The Care and Feeding of In-House Counsel: Practical Tips and Legal Considerations for Litigated Matters

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INTRODUCTION

Every client has its own unique set of business goals and attendant legal issues. In insurance coverage litigation, diverse companies nevertheless have many of the same general needs when it comes to their outside counsel. Integrity. Communication. Budgets. No surprises.

This paper provides an overview of key practice tips for working with in-house counsel on litigated matters, including: (1) overall “Do’s and Don’ts”; (2) litigation holds; (3) managing discovery, including depositions and files of in-house counsel; and (4) insurers’ litigation and billing guidelines.

I. DO’S AND DON’TS

A. Understand the Client’s Values

Outside counsel should understand what adds value to their clients. While a case that you are handling for a corporate client might or might not be a significant case in terms of liability and exposure, in-house counsel is always concerned with the big picture and how a single case can impact other cases and the way the corporate client handles certain issues. Be aware of your corporate client’s overall goals, not only in a particular case, but also its general litigation priorities and initiatives. Furthermore, in-house counsel expect lessons learned from individual cases to improve future corporate performance. In-house counsel is also tightly focused on matching the conduct of a case to the cost/benefit analysis: what will the case cost to litigate, and what is the economic value/cost to the company of winning, losing or settling.

- Focus at all times on those issues that drive desired outcomes.
- Spend the time necessary to understand the business of the client overall and the business objectives of the legal team relationship.
- Achieve the right results at the right cost.

B. Evaluate and Budget Early

In-house counsel expects outside counsel to develop a case evaluation and focused strategies early to achieve resolution in a cost-effective and efficient manner. To enable such a resolution, outside counsel should immediately develop a case evaluation and stay focused on issues that drive desired outcomes.

At the outset of an assignment, outside counsel should establish an accurate budget that correlates to the litigation strategy. Regular information about accrued fees (in hourly arrangements) should always be communicated; clients who are surprised by a bill will be less likely to pay it all! The bills should be consistent with the work you and your client have already agreed to undertake. In-house counsel may conduct mini audits throughout the litigation process to ascertain how budget consumption compares with designated milestones or benchmarks set for each phase of litigation.

In-house counsel should measure outside counsel’s performance at the close of the file and provide feedback. Outside counsel should feel free to ask for this if it is not volunteered.
- Develop an early case evaluation/litigation plan
- Establish an accurate case budget consistent with the litigation plan

C. **Collaborate, Don’t Dictate or Surprise**

The relationship between in-house counsel and outside counsel should be viewed as a long-term, collaborative relationship. Outside counsel is an integral part of a specialized team who represent the interests of the corporate client. By working closely together, the likelihood of achieving the right results at the right cost are dramatically increased.

For outside insurance litigators, also remember your client’s limitations. If you represent an insurance company, understand that your client’s in-house counsel might not specialize in the area involved in the underlying claim against the policyholder. If you represent a policyholder, understand that your client might not understand insurance law nuances. You have been retained to provide this expertise. At the same time, you have not been hired to supplant in-house counsel. Help your client understand why you recommend the steps you advise them to take, and keep them timely apprised of your activities and decision-making process along the way.

- No surprises!
- Agree with in-house counsel at beginning of case about staffing and a litigation plan of action.
- The time to seek approval for a specific undertaking is before you start, not the day before a deadline. Major tasks in the litigation should be accounted for in your budget.
- Don’t be meek about discussing money! If costs need to increase or the case takes an unexpected turn, talk about the budget issues immediately and proactively.

D. **Think Like a Businessperson**

In-house counsel expects outside counsel to add substantial value. In-house lawyers embrace creative, proactive thinking and appreciate lawyers that can think like businesspeople and understand the client’s business and business model.

Clients also expect outside counsel to consider the client’s business competition before embarking on a representation. Legal conflicts are a matter of professional ethics and often are obvious reasons not to undertake a representation. But business conflicts should be considered as well. In forming a relationship with a potential client, disclose business conflicts (e.g., representation of competitors in a small industry) up front.

- Be on the client’s business team. If you also represent a client’s business competitors, even if there is no legal conflict, tell the client.
- Keep the client’s business goals in mind in addition to litigation goals.
- Think about how to solve the client’s business problem, not just how to win the case.
E. **Operate with Integrity, Honesty and Candor at All Times**

In-house counsel are quite demanding, holding outside counsel to the highest standards of performance. It almost goes without saying that honesty and integrity must be adhered to throughout the litigation process.

This is particularly important when bad news must be delivered. Whatever it is, deliver it promptly. Don’t sugarcoat. Don’t make excuses. Do propose a solution for going forward. If you have established a collaborative relationship that is built on trust, partnership, and the client’s business objectives, this should not be as difficult as it sounds.

II. **LITIGATION PRACTICE TIPS**

A complaint has been filed. Now what? Before the litigators file an answer, start discovery or prepare motions, several procedural matters must be undertaken by in-house counsel, and special issues must be addressed regarding discovery involving the company’s legal department (as opposed to the rest of the company’s business).

A. **Litigation Holds**

“Litigation Holds” as enunciated by Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York are practically defined as communications to individuals or business units requiring them to take affirmative steps which avoid the inadvertent or intentional deletion or alteration of documents, ESI, or tangible evidence when litigation or an investigation is reasonably anticipated. This obligation, with its genesis in the common-law duty to prevent spoliation of evidence, first appearing in California as a separate cause of action in *Smith v. Superior Court*, has been codified with statutes and regulations including the Sarbanes-Oxley Act.

In addition to issuing a hold once litigation or an investigation is reasonably anticipated, the following steps, at a minimum, must be implemented: (1) communicating with the key players in the company (an obligation that likely falls to the General Counsel’s office), which can range from a field employee to the CEO or members of the board, depending upon the scope of the anticipated action the company faces; (2) ensuring compliance with the initial litigation hold by “remind[ing] these key players of the duty to preserve” and (3) producing electronic copies of active files to a secure location in the company and ensuring all backup media is securely stored. Underlying all of these steps will be the involvement of the company’s IT Department, for it is the IT Department that will be involved in electronic discovery potentially involving documents subject to the litigation hold.

Outside counsel needs to be cognizant of the obligation imposed on its client and to work assiduously to ensure that the client complies with the obligation (even though the client should be aware of the obligation before retaining counsel). The consequences of failing to ensure that a litigation hold is implemented and the parade of horribles that can ensue include:

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3 These activities were all discussed in *Zubulake vs. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (“Zubulake V”) In the 10 years since this decision, storage media has changed considerably.
• Monetary penalties (costs & fees);
• Adverse inference instructions vis-à-vis evidence\(^4\);  
• Issue preclusion;
• Dismissal;
• Contempt.\(^5\)

Failing to implement a written litigation hold has been characterized as “grossly negligent,”\(^6\) sufficient to support an adverse inference instruction. Under the majority rule, however, bad faith or intentional destruction of evidence is required.\(^7\) This is a continually evolving area of the law, and Judge Scheindlin last year issued a decision overruling her magistrate judge in *Sekisui American Corporation v. Hart*,\(^8\) stating that prejudice need not be proven to allow for an adverse inference instruction. Stay tuned, as the Judicial Conference of the United States has proposed revisions to Rule 37 which would require such prejudice.\(^9\)

Finally, given the myriad solutions available, but the limited resources that in-house counsel finds themselves confronted with today, outside counsel must be mindful of the expense of review and the concept of proportionality which governs this area of the law, i.e. does the burden or expense of responding to the proposed discovery outweigh the likely benefit.\(^10\) For example, spending $200,000 to manage and sequester documents and ESI in a case worth less than $800,000 is probably unacceptable and must be resisted.\(^11\)

**DO:**

• Promptly issue a written litigation hold.
• Ensure that employees and business units comply.
• Maintain documents, ESI, and other evidence in a secure fashion.

**DON’T:**

• Fail to work together (both in-house and outside counsel) in these efforts.
• Ignore the concept of proportionality.

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\(^5\) *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010) this decision has a comprehensive chart surveying each circuit’s position on spoliation.


\(^7\) *See Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).


\(^11\) For additional reading on the subject of litigation holds, please see [https://thesedonaconference.org/](https://thesedonaconference.org/) and [http://www.ediscoverylaw.com/](http://www.ediscoverylaw.com/)
Not keep abreast of the continually evolving state of law.

B. Discovery Directed at In-House Counsel and Legal Department Files

Discovery directed to in-house counsel or seeking legal department files implicates difficult issues relating to attorney-client privilege because in-house counsel serves in the dual role of business person and attorney. When defending the general counsel’s deposition or protecting in-house counsel files, one of outside counsel’s challenges will be to parse out that role to produce only relevant, factual information and to protect attorney-client privileges and attorney work product. For example, for policyholders, discoverable information within the general counsel’s knowledge arguably might involve discussions with underlying claimants or with other parties allegedly responsible for the loss. For insurers, discoverable information arguably might involve claims correspondence, reserves or reinsurance information, or discussions with other insurers on the risk.

1. Protecting Counsel’s Files from Discovery

Model Rule 1.6, which has been codified in most states, provides that “a lawyer shall not knowingly reveal confidential information.” In turn, “confidential information” is defined to include information that is protected by the attorney-client privilege. This begs the question of what information is protected by the attorney-client privilege.

The attorney-client privilege is one of the oldest privileges recognized by the common law. It is important to remember that the privilege does not protect every document that was sent to, handled, or even created by a person who happens to be a lawyer. It generally protects (1) a communication (2) between an attorney and a client, (3) in confidence, (4) for the purposes of obtaining legal advice for the client. While the privilege protects communications to and from the attorney and is not limited to communications made in anticipation of litigation, it does not protect disclosure of facts unless the facts were contained in the communications. The policy considerations underlying the privilege include encouragement of full and frank communication between lawyer and client and that sound legal advice depends on the lawyer being fully informed. But it must be remembered that the privilege is in tension with the judicial goal of full disclosure in discovery.

There are two basic approaches to analyze privilege for communications between a corporation’s counsel and its employees:

- Control Group Theory: Only protects communications between an attorney and corporate employees with authority to act on the attorney’s advice.
- Subject Matter Theory: Provides broader protection of any communications with corporate employees who have information for the attorney to give legal advice to the corporate client.

The United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981), rejected the control group approach and adopted the subject matter approach. In reaching its decision, the Court observed:

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• Attorney client privilege protects the giving of information to the lawyer to enable him to give sound legal advice;

• Obtaining facts is a first step to resolving a legal problem;

• Corporate employees with relevant information are frequently outside the “control group” and, therefore, the “control group” test makes it more difficult to convey legal advice to the employees who will put corporate policy into effect, and

• Communications were protected where they concerned matters within the employees’ duties, the employees were aware that they were providing information so that the corporation could obtain legal advice and the communications were treated as highly confidential.13

Federal courts and the courts of many states will give broad protection to communications between a corporation’s counsel and any corporate employee, as long as the counsel was attempting to obtain information for the purpose of providing legal advice. However, some states have rejected this approach and have continued to follow the control group approach. Illinois, for example, will only protect an attorney’s communications with corporate decision makers or their advisers.14

Communications with in-house counsel present unique issues because they play different roles within the company. Corporate employees may be licensed attorneys, but may not be acting as lawyers. Members of the legal department will often provide business advice, as opposed to legal advice. Federal courts addressing the attorney-client privilege for in-house counsel will generally uphold the privilege when the “primary purpose” of the communication must be to gain or provide legal assistance.15 This can be a detailed factual analysis that can impose substantial burdens on the party claiming the privilege. Further, states applying the control group approach will offer much narrower protection for communications with in-house attorneys.16

Courts addressing whether to protect communications involving in-house attorneys will attempt to determine whether the attorney was offering legal advice or had a business purpose. For example, in Rossi v. Blue Cross and Blue Shield of Greater New York, the court held that a memorandum by a staff attorney to a company officer was privileged because (1) it was an internal confidential document; (2) the attorney functioned as a lawyer and had no other responsibility in the company; and had the purpose of providing legal advice.17 The Court found that the communication need not reflect legal research to show legal intent and that the privilege was not lost where it refers to non-legal matters. The New York Court of Appeals reached a similar decision in Spectrum Systems International Corp. v. Chemical Bank, finding that the fact that a communication did not focus on imminent litigation, reflected no legal research and

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13 Id.
14 See Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103, 432 N.E.2d 250 (Ill. 1982).
reached no conclusions as to the parties’ legal positions did not change the privileged character of the communication.  

Similarly, the work product doctrine protects an attorney’s thought processes and mental impressions against disclosure. The United States Supreme Court first recognized this doctrine in Hickman v. Taylor.19 The attorney work product privilege is now codified in the Federal Rule of Civil Procedure, Rules 26 (b)(3), and protects documents “prepared in anticipation of litigation or for trial.” But note that some states may have narrower protections.

When protecting in-house counsel files, outside counsel faces the challenge of parsing out that role to produce only relevant, factual information and to protect attorney-client and attorney work product privileges. Courts will usually make a determination that the information sought had a business purpose before allowing disclosure. For example, in United States v. Textron, Inc., the court concluded that work papers prepared with the assistance of counsel to support a reserve for “contingent tax liabilities” had a business purpose (i.e., financial reporting) and were not protected because they were independently required by statutory and audit requirements. 20 Other areas of difficulty in analyzing this issue in the context of insurance disputes include: (a) for policyholders, whether information within the general counsel’s knowledge is arguably discoverable when it might involves discussions with underlying claimants or with other parties allegedly responsible for the loss, and (b) for insurance companies, whether information within the general counsel’s knowledge is arguably discoverable when the information might involve claims correspondence, reserves or reinsurance information, or discussions with other insurers on the risk.

Therefore, outside counsel should work closely with in-house counsel to identify relevant persons for purposes of privilege and to engage in a careful review process to guard against inadvertent production of privileged documents. The in-house counsel should be cognizant of whether he or she is acting as a lawyer providing legal advice or as a business person providing business advice.

DO:

- Know whether your litigation matters are subject to jurisdiction in a “control group” state or a “subject matter” state. This may drive some choice of venue decisions.
- Determine which functions are legal vs. business; protect or disclose documents accordingly.
- When in doubt, log it.

DON’T:

- Assume in-house counsel is “only” a lawyer or “only” a businessperson. Often (s)he is both.
- Assume a claims manager or risk manager with a J.D. is serving a legal function.

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20 577 F.3d 21 (1st Cir. 2009).
• Confuse the attorney-client privilege with the work product doctrine. One protection might apply even if the other does not.

2. Defending the General Counsel’s Deposition

Long before a corporate designee deposition is noticed, outside and in-house counsel should be thinking about who should be the “company spokesperson” on issues central to the case. An organization responding to a Rule 30(b)(6) deposition notice must produce a witness (or witnesses) who can respond to the areas of examination set forth in the deposition notice. In many cases, particularly those with long histories, fact witnesses that might no longer be with the company, and/or questions involving underlying claims, this witness might be in-house counsel. The primary concern with depositions of counsel is waiver of applicable privileges. In the case of a 30(b)(6) deposition, the key to avoiding waiver and providing appropriate testimony is preparation.

a. Obligation to Prepare the Witness

Federal Rule of Civil Procedure 30(b)(6) requires the designated witness to “testify about information known or reasonably available to the organization.”21 This rule has been interpreted to require the witness to become knowledgeable about topics that may be outside his or her personal knowledge.22 As stated by one federal court:

Rule 30(b)(6) explicitly requires [a corporation] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the “sandbagging” of an opponent by conducting half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process. The Court understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business.23

Indeed, in one storied life insurance case, the corporate designee was so unprepared and evasive during her deposition (twice!) that sanctions were recommended.24 Thus, unlike a deposition of a percipient witness, where the lawyer may not coach the witness, in the case of corporate designee depositions, the witness is almost obligated to be “coached.” Preparation, therefore, is key. In-house counsel and outside counsel should treat preparation as a collaborative effort. Although the facts originate with the client, outside counsel must collect, review and marshal all relevant documents and locate individuals who may need to be consulted, in order to help the witness prepare to testify about the designated topics. Start early. Make sure the client/witness has set

22 See e.g., S. Cal. Stroke Rehabilitation Assocs., Inc. v. Nautilus, 09-CV-744 JLS (AJB), 2010 WL 2998839, at *1 (S.D. Cal. Jul. 29, 2010) (“The corporate party then has an affirmative duty to educate and prepare the designated representative for the deposition. This duty requires a Rule 30(b)(6) designee to testify to more than just what he or she personally knows.” (citation omitted)).
aside sufficient time to prepare. Do not assume that in-house counsel completely understands the legal theories and issues that will come up in the deposition. The in-house lawyer, who is handling more than just this one litigation matter, might not be as deeply engaged in the nuances of the case as outside counsel who is living with it every day. Be prepared to educate the witness about things you think they should already know. As part of the preparation, outside counsel also must educate the designee not only on the substance of the deposition topics, but also as to the witness’s role and significance of the testimony: the witness “is” the organization, and her testimony is binding on it.

Standard rules of preparing for a deposition also apply to a corporate witness: including not speculating/assuming facts while testifying. Contrary to a conventional fact witness, preparation of a corporate witness often focuses upon educating the witness regarding information about which they have no personal knowledge and assisting with effectively telling the company’s story. Preparation should include anticipated areas of inquiry, based on the deposition notice, including fact questions, contention questions, organization’s policies and procedures, positions, compliance with internal standards, and opinions (other than expert). Outside counsel should also consider some preparation outside the scope of the notice, in case opposing counsel deviates from the notice and seeks to obtain the witness’s personal knowledge on certain topics.

b. Privileges and Waiver

Outside counsel should also be sensitive to attorney-client privilege and know the areas that are privileged or otherwise confidential (e.g., trade secrets, joint defense).

In general, as long as the questions posed and responses given involve purely factual information and do not reveal the substance of communications between attorney and client, there should be no waiver of the attorney-client privilege. Accordingly, the witness simply needs to confine her answers to non-privileged, factual matters. Further, the lawyer defending the deposition needs to be alert and object to questions probing for privileged information.

A few courts have held that designating counsel as a company’s witness waives the attorney-client privilege and work product doctrine, reasoning that counsel could only have learned about the subject matter of the deposition through the attorney-client relationship.

The majority rule is that designating in-house counsel as a company’s Rule 30(b)(6) witness does not create an automatic waiver of the attorney-client privilege or work product doctrine. On the other hand, a waiver could occur if the in-house witness volunteers privileged information during the deposition.

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Sometimes the line between what is waived and what is still privileged is very fine. For example, in *Sony Computer Entertainment America, Inc. v. Great American Insurance Company*, the court allowed the insurance company to ask the policyholder’s in-house counsel, who was its 30(b)(6) witness, about the company’s understanding of its legal obligations under the insurance policy, “even if the 30(b)(6) deponent is a lawyer and even if the answer to such questions might indirectly reveal the advice of counsel received by [the policyholder].” But the court did not permit the insurer to ask the lawyers about their actual communications or individual understandings, because “that would contain mental impressions protected by the work product privilege.” Further, the court rejected the insurer’s claim of issue waiver, because the lawyers’ individual understanding was irrelevant, and the company’s 30(b)(6) witness could testify about the company’s understanding directly.

An exception to the majority, non-waiver rule applies if the company is relying on “advice of counsel” as a defense. If the advice of counsel has been placed at issue, then the privilege that would ordinarily attach to relevant communications or work product may be waived. No such waiver would occur, however, if the company did not put the subject matter of the communication “at issue” and the discovering party had not shown that “invasion of the privilege is required to determine the validity of the client’s claim … and application of the privilege would deprive the adversary of vital information.”

**DO:**

- Understand why the deposition is being taken. Look at the topics through the lens of the requester.
- Select the right witness. It might not be the client you deal with on a day-to-day basis.
- Prepare, prepare, prepare. Send the witness key documents in advance and educate the witness as to the facts at issue. Meet with the witness in person. Practice. If deposition will be videotaped, consider conducting mock videotaped deposition.
- Educate the witness on privileges (attorney client, trade secret, joint defense issues) and work product protection (“in anticipation of litigation”).
- Remind the witness of the binding effect of his testimony on the company, but note that questions beyond the scope of the notice are not binding, but viewed as personal testimony. Object accordingly.
- File motions in limine in advance of trial to request limiting instructions on use of testimony.

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29 Id.
30 Id.
DON’T:

- Assume the in-house lawyer/witness is as knowledgeable as you are about the nuances of the legal issues and the detailed facts and documents you have been studying throughout the litigation.
- Be tempted to let the in-house counsel/witness advocate legal positions.
- Leave preparation to the last minute and risk potential sanctions or preclusion orders that may result from unprepared witness testimony.

C. Litigation Guidelines: Helpful Cost-Savers or Ethical Minefields?

Clients of all stripes may impose litigation and billing guidelines upon their outside counsel, and outside counsel generally have few problems adhering to such guidelines. Guidelines should set forth acceptable and unacceptable fee charges and expectations of defense counsel and can be helpful cost-savers and minimize disputes between the client and outside counsel. Guidelines can also set forth reporting requirements and assistance with obtaining necessary data elements, e.g., for CMS\textsuperscript{33} reporting. In an effort to rein in “scorched earth” litigation practices, some guidelines even detail the type and amount of discovery that may be undertaken, the amount and methods of legal research, and the seniority and number of attorneys and non-attorneys authorized to perform certain tasks.\textsuperscript{34}

A unique situation arises when an insurance company assumes the defense of its policyholder, and the insurer seeks to impose its own litigation guidelines on defense counsel. In general, insurance companies should not utilize restrictive guidelines for defense counsel retained to represent policyholders, and insurance companies should use different guidelines for counsel retained to represent the policyholder from counsel retained to represent the insurance company. Ethical issues could arise if the insurer’s guidelines interfere with the outside lawyer’s ability to defend the case and zealously represent the client. According to a California Court of Appeal:

> Under no circumstances can such guidelines be permitted to impede the attorney’s own professional judgment about how best to competently represent the insured. If the attorney’s representation is to be limited in any way that unreasonably interferes with the defense, it is the insured, not the insurer, who should make that decision.\textsuperscript{35}

As stated by the Tennessee Supreme Court, the relationship between the policyholder’s defense counsel and the insurer as counsel’s employer presents a loyalty challenge:

> The employer cannot control the details of the attorney’s performance, dictate the strategy or tactics employed, or limit the attorney’s professional discretion with regard to the representation. Any policy, arrangement or device which effectively limits, by design or operation, the attorney’s professional judgment on behalf of or loyalty to the client is prohibited by the Code, and, undoubtedly, would not be consistent with public policy.

\textsuperscript{33} “CMS” stands for Centers for Medicare & Medicaid Services.


…The same loyalty is owed the client whether the attorney is employed and paid by the client, is a salaried employee of the insurer, or is an independent contractor engaged by the insurer.36

Some guidelines imposed by insurance companies have been found to go too far. In a case involving litigation guidelines that required defense counsel to seek the insurance company’s prior approval before conducting such basic litigation tasks as motion practice, discovery and legal research, the Montana Supreme Court held that “the requirement of prior approval fundamentally interferes with defense counsels’ exercise of their independent judgment.”37 In rejecting the insurance company’s argument that insurance contracts effectively place absolute control of litigation with insurers, the court emphasized that the policyholder “is the sole client of defense counsel,” and stated:

[The insurers’] claim of absolute control of litigation cannot be reconciled with their insistence that whenever a conflict may arise between their litigation guidelines and an attorney’s ethical obligations, the attorney is to follow the ethical course of action. [Insurers’] assertion that defense counsel are not only free to but must follow their independent judgment is inconsistent with their claim that insurers have absolute control of litigation.38

The court concluded that defense counsel who submitted to an insurance company’s requirement of prior approval of various litigation activities “violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds.”39

Of course, litigation guidelines are useful and enforceable under appropriate circumstances. For example, in Pepsi-Cola Bottling Co. v. Insurance Company of North America, a federal court in California found that an insurance company’s reduction of hourly rates and use of other billing guidelines did not breach its duty to defend, where the guidelines were “strategy-neutral” and “based on objective standards”:

[T]he evidence does not show that the “billing guidelines” were applied in a manner that influenced [defense counsel’s] substantive strategy decisions, but instead, it appears that the purpose and result of the guidelines is to reduce overall fees based on objective standards relating to billing practices. …[T]he application of the guidelines in this case appears to turn on reducing costs that the insurer finds needless or unexplained, under strategy-neutral criteria.40

The Pepsi-Cola court also suggested that the insurers avoided ethical problems by “separat[ing] themselves from direct involvement in the management of Pepsi’s case by hiring a third-party auditing group.”41 That being said, counsel also should be wary of confidentiality and privilege waiver issues that could arise with respect to disclosures made to such third parties.

As a practical matter, billing guidelines might be more effectively employed if they are negotiated in advance rather than unilaterally imposed. To the extent that defense counsel believes that an insurer’s

36 Petition of Youngblood, 895 S.W.2d 322, 328 (Tenn.1995).
37 In re the Rules of Prof. Conduct, 2 P.3d 806, 815 (Mont. 2000).
38 Id. at 814-15.
39 Id. at 817.
41 Id. at 34.
proposed billing guidelines might impair its ability to represent the policyholder/client, counsel should raise concerns about problematic provisions with the insurer and seek to modify or eliminate them from the guidelines. Another approach is to submit a counter-proposal: If in-house counsel of the policyholder/client has its own litigation guidelines, ask the insurer to consider using those, or a hybrid of the two, instead. If advance negotiations are impractical, and defense counsel encounters a conflict between the guidelines and the ethical and effective representation of the client, a negotiated resolution still may be possible. Ultimately, however, it is the insured, not the insurer, who should make the decision about limitations on the attorney’s representation.\(^42\)

**DO:**

- Remember that defense counsel represents the policyholder, not the insurance company.
- Negotiate billing guidelines in advance, if possible, and as the litigation proceeds, if necessary; agree on what reasonable and necessary defense costs shall include (e.g., many insurers and in-house counsels alike will not include general overhead, administrative or internal expenses, or costs associated with coverage advice).

**DON’T:**

- Assume that the insurance company who pays the bills also controls the litigation.
- Leave the insured client’s in-house counsel out of the negotiations. They may have their own litigation guidelines that the insurance company can live with.\(^43\)

**CONCLUSION**

The care and feeding of in-house counsel is grounded on a long-term, collaborative relationship. Simply put, outside counsel that adds substantial value by developing early targeted strategies that enable the corporate client to achieve the right result for the right cost, conforms to the highest standards of performance and ethics, and takes the time to know the business goals of the corporate client will be rewarded with more business. We hope the enumerated “Do’s and Don’ts” provide outside counsel with insight into the expectations of in-house counsel. These tips as well as the attendant legal considerations for litigated matters illuminate the importance of communication with the client and the overall efficient management of the litigation. Reach beyond the norm, exceed expectations, and embrace being an integral part of a skilled team of lawyers to deliver excellent results.
