CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

ETHICAL ISSUES IN HANDLING COVERAGE DISPUTES

I. Insurer's Obligations - What is Bad Faith?

a. Essence of bad faith claim

Every insurance contract has an implied duty of good faith and fair dealing. The insurer and insured, generally, have a mutual or recipricol duty to treat each other in good faith and fair dealing. An insurer is not to put its interests above the interests of its insured. Breach of the duty of good faith and fair dealing is the tort of "bad faith" law. This tort, generally, allows consequential damages, and tort like damages, i.e. emotional distress damages, and punitive damages. The type of conduct that is necessary to constitute breach of the duty of good faith and fair dealing, typically are defined with such words as "deliberately", "willfully", "maliciously", "with reckless disregard", "unreasonable", "without probable cause", or "with knowledge of its unreasonableness". There generally is an allegation that the insurer unreasonably delayed or denied paying a claim. The insurer's conduct is examined to determine if the duty of good faith and fair dealing is breached. When a claim is "fairly debatable", generally, there will be no bad faith damages.

Bad faith law has evolved, since 1973, by making available extra contractual damages in favor of an insured against an insurance company. Gruenberg v. Aetna Insurance Company, 510 P.2d 1032 (Cal. 1973). Bad faith law applies to third party claims and first party claims. Depending on your state, a cause of action for bad faith may be driven by statute or common law.

Some states require an insurer intentionally fail to pay a valid claim with knowledge or reckless disregard of the lack of knowledge of a reasonable basis for denying a claim. Other states require that an insurer's delay or denial in paying a claim be dishonest, malicious or oppressive.

b. Insurer obligations

Many states have unfair claims practices statutes that are typically modeled after the National Association of Insurance Commissioners (NAIC) model Unfair Claims Settlement Practices Act. Generally, under these statutes, an unfair claims practice may be considered as follows:

- Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue.
- Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- Refusing to pay claims without conducting a reasonable investigation based upon all available information.
- Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
- Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.
- Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.
- Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanied or made part of an application.
- Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured.
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.
- Making known to insured or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
- Delaying the investigation or payment of claims by requiring that an insured or claimant, or the physician of either, submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
- Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

c. In handling the claim

In the third party and first party context, an insurer is obligated to protect the interests of its insured; and should not put its own interests above the interests of its insured. Where a mutual company is involved, the insurer also has an obligation to protect the interests of its shareholders. The insurer must balance its own interests with the interests of its insured(s). This obligation includes timely handling claims without delay, having reasonable claim procedures and processes in place to handle claims, and to timely pay claims.

Third-party, generally, no fiduciary duty. Third-party includes liability claims. First-party, generally, fiduciary duty exists. First-party includes direct benefit to insured, i.e., UM/UIM.

Remember:

- There is no perfect file
- Acting reasonably is the standard
- Document the claim file
- Document the facts/avoid opinions/bias
- Document claimant and claimant attorney's actions
- Refer to medical and/or attorney reports/correspondence
- Document your investigation

d. In keeping the insured informed

An insurer has an obligation to keep its insured informed of settlement discussions, coverage issues, choice of defense counsel, the providing of a defense, and if there is the potential for personal exposure to the insured - "comfort or excess" letter.

e. In the defense of suit

While an insurer, generally, has the right to direct the defense and settlement of a third party claim, the insurer also has the duty to protect the interests of its insured. *See* Tripartite relationship below. Insurer should comply with Unfair Claim Settlement statutes to effectuate fair, prompt, and equitable compromise.

f. In evaluating settlement opportunities

The insurer is obligated to reasonably value a claim and to offer an equitable, fair settlement of a claim where liability becomes clear. Fair, prompt, equitable. Protect insured from excess verdict.

g. In paying policy benefits

An insurer should evaluate and determine whether a case, particularly, in the third party context is going to exceed the available policy limits and should do what is necessary to protect its insured's interests.

II. The Tri-Partite Relationship

a. Explanation of concept

When counsel is retained by an insurer to represent an insured, the relationship is commonly referred to as a "Tripartite Relationship." As the name suggests, the relationship includes three parties: the insured, the insurance company and counsel retained by the insurance company to represent the insured. While defense counsel is retained and paid for by the insurer, his/her "client" is the insured, even though the relationship with the insurer is likely to have pre-existed and will likely continue long after the representation of one insured in a particular case. The Tri-partite Relationship is complex and thus fraught with actual and potential conflicts of interest and ethical land mines.

The complexity of the Tripartite Relationship arises due to the various duties, rights and obligations of each party. The insurer owes a fiduciary duty to its insured but also must take into account business realities and duties owed to its own shareholders. The insured must comply with policy conditions, such as a duty to cooperate and assist in the litigation, but of course, has his/her/own financial interests in mind and in the case of individual insureds, emotions may run high during litigation. It is generally accepted that in a Tripartite Relationship counsel owes its duties to the insured. However, counsel is generally contractually obligated to the insurer to provide reports and to comply with litigation guidelines which sometimes require approval of litigation tasks. In addition, counsel also is cognizant of the business relationship between counsel and the insurer.

The Tripartite Relationship is at its most vulnerable when coverage issues exist since the insured's and the insurer's positions are sometimes in conflict and counsel stands in the middle. Defense counsel must refrain from addressing coverage issues for either the insured or the insurer and should advise both the insurer and the insured that it would be improper to address any coverage issues that may exist. If requested, counsel should specifically decline to address any such coverage issues.

b. Coverage vs. Defense counsel/Conflicts of Interest

Where a claim is straight forward and involves no coverage issues, no potential conflicts of interest arise within the tri-partite relationship. However, the existence of coverage issues creates tension in the Tripartite Relationship. Tension arises because the common goal of minimizing the insured's potential liability and damages exposure can be in competition with the separate goals of the insured and the insurer. The insured seeks to maximize its available coverage under the policy. The insurer seeks to limit its obligations to those strictly provided for in the policy. Appointed defense counsel is between these two goals – oftentimes with information which may be material to the coverage issues. And while it is generally accepted that defense counsel represents, and owes his/her ethical duties to the insured, one cannot ignore

the business and financial reality that the attorney receives payment from the insurer and often relies upon repeat business from the insurer.

It is imperative in evaluating actual or potential conflicts of interest and ethical obligations that the rules and laws of the specific jurisdiction be consulted. State statues, case law, professional rules of conduct, of each jurisdiction will impact how the potential or actual conflict of interest should be addressed.

While it is clear that appointed defense counsel may not provide legal counsel to either the insurer or the insured as it relates to any of the coverage issues which may have arisen, a multitude of more subtle situations may arise which implicate coverage questions including: existence of absolute coverage defenses; the claim includes non-covered damages and/or punitive damages; there is a potential excess exposure; during the litigation counsel becomes aware of facts which may adversely affect the insured's coverage.

In addition to the potential conflict which may arise when the interests of the insured and insurer are adverse due to a coverage issue, other delicate issues also arise as a result of the Tripartite Relationship. Tension amongst the parties may arise under various circumstances, for example: during the defense of the litigation, counsel must report to the insurer a delicate issue regarding the insured which may affect the insurer's liability or damages evaluation; there is a settlement demand within the policy limits; there is a disagreement regarding control of the defense or insurer guidelines issues arise.

Coverage counsel and bad faith counsel are not a part of the tri-partite relationship, but operate outside the relationship, owing their allegiance solely to only one party – either the insurer or the insured. As such, similar conflicts of interest do not arise for coverage and bad faith counsel.

c. "Splitting" the claims handling

It is a common practice by insurers to "split the file" when there are coverage issues. This refers to the practice of separating the handling of the internal coverage and liability files. Different claims professionals are assigned to handle the two aspects of the file, thus minimizing the potential internal conflict which might arise and allowing the liability claims professional to make decisions on litigation management, evaluation of liability and damages and settlement unaffected by any of the coverage issues which may be present. In addition, splitting the file minimizes the possibility that privileged information acquired during the defense of the case might be used in the coverage evaluation.

There is no bright line delineating when it is appropriate to split the file.

III. Common Problems and Practical Approaches and Solutions

a. Excess Exposure

It is not unusual for a claim or lawsuit to involve potential damages in excess of the insured's policy limits. This situation often arises where the insured carries limited coverage in personal lines residential and auto policies and in commercial liability policies where the claim involves catastrophic injuries. The insurer retains counsel to represent the interests of the insured in connection with the claim. Counsel may evaluate the claim and determine that while liability may be questionable, if the insured is in fact found liable, the likely verdict might well exceed the policy limits and expose the insured's assets to a verdict in excess of the available policy limits. In such situations, counsel is under an obligation to candidly discuss the potential/likelihood of a defense verdict vs. the risk an adverse verdict and the potential amount of the verdict.

Conflicts discussion:

- May appointed defense counsel advise the insured to retain separate counsel?
- Does the insurer have an obligation to retain and/or pay for independent or *Cumis* counsel?
- May appointed defense counsel demand on behalf of the insured that the insurer pay or accept a settlement demand within the policy limits?
- May appointed defense counsel explain to the insured that the insure may assume the risk of an excess verdict (and face exposure for extra contractual damages and bad faith) if it rejects the policy limits demand?

b. Multiple Claims/Claimants

As with claims which involve potential damages in excess of the available policy limits, claims involving multiple claimants present the possibility that the insured may be faced with the risk of a judgment that will not be covered because the limits will likely be exhausted before all of the claims are resolved. The potential conflict arises since the insurer's obligations under the policy may end once the limits are paid. Thus, from the insurer's perspective the preferable outcome might be to pay the limits early. However, this may result in the insured having to face the defense of more serious or more numerous claims. As with the excess exposure scenario, it is imperative that counsel offer a candid discussion of his/her evaluation of the merits of each claim, the likelihood of success vs. the risk of a potential verdict and the amount of the verdict.

Conflicts discussion:

- What approaches are available and which are preferable where the insured contests liability?
- What approaches are available and which are preferable where the insurer decides to tender the limits?

c. Covered and Non-Covered Claims

The insurer's obligation to defend when the complaint alleges claims which fall within the policy's coverage as well as claims which are not covered or excluded by the policy varies by jurisdiction. Certain jurisdictions require that the insurer defend the entire action – both covered and non-covered claims. The insurer may have the right to reserve its right to reimbursement for defense fees incurred in connection with non-covered claims. A potential ethical pitfall arises for defense counsel when the cause of action which gives rise to coverage may be subject to dismissal. In such a situation, if the covered cause of action is dismissed, the insurer may have no further obligation to defend the insured for the remainder of the claims asserted in the complaint. The insured would then have to fund its own defense or may not have the means to do so.

Conflicts discussion:

- How should defense counsel evaluate whether to have the covered cause of action dismissed?

d. Claims Punitive Damages

Claims for punitive damages are generally uninsurable as a matter of public policy in most states and are typically excluded under liability policies.

Conflicts discussion:

- Does the mere presence of a punitive damages claim create a conflict?
- May appointed defense counsel discuss with the insured coverage issues relating to punitive damages?
- Should defense counsel suggest that punitive damages claims should be defended by separate counsel? If so, does the insurer have an obligation to retain and/or pay for independent or *Cumis* counsel?
- How should the question of a possible stipulated award of compensatory damages be handled?
- How should appointed defense counsel handle a settlement demand within policy limits that would extinguish all claims, including punitive damages?

e. Attorney Client Privilege Issues

Because appointed defense counsel answers to two masters, owes certain duties and obligations to each, and will be privy to privileged information from both, ethical questions will arise regarding the obligations and limitations of counsel as it relates to attorney client privilege.

Conflicts discussion:

- Who can claim the privilege?
- What constitutes waiver of the privilege?

- Under what circumstances, if any, may appointed defense counsel withhold information obtained from the insurer or policy holder from the other? (e.g., trade secrets, proprietary information, claims reserves)
- Does disclosure to third-party auditors of information contained in appointed defense counsel invoices violate attorney client privilege?

f. Confidentiality and Discovery/Disclosure of Sensitive Information

The classic tri-partite relationship conflict arises because as the litigation progresses appointed defense counsel may become privy to information which directly impacts the insurer's coverage evaluation or position. Information material to the coverage issues may be discovered through direct communications with the insured, in which case appointed defense counsel has to consider the implications of the attorney client privilege, but may also arise in contexts in which the privilege is not implicated, such as through routine discovery in the case.

Conflicts discussion:

- What is the obligation of defense counsel to communicate to the insurer information which may impact the coverage issues in the case?
- What is the obligation of appointed defense counsel who discovers the insured has committed fraud?
- Does the obligation change if the fraud is material to the defense to the litigation but not material to coverage issues which may exist?
- Does the obligation change if the information about the fraud is disclosed directly by the insured to the attorney rather than through routine discovery?

g. Insured's Duty to Cooperate

On notice of a claim, the insurer will in many, if not most instances, commence some sort of investigation. The policy's conditions will require that the insured cooperate in that investigation. The policy language may resemble:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

* * *

c. You and any other involved insured must:

* * *

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation, or settlement of the claim or defense against the "suit"; . . . .

Generally, insureds are willing to comply and provide the information requested. On occasion, the insured is skeptical of the investigation. In such cases, the insured may refuse to provide documents and information. The insured may also refuse to provide a statement or to be interviewed.

In certain cases, the insured has refused to cooperate due to concerns stemming from pending criminal investigations. Can the insurer insist on such cooperation and disclaim coverage in its absence? The existence of a criminal investigation may raise coverage concerns on the part of the insurer. In situations in which the insurer has retained and assigned counsel to defend the insured in the civil proceeding, what conflicts are created by the insurer seeking to use that attorney to secure the insured's cooperation and/or discovery?

What are the ethical obligations of appointed defense counsel to respond to inquiries by the insurer directed to the insured? Is it appropriate for the insurer to request defense counsel's assistance in securing cooperation by the insured when the materials sought are not for the defense or evaluation of the claim, but rather go strictly to coverage?

Courts generally will require that the insured respond in a reasonable fashion to the insurer's investigation.

h. Reservation of Rights

Many of the conflict and ethical issues created by the issuance of a reservation of rights are discussed above in the sections concerning the tripartite relationship and splitting the file. The reservation of rights may create a conflict in the representation of insured by the insurer's chosen counsel. In certain circumstances, after an analysis of the exposures and the strength of the coverage defenses, an insurer may determine to withdraw the reservation of rights in order to proceed with the assignment of the insurer's panel counsel. In those situations in which assigned counsel is providing the defense, how does the insurer address the protection of the coverage defenses when addressing: (1) preparation of certain motions (such as motions for summary judgment which may eliminate coverage), (2) seeking contributions to settlement offers, (3) determining whether to approve the selection and retention of experts which address non-covered claims, (4) allocation of verdicts.

i. Insurer's Control of Defense

When a claim is tendered, and litigation proceeds, standard liability policies provide that the insurer has the "right and duty to defend". In the absence of a conflict, the insurer selects counsel, receives updates and in many situations is active in the decision-making regarding the handling of the claim and the defense of the litigation. However, there are circumstances where an insured will disagree with the direction of the insurer. For example, a line of investigation that the insurer has deemed not worthwhile or a motion that the insurer does not warrant pursuit due to the minimal likelihood of success. How can an attorney, assigned by the insurer, fulfill its obligations to both the insurer and the insured? In a majority of jurisdictions, both the insurer and the insured are clients of the attorney. However, the duty of loyalty and obligation to

provide the best possible defense, may require the attorney to agree to certain strategies, against the will of the insurer. What are the insurer's obligations and/or options: (1) direct the attorney to NOT take such action (thereby potentially creating a conflict of interest), (2) discuss with the insured directly to seek agreement on the strategy, and/or (3) seek the insured's contribution to pay for the attorney's fees involved in such strategy?

j. Litigation Management Guidelines

Litigation management guidelines may seem innocuous enough, generally requiring certain reporting and analysis. However, are ethical issues raised when decision making is relegated to the insurer and not counsel? A conflict of interest is created when the insurer and insured have differing interests in managing and directing defense of the case.

The appointed defense counsel owes duties to the insured as client. One such duty is the duty to communicate with the insured – including explaining the relationship with the insurer. Does that relationship also require the disclosure to the insured of litigation management guidelines? ABA Opinion 96-403 provides that the attorney must disclose to the insured the nature of the representation and the insurer's right to control settlement. The Restatement (Third) of the Law Governing Lawyers (§134) has broadened this requirement to all matters on which the attorney receives insurer direction.

The ethical issues raised by litigation management guidelines differ depending on whether the counsel is assigned by the insurer, or not. Generally, the Restatement and ABA permit the attorney to defer to the insurer's directives so long as the defense of the insured's interests are not placed at risk. How do you address the situation where the insured refuses to consent to the directives authorized by the insurer? Has appointed counsel withdrawn due to the conflict created? Courts have held that the imposition of litigation management guidelines, and specifically limitations on the defense imposed by the insurer, may violate the duty to defend and/or violate the attorney's obligations to the insured.

When independent counsel is retained, the duty of cooperation under the policy controls. In many situations, the insurer is consulted as to strategy and decision-making, but the insurer cannot direct the defense and cannot unilaterally impose its litigation management guidelines on such counsel. Further, insurers may not be required to pay for services that are not reasonable and necessary to the defense. Is this question subjective or objective? Who determines what is reasonable and necessary?

k. Actions for Declaratory Judgment

Insurer appointed defense counsel is that – defense counsel. Such counsel is not coverage counsel. As a general rule, such counsel should not be participating in discussions concerning coverage issues. It is not permissible to have an attorney opine on the coverage for the liability matter, and then assign that attorney to provide the defense. Imagine the conflicts when and if a coverage dispute arises. Ethical issues may also arise when the discovery and/or reports from the defense case are sought for use in building the coverage action.

l. Communicating with the Insured and Insurer

The insured holds the attorney-client privilege even when the insurer retains defense counsel. Defense counsel should balance his or her obligations in a way that does not jeopardize the insured's coverage. Defense counsel must keep the insured involved in the litigation process and report to both the insured and insurer.

m. Sharing of Information

Defense counsel has the duty to report to the insurer information that would assist in the evaluation, settlement and litigation of a claim. Defense counsel may not waive the insured's attorney-client privilege particularly regarding issues that may jeopardize coverage.

n. Settling Within Policy Limits

Defense counsel should provide his or her professional opinion/judgment regarding the value of a claim and advocate for settlement where appropriate. Defense counsel's obligation, under the ethical rules, is primarily to the insured client. Defense counsel must provide independent analysis and protect client from excess verdict.

o. Wasting Policies

Defense counsel and the insurer should be mindful of available policy benefits needed to resolve a claim.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.6: Confidentiality of Information
Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7: Conflict of Interest: Current Clients
Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules
Client-Lawyer Relationship

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.16: Declining or Terminating Representation
Client-Lawyer Relationship

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law