Several new, interesting cases involving legal ethics issues in the context of insurance coverage litigation emerged over the course of the past year or so. The issues in these cases will be the subject of an ethics and insurance law debate, brought to you by the sponsors of last year’s political satire show, Point-Counterpoint, and the previous year’s game show, The Weakest Link. We hope you enjoy our re-imagination of weekday talk shows in this third iteration of our insurance and ethics law debates.

The authors (and presenters) offer the following as our written recitation of the issues that will be discussed during our presentation. We hope you enjoy reading it as much as we enjoyed writing it.

I. The California Supreme Court Allows an Insurer to Recover Unnecessary or Unreasonable Defense Costs Directly from Cumis Counsel in Certain Limited Circumstances

In *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 353 P.3d 319 (Ca. 2015), the California Supreme Court examined the question of whether an insurance company could seek reimbursement for allegedly unreasonable and unnecessary defense fees directly from the
insured’s independent defense counsel. The court held that the insurer could recover directly from the independent counsel, but explicitly stated that its holding was limited to the peculiar facts of the case, and refused to rule on certain other general issues.

A. Factual and Legal Background

Under California law, if an insurance policy obligates an insurer to defend the insured and a conflict of interest arises, the insurer is obligated to provide independent counsel (known in California as “Cumis counsel”) to represent the insured, unless the insured expressly waives its rights to independent counsel. See Cal. Civ. Code § 2860.

California law also entitles the insurer to seek reimbursement from the insured of defense costs attributable to the claims that were outside policy coverage. However, until the J.R. Mktg. case, the California courts had never determined from whom a CGL insurer could seek reimbursement of allegedly unnecessary or unreasonable costs billed by Cumis counsel.

In the J.R. Mktg. case, the insurer initially denied that it had a duty to defend or indemnify its insureds against claims asserted in an underlying lawsuit. In response, the insureds hired the law firm of Squire Sanders (US) LLP (“Squire”) to file a coverage action against the insurer. After the coverage suit was filed, the insurer agreed to provide a defense, but declined to pay defense costs incurred prior to January 19, 2006, and also refused to provide Cumis counsel.

The trial court in the coverage action ultimately ordered the insurer to pay defense costs incurred prior to January 19, 2006, and to provide Cumis counsel. The insureds retained Squire to act as Cumis counsel in the underlying case. A short time afterwards, apparently in reaction to the insurer delaying payment of Squire’s bills, the trial court issued an enforcement order that was drafted by Squire and accepted by the court. The order stated that the insurer had breached the duty to defend, and declared that, although Squire’s bills “still had to be reasonable and necessary,” the insurer would be precluded from invoking the rate provisions of Cal. Civ. Code § 2860, which limit Cumis counsel fees to rates that the insurer would normally pay to defense counsel it hired to defend insureds against similar claims in the same community. The order also provided that “to the extent [the insurer] seeks to challenge fees and costs as unreasonable or unnecessary, it may do so by way of reimbursement after resolution of the [underlying lawsuit].” The underlying lawsuit was resolved, and the insurer subsequently sought reimbursement from Squire of certain fees that the insurer alleged were unreasonable and unnecessary. The trial court and California Court of Appeals held that the insurer had no direct right of reimbursement against Cumis counsel, and that, if the insurer had any right of reimbursement, it was against the insureds. The insurer appealed those decisions to the California Supreme Court.

B. The Court’s Analysis and Decision

The court began its opinion by stating that the insurer’s appeal raised “a narrow question,” which, in the court’s words, was: “[m]ay an insurer seek reimbursement directly from counsel when, in satisfaction of its duty to fund its insureds’ defense in a third party action against them, the insurer paid bills submitted by the insureds’ independent counsel for the fees and costs of mounting this defense, and has done so in compliance with a court order expressly
preserving the insurer’s post-litigation right to recover ‘unreasonable and unnecessary’ amounts billed by counsel?” The court answered that question in favor of the insurer, reasoning that if the fees at issue were in fact unreasonable or unnecessary, then they would not have been incurred “for the benefit of the insured.” Thus, by receiving payment for those fees, Cumis counsel, and not the insured, was unjustly enriched. Therefore, under common law principles of unjust enrichment and restitution, the insurer had a direct right to seek reimbursement against Squire, rather than the insured.

However, the court immediately followed that ruling by stating that “[w]e emphasize that our conclusion hinges on the particular facts and procedural history of this litigation.” In particular, the court pointed to the provisions of the trial court’s enforcement order—which had been drafted by Squire—that Squire’s bills still had to be reasonable and necessary, and that the insurer could challenge fees and costs as unreasonable and unnecessary by way of bringing a claim for reimbursement after the underlying litigation had concluded. The Court further specifically stated that “we express no view as to what rights an insurer that breaches its defense obligations might have to seek reimbursement directly from Cumis counsel in situations other than the rather unusual one before us in this case.”

The court next turned to an examination of various objections raised by Squire and its amici curiae to the general proposition that an insurer could assert a direct action against Cumis counsel. The court ruled that “none of these arguments compels the conclusion that such a claim is absolutely foreclosed.”

The first objections raised were based on principles of contract law. First, Squire argued that the insurer could not recover under unjust enrichment under the principle that a person acting out of duty or self-interest cannot claim compensation from anyone who “incidentally” benefits as a result. The court disagreed that the principle applied to the facts of the case, holding that the insurer’s obligation to pay for Cumis counsel was not unlimited, but instead, pursuant to the trial court’s enforcement order, as well as the ethical rules that govern attorney conduct generally (see Rules Prof. Conduct, Rule 4-2000(A)), the insurer’s obligation to pay for the insured’s defense was limited to reasonable and necessary costs. Additionally, the court reasoned that any payments for unreasonable or unnecessary defense costs were not merely an “incidental” benefit to Squire.

Next, Squire argued that the insurer could not obtain relief for unjust enrichment because its claim was already addressed by an on-point, express contract between the insurer and the insured. The court disagreed, ruling that the insurer did not contract to pay whatever Cumis counsel chose to bill, no matter how excessive.

Squire also raised multiple public policy arguments against a direct action by an insured against Cumis counsel. First, Squire argued that, per public policy, Cumis counsel must be completely independent, and that, since the insurer wrongfully refused to provide Cumis counsel, the insurer had forfeited all rights to control the defense. The court rejected that argument, holding that, although Cumis counsel must indeed retain independence, such independence is not inconsistent with an obligation of counsel to justify their fees. The court further pointed out that Cal. Civ. Code § 2860 specifically addresses the possibility of fee disputes between an insurer and Cumis counsel.
Squire next raised objections about the timing of the claim for reimbursement, arguing that Cal. Civ. Code § 2860 establishes a preference for contemporaneous resolution of fee disputes, which Squire asserted intrudes less on Cumis counsel’s independence than after-the-fact litigation, because such contemporaneous resolution provides real-time guidance to the counsel about which activities they may undertake. The court dismissed these concerns about timing as “speculative at best.” The court also pointed out that the trial court’s enforcement order—which, again, was drafted by Squire—allowed for the insurer to seek reimbursement after the underlying litigation had concluded.

Squire next argued that, because of the exclusive attorney-client relationship between Cumis counsel and the insureds, the insureds alone have the authority and responsibility to monitor Cumis counsel’s expenditures. Thus, Squire argued, the insured should be directly liable to the insurer for any payments deemed by the insurer to be unnecessary or unreasonable, subject to a right of cross-indemnity against Cumis counsel. The court held that the argument “all but ignores the realities of cases like the one before us.” The court pointed out that Squire had acknowledged that the insureds were not sophisticated, frequent litigators accustomed to monitoring their counsel’s day-to-day litigation decisions, and that the insureds, having contracted with the insurer and paid the insurer premiums to handle their defense, had no reasonable cause to expect that they would nonetheless face exposure if Cumis counsel submitted unreasonable and excessive bills to the insurer. The court also rejected Squire’s argument as creating unnecessary and circuitous litigation.

The court also found unavailing Squire’s argument that a Cumis counsel’s due process rights could be affected by allowing the insurer to recover directly from it, because, if the insured refused to waive attorney-client privilege, it could be prevented from effectively defending against the insurer’s claims for reimbursement. The court rejected this argument as purely hypothetical, since the insured in the case at hand had not refused to waive the privilege in the case. The court further held that, in any case, an objective review of the litigation as a whole to determine whether counsel’s bills appear to be fundamentally unreasonable is unlikely to involve examination of attorney-client communications, and even if it did, such privileged information could be redacted.

Finally, Squire argued that allowing an insurer to seek direct reimbursement from Cumis counsel would contravene California’s prohibition on the assignment of legal malpractice claims. The court disagreed, holding that the insurer was not seeking to assert a claim on behalf of the insureds, but was instead attempting to recover legal charges that it had paid itself.

However, having rejected the various arguments brought by Squire against the general principle that an insurer should not be able to assert a direct claim against Cumis counsel, the court once again stated that its decision to allow a direct action against Cumis counsel in the instant case was “a limited one, and a particularly apposite one given the history of this litigation.” The court also explicitly pointed out that it was not ruling on three other more general questions. First, the court refused to answer whether an insurer that breaches its defense obligations has any right to recover excessive fees it paid Cumis counsel in the absence of a court order similar to the one in the instant case specifically allowing such a right. Second, the court stated that it was not addressing whether, in general, a dispute over allegedly excessive fees is more appropriately decided through a court action, or instead should be resolved through
arbitration, given that the Cumis Counsel Statute specifies that Cumis counsel fee disputes must be resolved by final and binding arbitration. Finally, the court stated that it was not addressing the issue of when any Cumis counsel fee disputes generally ought to be decided relative to the underlying litigation in the absence of a court order like the one in the instant case that specifically provides when a resolution of a fee dispute may occur.

II. Does Insurer Reservation of Rights Letter Allow Appointment of Independent Counsel?

In *DHR International v. Travelers Casualty and Surety Co. of America* (N.D. Ill); Case No. 1:15-CV-4880, DHR International (“DHR”) filed a declaratory judgment seeking a finding that Travelers Casualty and Surety Co. of America (“Travelers”) created a conflict of interest entitling it to independent counsel by virtue of a reservation of rights letter that Travelers transmitted to DHR regarding certain underlying litigation. Travelers filed a motion to dismiss DHR’s declaratory judgment action on the grounds that it failed to state a claim for which such relief could be granted. No order has been released on Travelers’ motion as of the date of the creation of these written materials.

A. Factual Background

DHR was sued by three former employees in separate actions for wrongful termination. Regarding one such action, referred to as the “Barge” matter, DHR sued Travelers claiming that it should be permitted to have independent counsel and that Travelers breached a duty by failing to inform DHR of its rights to have independent counsel. The Barge matter included claims for sex and race discrimination as well as wage and hour claims.

DHR alleges that on March 3, 2015, Travelers acknowledged that the Barge claim implicated its EPL coverage and that it had a duty to defend in a reservation of rights letter. Travelers then identified several potential coverage defenses including the coverage for damages outside the definition of loss and for claims that fall within the policy’s wage and hour law exclusion. Travelers then agreed to provide a defense to DHR subject to these reservations of its rights. DHR alleges that this reservation of Travelers rights entitled DHR to independent counsel, and that Travelers should have informed DHR of this right in its letter.

DHR demanded that it should be allowed to appoint its own choice of counsel in February 2015 and again in May 2015. Each time, Travelers denied this request and agreed only to defend DHR in the claim by use of counsel it selected. The policy gives Travelers the right to select counsel.

B. Legal Issues for the Court to Decide

Travelers moved to dismiss the complaint for declaratory relief on the grounds that DHR had failed to state a claim upon which relief may be granted and that the claim is not ripe to be adjudicated. \(^1\) It noted that under Illinois law, when an insurer has a duty to defend, but a “serious” conflict of interest is presented, the insurer must either reimburse the insured for the

\(^1\) As this issue does not implicate an ethical rule, we do not discuss it here.
costs of defending the claim through independent counsel, or the insurer risks losing coverage defenses. Travelers noted that not every conflict of interest is "serious" enough to give rise to a right to independent counsel. In particular, an actual conflict does not exist merely because one or more claims in the underlying litigation is not covered by the policy. Instead, in order for a serious enough conflict to exist, the manner in which the insured defense is handled must affect the determination of coverage.

The right to independent counsel is derived from Rule 1.7 of the Rules of Professional Conduct, and that rule is the starting point for any analysis of an insurer’s alleged conflict of interest. For this rule to be implicated, there must be a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibility for another client, a former client, or by the lawyer’s own self-interest. Travelers argued that where the covered and uncovered claims have separate factual bases, there is no material limitation on the lawyer with respect to how facts will be developed in the underlying case. In other words, where there is no circumstance whereby proof of certain facts in the underlying case would shift liability from the insurer to the insured, there is no serious conflict of interest. Since the wage and hour claims excluded under the policy per the reservation of rights are based on a different factual analysis from the discrimination claims, there was no conflict, Travelers argued.

In response, DHR argued that in order to determine whether a serious conflict exists for purposes of stating a claim that would survive a motion to dismiss, DHR must simply allege a circumstance in which the insurer’s interests would be furthered by providing a less than vigorous defense. DHR argued that the underlying complaint fell within the scope of the classic situation where an insured is permitted independent counsel—where there are allegations of covered negligent conduct and uncovered intentional conduct. DHR pointed out that in the underlying complaint there are allegations of both potentially uncovered willful conduct subjecting it to potential punitive damages, and allegations of discrimination for which compensatory damages are sought, which are covered. DHR argued that if the facts that were developed in the underlying case pointed to willful misconduct, then appointed counsel could litigate DHR out of coverage. DHR concluded that the claim for punitive damages in the underlying case mandates the appointment of independent counsel.

In its reply, Travelers argued that reserved uncovered claim was the wage and hour claim, and that DHR’s failure to establish that this uncovered claim is a basis for its demand for independent counsel undermines its argument that Travelers’ reservation of rights letter created a conflict of interest.

Regarding the claim for punitive damages, Travelers argued that it never reserved on this issue, and even if a punitive damages award were to be uncovered pursuant to California law (the jurisdiction of the underlying claim), there would be no interest for panel counsel to steer the case towards those facts because it would not shift liability from the insurer to the insured, it would simply create liability for the insured, without any benefit to the insurer. Indeed, the insurer would still be on the hook for the compensatory damages under that situation. As such, the insurer has no interest in such result, and therefore, no conflict exists.

There is no judicial ruling yet on this case (as of the preparation of these materials). How should the court rule?
III. Conflicts of Interest—Policyholder’s Right to Control Its Defense When Conflict Exists

In *Valley Forge Insurance Co. v. Hartford Iron & Metal, Inc.*, 2015 WL 8180104 (N.D. Ind. Dec. 7, 2015), the court analyzed whether an insurer had the right to control both the defense and the remediation of environmental claims related to the policyholder’s metal scrap yard. Specifically, the legal question presented was whether, as a matter of law, the insurer retained the right to control the defense of an Indiana Department of Environmental Management ("IDEM") proceeding under the insurance policies and prior settlement agreements between the parties after the insurer filed a breach of contract and declaratory judgment action against its policyholder. The court held that by filing a breach of contract action against the policyholder that sought recovery of the same remediation costs that the policyholder claimed the insurance policies covered, the insurer created a conflict of interest that prevented the insurer from controlling the defense of the environmental actions or remediation of the site.

A. Factual Background

Hartford Iron & Metal, Inc. ("Hartford Iron") operated a metal scrap yard in Hartford City, Indiana. Valley Forge Insurance Company ("Valley Forge") issued several general liability insurance policies to Hartford Iron covering the scrap yard. These policies (1) gave Valley Forge the right and duty to investigate, defend, and settle covered liability claims, (2) required Hartford Iron to cooperate with Valley Forge in the investigation, settlement, or defense of the claim or suit, and (3) restricted Hartford Iron, except at its own cost, from voluntarily making a payment, assuming an obligation, or incurring an expense without Valley Forge’s consent.

In August 2006, IDEM found the scrap yard in noncompliance with environmental regulations and issued a Notice of Violation to Hartford Iron. Valley Forge initially agreed to defend. In 2009, IDEM and Hartford Iron entered into an Agreed Order concerning investigation and remediation, and Valley Forge and Hartford Iron entered into a settlement agreement allocating responsibility for complying with the Agreed Order.

Environmental violations continued and the Environmental Protection Agency ("EPA") issued Hartford Iron a Notice of Intent to File Civil Administrative Complaint. IDEM also issued a Remediation Request in April 2012 requiring Hartford Iron to submit a plan to reduce the discharge of PCBs from the site. Hartford Iron submitted a plan in July 2012.

In December 2012, Valley Forge and Hartford Iron reached a second settlement agreement (the “2012 agreement”). In relevant part, the 2012 agreement established that: (1) Valley Forge may immediately appoint new defense counsel to defend the EPA and IDEM claims, supervise the environmental consultant, and represent Valley Forge’s interests in prompt and cost effective remediation; (2) Valley Forge may immediately replace the former environmental consultant with August Mack—which would work to control storm water discharges and implement any future remediation plans; (3) Valley Forge must defend and indemnify Hartford Iron for the EPA penalty already imposed; (4) Valley Forge must defend and indemnify Hartford Iron for the EPA and IDEM claims and will control the defense of those matters; and (5) Hartford Iron must cooperate with Valley Forge, defense counsel, and August Mack in implementing the remediation plan.
After the 2012 agreement, both storm water discharge and disputes over control of the defense continued. In 2014, Valley Forge filed suit against Hartford Iron seeking damages for breach of the 2012 agreement as well as declaratory relief regarding Hartford Iron’s obligations under that agreement.

B. The Court’s Analysis and Decision

Valley Forge argued that no conflict of interest existed that would prevent it from controlling the defense of the IDEM and EPA claims because Valley Forge had agreed to pay the costs of defense in full, and therefore, defense counsel chosen by and answering to Valley Forge would have no incentive to defend in any way other than the most meritorious and cost-effective.

The court concluded that there was sufficient risk of misaligned incentives to prevent an attorney from representing both Hartford Iron’s and Valley Forge’s interests consistent with Indiana’s rule on attorney conflicts of interest embodied in Rule of Professional Conduct 1.7. The court stated that a conflict often exists between the respective interests of an insurer and policyholder when the defense to an underlying lawsuit or enforcement action may influence whether the claim is covered or not covered. The court went on to note that when such misaligned incentives exist, the accepted practice has long been for the insurer to pay for independent defense counsel and exercise no control.

IDEM and the EPA alleged further discharge of contaminated storm water that occurred after August Mack began remediation work. One defense pursued by Hartford Iron was that damages were caused by a nonparty (August Mack). This defense was in conflict with Valley Forge’s breach claim, which alleged that Hartford Iron’s bad faith failure to cooperate with August Mack was the cause of the ongoing storm water discharge. Any defense counsel appointed for Hartford Iron, but controlled by Valley Forge, would need to decide which of the two masters to serve in gathering evidence and preparing reports about the storm water discharge. Consequently, the court held that the conflict of interest created by Valley Forge’s breach of contract claim against Hartford Iron prevented Valley Forge from controlling the defense of the environmental claims.

Valley Forge also argued that even if a conflict existed regarding defense of the IDEM and EPA claims, it did not impact Valley Forge’s right to control the remediation (which it was paying for). The court noted that the distinction between defense and indemnity costs blur in environmental actions, in which investigations are open-ended and remediation is intended to address past violations and convince regulators not to proceed further against the violator. Accordingly, the court reasoned that many of the same conflicts presented by control over the defense also existed regarding control of the remediation. Valley Forge’s lawsuit attempted to avoid some of the costs of remediation on the grounds that Hartford Iron’s actions prevented August Mack from fixing the problem. If Valley Forge exercised control over the remediation despite its lawsuit, it would have an incentive to prioritize fixing things for which it is unquestionably responsible while neglecting work for which it believes Hartford Iron will ultimately be responsible. Consequently, the court denied Valley Forge’s motion for summary judgment on its claim for declaratory judgment regarding control over the remediation.
Finally, Valley Forge argued that the 2012 agreement should be enforced because it was an arms-length contract negotiated between counseled parties not subject to rules of construction applied to insurance contracts. Based on the court’s prior finding of a conflict of interest, the court rejected this argument because even a valid contract can’t require or permit an attorney to violate state ethical rules by providing a conflicted defense. The court noted that had Valley Forge only filed suit for declaratory relief, no conflict would exist and Valley Forge would have been free to control the underlying defense. However, by seeking a damages remedy for breach of contract, Valley Forge effectively forfeited its control rights. Valley Forge’s claim for breach of contract sought damages from Hartford Iron for the same incurred costs that Hartford Iron contends are covered under the policies. By filing its complaint, Valley Forge in effect disputed its duty to pay for remediation costs and created a conflict of interest for defense counsel.

IV. Counsel Selected By Insurer Not Disqualified, But Permitted to Withdraw

In Citizens Development Corporation, Inc. v. County of San Diego et. al, 2015 WL 9244287 (S.D. Cal.) Case No. 3:12-cv-0334-GPC-KSC (December 17, 2015), the district court considered several challenges brought by the policyholder plaintiff against a firm that its insurer hired to represent it. The district court denied all of the policyholder’s grounds for moving to disqualify the firm as counsel under the California Rules of Professional Conduct, but ultimately granted the firm’s motion to withdraw as counsel.

A. Factual Background

Citizens Development Corporation (“CDC”) filed a motion to disqualify its counsel in connection with a CERCLA cost recovery action it had filed against various defendants in federal court. The litigation had been stayed pending mediation since early 2014, but in September 2015, the court granted CDC’s motion to lift the stay for the limited purpose of filing a motion to disqualify Wood, Smith, Henning & Berman LLP (“WS”), one of the law firms hired to represent it. One of CDC’s insurance carriers, Fireman’s Fund Insurance Company (“Fireman’s Fund”), had appointed WS to represent CDC. After CDC filed its motion to disqualify, Fireman’s Fund moved for leave to object to the motion, but the court denied that motion, holding that WS was in the best position to respond to the allegations in the disqualification motion.

In its motion, CDC alleged that WS acted unethically in: (1) forwarding CDC’s confidential mediation brief to Fireman’s Fund against explicit instructions to the contrary from CDC’s lead counsel and the mediator; (2) disclosing confidential attorney-client communications to Fireman’s Fund against CDC’s express instructions; (3) declining to provide its litigation file to CDC; (4) sending litigation memoranda with erroneous and slanted facts to Fireman’s Fund to bolster Fireman’s Fund’s coverage position against CDC; (5) submitting briefing to the mediator advocating for an allocation of liability benefiting Fireman’s Fund, to CDC’s disadvantage; and (6) conditioning its withdraw as CDC’s counsel on absolution from its alleged ethical violations.

In its response to CDC’s motion, WS denied each of CDC’s allegations. A few weeks after the motion was briefed, WS also filed a motion to withdraw as counsel. The court considered both motions together.
B. The Court’s Analysis and Decision

The district court began its analysis by explaining that motions to disqualify are disfavored, and “should be subjected to judicial scrutiny.” It emphasized that “the paramount concern must be the preservation of the public trust both in the scrupulous administration of justice and the integrity of the bar.” The court also cited to another decision in the case which discussed the uniqueness of the tripartite relationship, noting that the California State Bar’s Standing Committee on Professional Responsibility and Conduct already made clear that “the attorney is obligated at all times to protect the insured/client and may not act in any way which prevents devoting his entire energies to his client’s interest.” The court continued:

This means that, even where the attorney has a close ongoing relationship with an insurer, and from a business perspective considers [sic] insurer an important “client,” in any particular representation it is the obligation to protect the insured’s confidences and secrets which is paramount. Thus, if, for example, the attorney gains information during the course of representation which the attorney believes demonstrates that the insured is actually not entitled to coverage, the attorney nevertheless owes a duty to the insured/client not to reveal this information to the insurer. This is true even where the attorney comes to believe that the insured has fraudulently created a situation in which coverage appears to exist where it actually does not. For example, an insured might claim to be driving a vehicle when the actual driving was done by a friend or family member who was not insured. Even in these relatively extreme situations, the requirements of Business and Professions Code section 6068, subsection (e) prevent disclosure to anyone, including the insurer, of material harmful to the insured.

The court also cited the standard for permissive withdrawal, the relief WS sought in its motion. For that aspect of its decision, the court cited California Rule of Professional Conduct 3-700, which prohibits an attorney from withdrawing from pending actions unless, among other reasons, the client or co-counsel renders it unreasonably difficult for the attorney to represent the client or carry out his/her duties effectively. The Rules also require that, where permissive withdrawal is granted, the attorney take reasonable steps to avoid prejudice to the client. See California Rule of Professional Conduct 3-700(A)(2).

C. CDC’s Motion to Disqualify

The court considered each of CDC’s allegations in turn. The court first rejected the claim that WS illicitly obtained a copy of CDC’s confidential mediation brief and sent it to Fireman’s Fund against lead counsel’s instructions. Although CDC submitted a declaration from lead counsel confirming these instructions and attached an email from an attorney at WS to Fireman’s Fund that summarized the mediation brief (in contravention of the instructions), WS argued it had not committed any ethical violations. WS explained that it never sent a copy of the actual brief to Fireman’s Fund, and did not send the email to Fireman’s Fund until seven months after
the mediation brief was submitted. WS further argued that the information it sent to Fireman’s
Fund from the mediation brief was not disadvantageous to CDC, and much of it was publicly
available.

The court agreed with WS. It did not believe CDC had sufficiently explained how the
information provided to Fireman’s Fund would prejudice CDC in a coverage dispute. It also
found persuasive the fact that WS did not send the email at issue to Fireman’s Fund until seven
months after submission of the mediation brief. The court characterized the email as part of
counsel’s “obligation . . . to keep clients reasonably informed about significant developments
relating to the case.”

The court then analyzed CDC’s allegation that WS disclosed confidential
communications to Fireman’s Fund. CDC claimed that an attorney at WS copied a Fireman’s
Fund claims adjuster on an email with a lead counsel attorney, so that the claims adjuster at
Fireman’s Fund received a chain of prior, confidential emails about coverage issues. In its
response, WS conceded that it had forwarded this email to the claims adjuster, but argued that
the disclosure was incidental and harmless, since Fireman’s Fund did not take any action in
response to it or modify its reservation of rights.

The court again agreed with WS that the emails did not prejudice CDC because CDC did
not identify anything in the email chain that could prejudice its coverage position vis a vis
Fireman’s Fund. Indeed, the court went one step further in its analysis, criticizing the
“adversarial, confrontational tone” that lead counsel adopted toward WS in the emails, and
described the messages from lead counsel to WS as “irrelevant, if not inappropriate.”

With respect to the WS’ litigation file, CDC argued that WS did not produce the whole
file upon CDC’s request, and that under California law, “an attorney has a duty to promptly
surrender any communicated work product . . . upon request of the client.” The court cited
additional guidance from the California State Bar’s Standing Committee on Professional
Responsibility and Conduct, which recommended that:

[W]hen a lawyer represents multiple clients in the same matter,
each client usually is entitled to review information in the client
file that any one of the clients is entitled to receive . . . absent a
special circumstance, retained counsel should honor Insured’s
request to examine the entire file, subject to retained counsel’s
right to assert the work product doctrine . . . However, if retained
counsel is unsure whether permitting Insured to review the file will
violate retained counsel’s duty of confidentiality to the Insurer,
than retained counsel should decline to permit Insured to review
the portions of the file over which retained counsel believes Insurer
might be able to assert confidentiality.

The court held that the dispute turned in large part over the definition of the “litigation
file.” CDC characterized the litigation file as not only the case documents and WS’ status
reports to Fireman’s Fund, but also as including a copy of all communications between the firm
and CDC’s insurance carriers. CDC also interpreted this file-related duty as requiring the
participation of its lead counsel in all future oral or written communications between WS and the
insurance carriers. The court found that while CDC had a right to any communications between
the insurer(s) and WS concerning the claim for which WS had been appointed, CDC did not
have a right to every communication between WS and Fireman’s Fund (or other insurers) that
was unrelated to the case. Nor did it have the right to force WS and Fireman’s Fund to include
CDC’s lead counsel in every oral communication between them. However, consistent with the
California State Bar’s guidance, the court ordered WS to produce to CDC any communications it
had with Fireman’s Fund (or to which Fireman’s Fund had been privy) relating to the case.

The court then turned to CDC’s allegation that WS misstated facts in its litigation
memoranda to Fireman’s Fund, to bolster Fireman’s Fund’s coverage position. The “misstated”
facts consisted of an erroneous estimation of the time during which CDC owned the polluted
asset, as well as misrepresentations about when the pollution happened. CDC believed the
misstatements were tactically designed to support Fireman’s Fund’s position that the pollution
occurred outside of Fireman’s Fund’s policy period. In defense, WS argued that the erroneous
facts were sent in an email status report to Fireman’s Fund on which CDC’s lead counsel was
copied, so CDC easily could have remedied them.

The court again sided with WS, finding that “WS’ factual errors do not amount to
‘material’ misrepresentations.” The factual misstatements were in the background section of the
status report, and the errors were easily verifiable such that Fireman’s Fund would be unable to
rely on them. The court did not believe the misrepresentations materially disadvantaged CDC as
a result.

The court summarily dismissed CDC’s claim that WS secretly submitted briefing to the
mediator that argued for a high percentage of liability to be attributed to CDC. WS contended
that it never sent such a brief to the mediator (although it appears to have conceded that it wrote
one). Because there was no evidence WS actually sent the brief, the court rejected CDC’s
contention.

Finally, CDC asserted that WS refused to withdraw from representing CDC “in a manner
consistent with its ethical obligations to CDC.” CDC defined those ethical obligations, however,
as a withdrawal conditioned on admitting ethical breaches. While WS asked Fireman’s Fund to
select new counsel and Fireman’s Fund agreed, WS would not admit it had engaged in unethical
conduct. As a result, CDC’s lead counsel refused to sign the substitution of counsel and would
not stipulate to WS’ withdrawal unless WS made the admissions it sought.

In connection with this prong of CDC’s argument, the court also considered CDC’s
request for sanctions based on the preceding conduct and on certain of WS’ statements to a legal
publication about the disqualification motion. In an interview, an attorney at WS described
CDC’s motion as “groundless and disingenuous,” and CDC believed this characterization about
an existing client to the media was inappropriate and unprofessional. The court rejected CDC’s
sanctions arguments.

In concluding its discussion of CDC’s disqualification motion, the court found that WS’
bad acts did not satisfy the “strict judicial scrutiny” standard necessary for disqualification under
California law. The court held, however, that WS “easily met” the standard for withdrawal under
the prong whereby the client renders it “unreasonably difficult for counsel” to carry out his or her duties. Thus, the court denied CDC’s motion to disqualify but granted WS’ motion to withdraw.

V. The Unlikely Story of How an Insurance Issue Resulted in the Removal of a Florida State Court Judge

 Inquiry Concerning a Judge, No. 12-613 Re: Laura Marie Watson, 174 So. 3d 364, 2015 Fla. Lexis 1335 (June 18, 2015) concerns an effort to remove Judge Laura Watson from the bench. Laura Watson was an attorney in Florida. Prior to her elevation to the bench, she was involved in the representation of personal injury clients who were pursuing claims against their insurance company for bad faith in failing to pay Personal Injury Protection (PIP) claims. The insurer ultimately paid to settle the claims, but the clients were not allowed to participate in those recoveries, were not informed of the recoveries, and yet were required to release the claims.

A. Factual Background

Prior to 2002, Laura Watson, then practicing as the Law Office of Laura M. Watson, P.A., d/b/a/ Watson & Lentner, entered into a business plan with other law firms, Marks & Fleischer, P.A. and Kane & Kane, to represent healthcare provider clients in numerous lawsuits against Progressive Insurance Company (“Progressive”) arising out of the payment of PIP claims. PIP is an extension of car insurance available in some states that covers medical expenses for insureds and their passengers, regardless of fault for the accident and regardless of whether or not the other person involved in the accident has insurance. PIP may also be available for other damages, including disability, lost wages or death benefits that result from a covered accident.

After making this business agreement, the law firms shared expenses for marketing and procuring clients. Each firm maintained and managed its own clients and files, but had joint representation contracts in which all of the firms agreed to represent all of the clients and to assume joint responsibility for the claims. The attorneys alleged that Progressive had systematically underpaid health care providers for claims submitted.

The PIP attorneys retained another law firm, Slawson Cunningham Whalen & Stewart, P.A., to file a bad faith case against Progressive. The lead plaintiff was an orthopedic medicine medical practice, Drs. Fisher & Stashak, M.D., P.A. d/b/a Gold Coast Orthopedics and Rehabilitation. The attorney working on the case, Todd Stewart, left the firm, forming his own firm, Todd A. Stewart, P.A., which then took over this matter and associated with another lawyer and law firm, Larry Stewart of Stewart Tilghman Fox & Bianchi, P.A. Larry Stewart brought in yet another attorney, William C. Hearon, to assist in the bad faith litigation. (Stewart, Stewart, and Hearon will be referred to as the “Bad Faith Counsel”).

In the Spring of 2002, the PIP attorneys and the Bad Faith Counsel collectively agreed on how the work would be handled and how the fees would be split. The arrangement provided that the clients would receive 60 percent of the recovery and the attorneys would collectively receive

Of the portion of fees to be shared by the attorneys, the Bad Faith Counsel would receive 60 percent. As one of the PIP Attorneys, Watson was part of the attorney group sharing the remaining 40 percent of the attorneys’ fees.

The initial group of plaintiffs in the bad faith litigation consisted of 40 health care providers. The lawyers expected that bad faith claims would be asserted on behalf of a group of approximately 441 clients. During the litigation, Progressive negotiated settlement with both sets of attorneys. The PIP Attorneys gave full authority to Bad Faith Counsel to negotiate a global settlement of all of the bad faith claims, even those filed by the PIP Attorneys.

In May 2004, the PIP Attorneys accepted an aggregate settlement offer from Progressive of $14.5 million. This amount was in settlement of the all of the bad faith claims, whether perfected or potential. The PIP Attorneys did not notify Bad Faith Counsel of the settlement. A Memorandum of Understanding was drafted that clearly set out that the settlement covered all claims, whether perfected or potential. It did not allocate any recovery to the bad faith claims. It required release of all of the claims. The Bad Faith Counsel objected to the settlement. After they objected, the Memorandum of Understanding was amended to award $1.75 million to the bad faith claims.

The PIP Attorneys notified their clients of the settlement and sent releases. They did not disclose any conflicts of interest, provide closing statements, or advise the clients of any material facts necessary to provide the clients with the information needed to evaluate the settlement or the propriety of executing the releases.

In June 2004, Progressive sent the settlement funds. Watson’s firm received over $3 million, which was placed into her trust fund account. Of this amount, only $361,470.30 was paid out to her clients. None of these payments were sent with closing statements.

The Bad Faith Counsel asserted a dispute about the funds. Florida’s ethics rules require that disputed funds be deposited into a separate escrow account. The PIP Attorneys did not deposit the funds into a separate escrow account.

After the Bad Faith Counsel disputed the settlement agreement, the PIP Attorneys placed some funds into escrow. The escrow account was created for the purpose of setting aside the attorneys’ fees due to them for the bad faith litigation. In 2006, Watson transferred some funds to Bad Faith Counsel, leaving the remainder in the account in dispute. The Court then ordered that no further distributions from the account be made, without a Court order. Thereafter, in June 2006, Bad Faith Counsel settled with one of the PIP law firms, but not Watson’s firm or the Kane firm.

Bad Faith Counsel sued the PIP Attorneys for fraudulent inducement and for quantum meruit. A bench trial followed. In April 2008, the trial court found that the conduct of the PIP Attorneys violated several rules of professional conduct.

The Court identified the conduct at issue as:

1. the failure to notify Bad Faith Counsel of the settlement;
2. the failure to notify the clients with bad faith claims that the claims would be released and that they would be receiving little to no compensation for the claims;
3. the exaggeration of hours by the PIP attorneys with regard to the work they allegedly did on both the PIP claims and the bad faith claims.

Bad Faith Counsel was awarded additional attorneys’ fees, based on the finding that the PIP attorneys were unjustly enriched and for the cost of the work performed by Bad Faith Counsel. A judgment of more than $900,000 was entered against Watson. A copy of the Order was also sent to the Florida Bar. Watson appealed, and the judgment was affirmed in February 2012.

Thereafter, the Florida Bar started grievance proceedings against Watson. In June 2012, the matter was referred to the grievance committee for a probable cause review. In October 2012, Watson was informed that probable cause had been found. In November 2012, Watson was elected to the Seventeenth Judicial Circuit and assumed office in January 2013. As a result of her election, the Florida Bar referred Watson’s file to the Judicial Qualifications Committee. A separate complaint was also filed against Watson by Larry Stewart, one of the Bad Faith Counsel.

In July 2013, the Judicial Qualifications Commission filed notice of formal charges against Watson, alleging that she violated Canons of the Code of Judicial Conduct, as well as Rules of Professional Conduct.

The Florida Judicial Qualifications Commission held a hearing where witnesses were heard both as to the facts, and Watson’s character. Larry Stewart testified that Watson was present at all of the meetings with the PIP Attorneys and Bad Faith Counsel. He stated that she never objected or corrected any of the agreements or understandings at those meetings. He presented email evidence that showed that Watson was involved in the defense and that she had communicated with Stewart about the bad faith litigation.

Watson argued that she had no involvement in the making of the agreement with the Bad Faith Counsel and that she had no knowledge of the agreement for Stewart to pursue bad faith claims on behalf of any of her clients. Watson stated that she was not aware that Stewart was in settlement negotiations with Progressive. However, based on the evidence and testimony, these arguments were not considered credible by the Judicial Qualifications Commission.

The Commission found that Watson provided the clients with a form release letter that only disclosed the amount that they were going to receive. The settlement was structured so that only the PIP payments due to the medical providers were paid, with little or nothing allocated to the bad faith claims. The releases provided a release of bad faith claims. The plaintiffs did not receive closing statements and were not told the total amount of the settlement, and were not kept informed of the progress of settlement negotiations. The clients were not asked to consent to the settlement. The clients were not told about the amount of the fee going to the attorneys. The clients were not told that the bad faith claims were not compatible with PIP recovery claims and, therefore, presented a conflict. In response to these issues, Watson argued that her contracts with her clients provided only for PIP claim recovery. She stated that it was common in these cases not to prepare closing statements.
The Commission found that the PIP Attorneys were told by Bad Faith Counsel about the conflicts presented by the PIP claims and the bad faith claims, and that settlement would require careful handling and client transparency. The Commission found that the PIP Attorneys excluded Bad Faith Counsel from the settlement negotiations, and that, as a result, the settlement was ethically flawed. The Commission also found that Watson never told her PIP clients that the money had been paid to settle the bad faith claims, and that they were not permitted to participate in that recovery, even though they had to sign a release of any bad faith claims that they had. Watson had decided that the clients had no interest in the bad faith case and that she had no duty to pay or include people who had potential or prospective claims in the settlement. The Commission found that the agreement with the named plaintiffs in the bad faith litigation was contrary to the interests of the other claimants, and that Watson failed to disclose material information to her clients. This information that was not disclosed included the conflicts of interest and the allocation of funds between the PIP and bad faith claims. Under the methodology used by the PIP Attorneys, the PIP Attorneys received over $10.9 million of the total $14.5 million settlement in fees, and they received a portion of the attorneys’ fees awarded in the filed bad faith litigation.

The Florida Judicial Qualifications Commission found clear and convincing evidence that Watson’s conduct, as a practicing attorney, violated numerous rules of professional conduct and recommended that she be removed from office.

Following the decision of the Judicial Qualifications Commission, Watson filed a Petition for Declaratory and Injunctive Relief to the Supreme Court of Florida. This Petition was denied, without prejudice, in June 2014. The order noted that Watson could raise her issues in her response to the Order to Show Cause that was issued by the Supreme Court of Florida on April 29, 2014.

B. The Florida Supreme Court’s Analysis and Decision

The Florida Supreme Court reviews decisions of the Judicial Qualifications Commission. The standard applied by the Florida Supreme Court for removal requires the determination that the judge’s conduct is fundamentally inconsistent with the responsibilities of judicial office. The court must determine that the Judicial Qualifications Committee findings were supported by clear and convincing evidence. This standard, in Florida, is defined as a standard that requires more proof than a “preponderance of the evidence” but less proof than “beyond a reasonable doubt.” This is considered to be a standard with both objective and subjective issues. The Court requires that the evidence be credible, and that the testimony be based on clear memories and that the totality of the evidence be sufficient to convince the trier of fact, without hesitancy, of the truth of the allegations sought to be established.

The Court noted that the purpose of the proceedings was to gauge the judge’s fitness to serve as an impartial judicial officer, not to punish. The Court noted that Judges are held to higher ethical standards by virtue of their position in the judiciary and the impact of their conduct on public confidence in an impartial justice system.

Watson made jurisdictional challenges premised on the fact that the conduct had occurred while she was an attorney, and that she was now a judge. The court noted that misconduct that
was committed by an attorney who becomes a judge is specifically within the subject-matter jurisdiction of the Judicial Qualifications Committee and the Court.

The Court noted that it had previously held that a pattern of deceit and deception casts serious doubt on a judge’s ability to be perceived as truthful by those that might appear before her in the courtroom. The Court also noted that such conduct diminishes the public’s confidence in the integrity of the judicial system. Removal was warranted as a sanction here, because Watson’s conduct was fundamentally inconsistent with the responsibilities of judicial office. Finally, the Court noted that Watson’s demeanor during the proceedings also cast serious doubts on her ability to be perceived as truthful by those who might appear before her in her courtroom. Thus, removal was the appropriate sanction.

Following this decision, Watson requested a rehearing. The rehearing request was denied on August 31, 2015. Thereafter, Watson requested a stay from the United States Supreme Court. This request was denied. Watson filed a Petition for Certiorari to the United States Supreme Court, dated November 30, 2015. Watson’s Petition raises the issue of whether the Judicial Qualifications Commission is unconstitutionally interfering in valid elections by investigating a judge’s conduct retroactively. Essentially, she challenges the Supreme Court of Florida’s ability to remove a judge for conduct unrelated to the candidacy or judgeship, which occurred prior to running for office.

APPENDIX WITH ETHICAL CONSIDERATIONS AND RULES OF PROFESSIONAL CONDUCT FOR THE FOREGOING ILLUSTRATIONS

As the cases discussed herein illustrate, there are a number of considerations that must be balanced in addressing the intersection between ethics and insurance coverage. The ABA Model Rules of Professional Conduct provide some guidance with regard to ethical considerations of attorneys and insurers with regard to these matters. We do note that each state has its own Rules of Professional Conduct with slight variations and that California does not follow or model its rules on the ABA Model Rules. We identify the following rules for your reading pleasure:

**Reasonable Fees**

ABA Model Rule 1.5 addresses the fees an attorney can ethically charge:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(a) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(b) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(c) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(a) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.
Confidentiality

ABA Model Rule 1.6 addresses the confidentiality of information. The Rule states as follows:

(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.
Conflicts

ABA Model Rules 1.7 and 1.9 address conflicts of interest with current and former clients. Rule 1.7 states as follows:

(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 1.9 states as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.
A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Attorney Withdrawal of Representation

Rule 1.16 of the ABA Model Rules of Professional Conduct provides as follows with respect to declining or terminating representations:

(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.

The ABA has also promulgated the following Model Rules of Judicial Conduct applicable to our presentation:

**CANON 1**

A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

**CANON 2**

A judge shall perform the duties of judicial office impartially, competently, and diligently.

**The Florida Ethical Rules Implicated (Watson)**

- **Rule 3-4.2** – Violating the Rules of Professional Conduct;
- **Rule 3-4.3** – Commission of acts contrary to honesty or justice;
- **Rule 4-1.4(a) and (b)** – Failing to keep clients informed about the status of a matter and failing to explain a matter to the extent reasonably necessary to allow clients to make an informed decision about the representation;
- **Rule 4-1.5(f)(1) and (f)(5)** – Failing to provide written statements to bad faith clients regarding the case outcome, the remittance to the client and how it was determined and failing to provide closing statements to bad faith clients reflecting an itemization of costs and expenses, as well as the amount of fees received by the lawyers and law firms;
- **Rule 4-1.7(b)** – Representing clients with directly adverse interest and representing clients where representation was materially limited by lawyers’ responsibilities to other clients, third persons and the lawyers’ own interests;
- **Rule 4-1.8(g)** – Making an aggregate settlement of the claims of two or more clients without requisite disclosure or consent;
- **Rule 4-8.4(a)** – Violation of the Rules of Professional Conduct by herself and through acts of others;
- **Rule 4-8.4(c)** – Engaging in conduct involving deceit; and,
- **Rule 5-1.1(f)** – Failing to treat disputed funds as trust property.