stating that a 1980s survey found that the public viewed the unauthorized practice doctrine as "'self-protective,' 'monopolistic,' and 'greedy'").

161. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 159 (2000). Further, Giesel suggests that an unstated argument for the prohibition of the corporate practice of law is to prevent competition. *Id.* at 159.

162. *See* Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002) (failing to state the reasoning behind the conclusion).

163. *See* Texas Judiciary Online, Eleventh Court of Appeals, *at* http://www.11thcoa.courts.state.tx.us (last visited Feb. 6, 2003) (indicating that the notice of appeal was filed on June 19, 2002).

164. *See* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 351 (2001) (echoing the sentiment that the debate over insurance companies' use of cost saving measures, including the use of in-house counsel, or captive counsel has an impact on the entire industry and "virtually every aspect of the tort system in America"); Keith A. Brown, Note, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary?*, 22 J. LEGAL PROF. 211, 220 (1998) (stating that conflicts and insurance related suits go hand-in-hand, and any separation would result in an upheaval of the industry).

165. Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 806 (2000); Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 808 (2000).

These opinions are supported by Texas Disciplinary Rules of Professional Conduct that govern the duty of confidentiality and the duty to defend a client free from outside influence.[166] Because of the presence of conflicts of interest and economic tension, along with the opportunity for undue influence in the captive or in-house counsel employment scenario, the practice is inherently problematic and therefore should be prohibited.[167] The captive counsel practice provides nonlawyers who have ownership interests in insurance companies the ability to control and decide matters related to the legal practice of salaried in-house lawyers.[168] Under this arrangement, the threat of interference with a lawyer's professional judgment is not remote, even when the parties agree by contract that the insurance company "may not 'control the details of the attorney's performance'" nor interfere with the attorney's ability to exercise independent judgment with regard to the representation.[169] "Even the most optimistic view of human nature requires us to realize that an attorney employed by . . . an insurance company will slant his efforts . . . in the interests of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company."[170] Therefore, the State of Texas must follow the *American Home* decision and

166. Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 805 (2000); Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 806 (2000).

167. *See* Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 181 (Ind. 1999) (suggesting that "the practice is so fraught with danger that a *per se* rule of disqualification should be imposed") (Dickson, J., dissenting); Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 401 (2001) (stating that the appearance of impropriety by attorneys is inevitable).

168. *Wills*, 717 N.E.2d at 183 (Dickson, J., dissenting); State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 634 (Tex. 1998) (Gonzalez, J., dissenting).

169. Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 661 (2000); *see also L.E.I. 99-01: Ethical Propriety of Insurance Company Captive Law Firms*, W. VA. LAW., Sept. 1999, at 20, 20-21 (urging that a company-employer's interference would violate the professional rules).

170. Eileen M. Dacey, *The Delicate Balance of the Attorney-Client Privilege in the Tripartite Relationship*, *in* 602 PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 199, 205 (1999), WL 602 PLI/Lit 199; *see also* Michael Rigby, Casenote, *The Broken Triangle—Should Insurers Be Held Vicariously Liable for the Legal Malpractice of Counsel They Retain to Defend Their Insureds?*—State Farm Mutual Automobile Insurance Co. v. Traver, *980 S.W.2d 625 (Tex. 1998)*, 41 S. TEX. L. REV. 651, 662 (2000) (stating that "[f]ailure of defense counsel to protect the interests of these 'client' insurance companies . . . can result in fewer cases being referred to the firm or even termination of the relationship . . . [and be] potentially fatal to a defense firm").

declare that the use by Texas insurers of in-house counsel represents the unauthorized practice of law.[171]

VI. CONCLUSION

As discussed previously, the State Bar Act does not specifically state that the use of in-house counsel by insurance companies to defend its insureds constitutes the unauthorized practice of law.[172] It would not be feasible to use the State Bar Act to provide support for another opinion similar to Opinions 532 and 533, which are supported by ethical rules.[173] The trend of the opinions issued by the Ethics Committee along with the decision in *American Home* provide support for declaring the practice of using in-house or captive counsel by insurance companies to represent their insureds as the unauthorized practice of law.[174] Unfortunately, the judge in *American Home* did not provide a reason for his decision.[175] While the judgment in *American Home* was the right decision for Texas, it does not provide a clear rule for attorneys and insurance companies. Therefore, the use of in-house counsel by insurers to defend their insureds should be declared the unauthorized practice of law by amending the State Bar Act to expressly prohibit the practice.[176]

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171. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002).

172. *See* Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 653 (5th Cir. 2002) (finding the interpretation of the State Bar Act is disputable); Amended Response of the Travelers Indemnity Co. to Defendant's Motion for Summary Judgment at 6, *Am. Home* (No. DV-99-08673-C) (urging that the State Bar Act is "vague, indefinite and overly broad").

173. *See* Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805, 805 (2000) (using the Texas Disciplinary Rules of Professional Conduct to support their decision); Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806, 806 (2000) (supporting the guiding principals of these opinions with Rules 1.05, 1.06, 1.08(e)(2), and 5.04(c) of the Texas Disciplinary Rules of Professional Conduct).

174. *See generally*, Tex. Comm. on Prof'l Ethics, Op. 532, 63 TEX. B.J. 805 (2000); Tex. Comm. on Prof'l Ethics, Op. 533, 63 TEX. B.J. 806 (2000); Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002).

175. Am. Home Assurance Co. v. Unauthorized Practice of Law Comm., No. DV-99-08673-C (68th Dist. Ct., Dallas County, Tex. May 20, 2002).

176. *See* Tex. H.B. 1383, 77th Leg. R.S. (2001) (amending the Texas Insurance Code by declaring the use of in-house or captive counsel by insurance companies to represent insureds constitutes the unauthorized practice of law); Tex. H.B. 3563, 77th Leg., R.S. (2001) (amending the Texas Government Code by declaring the use of in-house or captive counsel by insurance companies to represent insureds as the unauthorized practice of law; left pending in committee). Although these bills were not enacted into law, the author suggests that similar legislation be proposed to prevent this practice.

The State of Texas should not succumb to the market pressures that the insurance companies face by allowing this practice to infringe on the ethical standards that are prescribed in the practice of law.[177] The Texas Government Code was specifically amended to prohibit title companies from drafting legal documents for third-parties.[178] Further, the Texas Insurance Code has also been amended to prevent nonprofit legal service corporations from employing staff counsel to represent third-parties.[179] These amendments were adopted to protect consumers from the unauthorized practice of law.[180] Statutes prohibiting the unauthorized practice of law protect the public by requiring legal professionals to abide by professional rules and ethical standards.[181] The State of Texas should not allow the marketplace to dictate the ethical principles in light of the economic pressures of insurance companies and the insurance market.[182] Therefore, the Texas Legislature must follow suit by modifying the State Bar Act.

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177. *See* Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1397 (2000) (discussing that many rules, procedures, and remedies exist to protect insureds); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 417 (2001) (suggesting that lawyers have tough ethical decisions to make without guidance from courts and ethics committees).

178. TEX. GOV'T CODE ANN. § 83.001 (Vernon 1998); *see also* Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 654 (5th Cir. 2002) (distinguishing insurance companies from title companies with regards to employing duly licensed staff counsel).

179. TEX. INS. CODE ANN. § 961.303 (Vernon 2002); *Nationwide*, 283 F.3d at 655.

180. *See* Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 158 (2000) (shielding the public from unscrupulous lawyers is the primary rationale for regulating the unauthorized practice of law); Grace M. Giesel, *The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds*, 225 N. KY. L. REV. 365, 376 (1998) (stating that the usual justification for the unauthorized practice of law doctrine is to protect the public).

181. Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 183 (Ind. 1999) (Dickson, J., dissenting).

182. *See* Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1397 (2000) (emphasizing that protections do exist to prevent any detriment to the public); *see also* Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 417 (2001) (suggesting that courts and ethical committees must guide lawyers in making ethically sound decisions).