

OPINION

COMMITTEE: Ethics Committee

DATE: October, 2008 *Benchers' Bulletin*

Extract from October 2008 *Benchers' Bulletin*

1. A lawyer may defend a third-party liability claim under joint retainer

A lawyer engaged by an insurer to represent an insured to defend a third-party liability claim may represent the insured alone or, with appropriate disclosure in accordance with Chapter 6 of the Professional Conduct Handbook, may represent both the insurer and the insured jointly with respect to all or some aspects of the matter. Where the representation is structured as a joint retainer, the lawyer has duties to both the insured and the insurer, and must take care to identify and avoid conflicts of interest between the two clients. So long as the insured is a client, the Rules of professional conduct — and not the insurance contract — govern the lawyer's obligations to the insured.

2. A lawyer's duty when a conflict emerges

If, after commencing to act on a joint retainer, the lawyer receives information that evidences a conflict between the insured and the insurer, the lawyer must withdraw from the joint representation without disclosing the information giving rise to the conflict.

3. A lawyer's duty when the policy authorizes the insurer to conduct a defence

Where the policy of insurance authorizes the insurer to control the defence and to settle within policy limits in its sole discretion, the lawyer must inform the clients of those limitations on the representation. After the lawyer has communicated the necessary information to the insured, the lawyer may settle at the direction of the insurer.

For a further discussion of bad faith and negligence in the context of the defence of third-party liability claims, the Ethics Committee commends the advice contained in the October 2003 Law Society *Alert Bulletin*.