

IN THE SUPREME COURT OF FLORIDA

ARCH INSURANCE COMPANY,

Petitioner,

Case No. SC19-673

DCA Case No. 4D17-2889

vs.

KUBICKI DRAPER, LLP,

Respondent.

***AMICUS CURIAE* BRIEF OF
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
(APCIA)
IN SUPPORT OF PETITIONER, ARCH INSURANCE COMPANY**

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IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

APCIA is the preeminent national trade association representing property and casualty insurers doing business in Florida, nationwide and globally. APCIA was recently formed through a merger of two longstanding trade associations, American Insurance Association and Property Casualty Insurers Association of America. APCIA's members, which range from small companies to the largest insurers with global operations, represent nearly 60% of the U.S. property and casualty marketplace.

On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members and the industry in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA advocates for the clear, consistent, and reasoned development of law that affects the industry, and APCIA's members and the policyholders they insure.

The answer to the certified question in this case is of great importance to APCIA's members because the answer could have a significant impact on the insurance industry generally and on how insurance cases are defended in Florida.

SUMMARY OF THE ARGUMENT

When a lawsuit is filed against an insured for which no issue regarding the applicability of insurance coverage exists, the insurer has a direct financial interest in the outcome of the lawsuit. With the inception of the insurance policy, the insurer is obligated to pay all covered damages up to policy limits. In addition, pursuant to its contractual obligations with the insured, the insurer generally must pay for the entire cost of the defense and is charged with working with the defense lawyer to make “client-type” decisions. The insurer also has authority to settle a case within policy limits. This means that the insurer routinely seeks advice from the defense lawyer regarding the lawsuit.

For the reasons described in the preceding paragraph, Florida and the overwhelming majority of other jurisdictions recognize that the defense lawyer typically has two clients—both the insurer and insured—when defending a lawsuit filed against an insured. Thus, in the absence of a conflict of interest, the general presumption is that the defense lawyer represents both the insurer and the insured because of the insurer’s direct financial interest in the outcome of a covered lawsuit. The “tripartite” relationship arising from this co-client representation is so well entrenched that Florida adopted a Rule of Professional Conduct (Rule 4-1.7(e)) to require defense lawyers to unequivocally advise both the insurer and the insured at the beginning of the representation whether the lawyer will depart from

the norm and represent solely the insured or proceed according to the norm and represent both the insurer and the insured.

In this case, Kubicki Draper (the “Firm”) failed to follow Rule 4-1.7(e), never advising Arch Insurance Company (“Arch”) and its insured whether the Firm represented both Arch and the insured, consistent with the norm in Florida and across the country, or only the insured, which is a departure from the norm. The Fourth District Court of Appeal nevertheless accepted the Firm’s argument that there was no “affirmative” indication in the Record expressly stating that Arch was a client and, therefore, nothing to establish that Arch had privity with the Firm.

The Fourth District’s holding mistakenly presumes that the insurer is a stranger to the relationship between the insured and the lawyer retained to defend the insured and must somehow affirmatively establish a connection to the relationship. This ignores the fact that the insurer is entwined in the creation of the relationship between the insured and the defense lawyer and is generally a co-client. Severing the insurer’s connection to the defense necessitates an affirmative action like the notice required by Rule 4-1.7(e) to establish that the defense lawyer intends to represent only the insured. This is exactly why Rule 4-1.7(e) requires the defense lawyer to inform both the insured and insurer as to the scope of representation and their status as clients at the beginning of the representation.

The Firm's failure to adhere to its ethical duty to notify Arch and its insured whether the Firm represented both or only the insured should not give the Firm an "out" to argue the insurer has no standing to pursue a malpractice claim against it. Such a result would allow lawyers to avoid accountability to the insurer (depending upon the facts) for gross negligence or even malfeasance even though the insurer obtains advice from the defense lawyer and that advice impacts the insurer's direct financial interest in the litigation.

Where, as in the underlying action, an attorney argues the insurer lacks privity and, therefore, lacks standing to sue because there is no "affirmative" indication that the insurer was the defense lawyer's client, the appropriate presumption (consistent with Rule 4-1.7(e)) is that the insurer is entitled to bring a malpractice action against the defense lawyer when, as here, **(1)** the insurer is communicating with the lawyer about the case and is relying on the lawyer's advice to make certain "client type" decisions; **(2)** the insurer has a direct financial interest in the outcome of the litigation based on its indemnity obligations; **(3)** there is no material conflict of interest between the insurer and the insured relevant to the defense of a covered claim; and **(4)** the lawyer fails to notify the insured and insurer at the outset of the representation whether the defense lawyer will solely be representing the insured or both the insurer and the insured as co-clients.

ARGUMENT

AN INSURER HAS STANDING TO MAINTAIN A MALPRACTICE ACTION AGAINST DEFENSE COUNSEL IF THE INSURER HAS A DIRECT FINANCIAL INTEREST IN THE OUTCOME OF THE LITIGATION, THE INTERESTS OF THE INSURER AND THE INSURED ARE ALIGNED, AND THE DEFENSE COUNSEL FAILS TO ADVISE THE INSURED AND INSURER THAT IT INTENDS TO REPRESENT ONLY THE INTERESTS OF THE INSURED AS REQUIRED BY THE RULES OF PROFESSIONAL CONDUCT.

This Court accepted jurisdiction to review the following certified question:

WHETHER AN INSURER HAS STANDING TO MAINTAIN A MALPRACTICE ACTION AGAINST COUNSEL HIRED TO REPRESENT THE INSURED WHERE THE INSURER HAS A DUTY TO DEFEND.

To answer the certified question, one must first understand **(A)** the rights and obligations of the insured and insurer under an insurance policy and **(B)** Florida's Rules of Professional Conduct governing the "tripartite" relationship among the insurer, its insured, and the lawyer hired to defend a covered lawsuit filed against the insured. A review of the law governing those issues establishes that the answer to the certified question is "yes," the insurer has standing to maintain a malpractice action against an insurance defense lawyer if the insurer has a direct financial interest in the outcome of the litigation, the interests of the insurer and the insured are aligned, and the defense lawyer fails to determine and notify the insurer and insured (as required by the Rules of Professional Conduct) whether defense counsel has two clients, consistent with the norm, or only one. Only where the

defense lawyer unequivocally informs the insurer and the insured that the lawyer is not representing the insurer's interests or where there is a direct conflict of interest between the insurer and the insured such that the lawyer could not represent the insurer would the answer be otherwise.

A. Florida Law Governing Rights And Obligations Under The Insurance Policy.

Under most liability insurance policies, the insured has a right to two distinct benefits, which derive from two distinct duties imposed on the insurer: **(1)** indemnification of covered damages up to policy limits, and **(2)** defense of any covered lawsuits. *See, e.g., Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 442-43 (Fla. 2005). Because of its duty to indemnify, the insurer has a direct financial interest in the outcome of a covered lawsuit against the insured. Under its duty to defend, the insurer generally must provide and pay for a lawyer to defend the insured against a covered lawsuit, regardless of policy limits.

In exchange for providing these benefits to the insured, the insurer also has rights under the insurance policy. First, the insurer has the right to consult with the defense attorney and make "client-type" decisions in overseeing the defense of the lawsuit filed against the insured. *See, e.g., Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 373-74 (Fla. 1995).

Second, the insurer has the right to control settlement of a lawsuit within policy limits. *Id.* at 374 ("The insurer also makes decisions as to when and when

not to offer or accept settlement of the claim.”); *Shuster v. S. Broward Hosp. Dist. Physicians’ Prof’l Liab. Ins. Trust*, 591 So. 2d 174, 178 (Fla. 1992). Again, this right arises from the fact that the insurer must pay all covered damages up to policy limits, so it has a direct financial interest in the outcome of the lawsuit.

The insurer’s contractual rights generally include the right to select the lawyer to defend the insured absent a conflict of interest material to the defense of a lawsuit between the insurer and the insured. *See, e.g., Doe*, 653 So. 2d at 373-74. Insureds sometimes negotiate for a “choice of counsel” provision up-front. However, under such provisions, the insurer still works with the defense lawyer. The chosen defense lawyer exercises independent professional judgment to advise the insurer on legal aspects of the lawsuit; and the insurer’s direct financial interest in the outcome of the litigation continues because it remains obligated to pay all covered damages up to policy limits.

In other words, in addition to making legal decisions in the defense of a case, the defense lawyer advises the insurer—as the lawyer would do with any client—by exercising independent professional judgment to evaluate the strengths and weaknesses of a case, recommend courses of action, and provide advice that the insurer must have to determine whether to settle the case within policy limits or take the case to trial.

B. Defense Counsel Typically Has Two Clients—The Insurer And The Insured.

As set forth above, the defense lawyer generally works with both the insurer and the insured in defending the case because both the insurer and the insured have a financial stake in the outcome of the litigation. Florida has long recognized that the defense lawyer typically has two clients when defending a lawsuit filed against an insured—both the insurer and the insured. *In re Rules Governing the Conduct of Attorneys in Fla.*, 220 So. 2d 6, 8 (Fla. 1969).

In the *In re Rules* decision, this Court based the two-client conclusion on the insurer’s direct financial interest in the outcome of the litigation, agreeing that: “[T]he legal responsibility placed on the insurer give[s] pointed verification to the fact that the interest involved in defense of liability suits is primarily and ultimately the interest of the insurance company.” *Id.*¹ The overwhelming majority of other states (thirty-four states, in fact), the District of Columbia, and the American Bar Association agree that, in the absence of a material conflict of interest, the defense

¹ *In re Rules* was the first Florida decision to approve the use of in-house insurance lawyers (“staff counsel”) to defend covered lawsuits filed against an insured so long as there is no material conflict of interest between the insurance company and the insured. In 2003, as a result of an extensive review of insurance practices by a special commission of The Florida Bar, this Court confirmed the use of staff counsel and codified Rules of Professional Conduct governing staff counsel. *See* Rule 4-7.21(g). The well-established use of staff counsel is not at issue in this proceeding.

lawyer typically has two clients: the insurer and the insured.² Only nine states have determined that defense counsel's *only* client is the insured.³ Six states have not directly addressed this issue.⁴

² **Alabama:** *Mitchum v. Hudgens*, 533 So. 2d 194 (Ala. 1988); **Alaska:** Alaska Bar Ass'n, Ethics Op. 99-3; **Arizona:** *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 601 (Ariz. 2001); **California:** *Gafcon Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th 1388, 1406 (Cal. Ct. App. 2002); **Delaware:** *Hoechst Celanese Corp. v. Nation Union Fire Ins. Co.*, 1995 WL 411805 (Del. Super. Ct. Mar. 17, 1995); **Dist. of Columbia:** *Cincinnati Ins. Co. v. All Plumbing, Inc. Serv., Parts Installation*, 983 F. Supp. 2d 162, 167 (D.C. Dist. 2013); **Georgia:** *Coscia v. Cunningham*, 299 S.E.2d 880, 881 (Ga. 1983); **Hawaii:** *Anastasi v. Fidelity Nat'l Title Ins. Co.*, 366 P.3d 160, 170-71 (Haw. 2016); **Idaho:** *Pendlebury v. W. Cas. & Sur. Co.*, 406 P.2d 129, 134 (Idaho 1965); **Illinois:** *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 329 (Ill. 1991); **Indiana:** *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 155 (Ind. 1999); **Iowa:** *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923 (Iowa 1958); **Kansas:** *Glenn v. Fleming*, 781 P.2d 1107, 1113 (Kan. Ct. App. 1989), *aff'd in part & rev'd in part*, *Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990); **Louisiana:** *Hodges v. State Farm Bureau Cas. Ins. Co.*, 433 So. 2d 125, 132 (La. 1983); **Maryland:** *Roussos v. Allstate Ins. Co.*, 655 A.2d 40, 44 (Md. Ct. Spec. App. 1995); **Massachusetts:** *McCourt Co. v. FPC Props., Inc.*, 434 N.E.2d 1234, 1235 (Mass. 1982); **Minnesota:** *Pine Island Farmers Coop v. Erstad & Reimer, P.A.*, 649 N.W.2d 444, 451 (Minn. 2002) (generally one client, but can be two if expressly agreed to by insured); **Mississippi:** *Moeller v. Am. Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1070 (Miss. 1996); **Missouri:** *In re Allstate Ins. Co.*, 722 S.W.2d 947, 952 (Mo. 1987); **Nebraska:** *Hawkeye Cas. Co. v. Stoker*, 48 N.W.2d 623, 632 (Neb. 1951); **Nevada:** *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 340-41 (Nev. 2015); **New Hampshire:** *Dumas v. State Farm Mut. Auto. Ins. Co.*, 274 A.2d 781, 784-85 (N.H. 1971); **New Jersey:** *Lieberman v. Emps. Ins. of Wausau*, 419 A.2d 417, 424 (N.J. 1980); **New York:** *Vandermulen v. Fidelity Nat'l Title Ins. Co.*, 2007 WL 3082266 (N.Y. Sup. Ct. Oct. 9, 2007); **North Carolina:** 2003 Formal Ethics Op. 12 (Oct. 21, 2004); **Ohio:** *Netzley v. Nationwide Mut. Ins. Co.*, 296 N.E.2d 550, 561 (Ohio Ct. App. 1971); **Oregon:** Or. State Bar Ethics Op. 2005-30; **Pennsylvania:** *Schoffstall v. Nationwide Mut. Ins. Co.*, 58 Pa. D & C 4th 14, 33 (Pa. Ct. Comm. Pleas 2002); **Rhode Island:** *Emp'rs Fire Ins. Co. v. Beals*, 240 A.2d 397, 403 (R.I. 1968), *abrogated on other grounds in Peerless Ins. Co. v.*

C. The Statement Of Insured Client’s Rights And Rule 4-1.7(e) Direct That A Defense Lawyer Must Determine Whom The Lawyer Represents In The Tripartite Relationship At The Outset Of The Representation And Notify Both The Insured And Insurer As To Their Client Status

Between 1999 and 2003, The Florida Bar embarked on an extensive review of a number of insurance practices impacting the tripartite relationship.⁵ This review resulted in the Bar’s recommending this Court adopt Rules of Professional Conduct unique to insurance defense lawyers, two of which are pertinent here.

Viegas, 667 A.2d 785 (R.I. 1995); **Texas**: *Unauthorized Practice of Law Comm’n v. Am. Home Assur. Co.*, 261 S.W.3d 24, 42 (Tex. 2008); **Utah**: *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 607 (Utah 2003); **Vermont**: *In re Illuzzi*, 632 A.2d 346, 355 (Vt. 1993); **Virginia**: *State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97 (Va. 1988); **Washington**: *Barry v. USAA*, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999) (two clients barring conflict of interest); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137-38 (Wash. 1986) (one client if conflict of interest); **Wisconsin**: *Roeske v. Diefenbach*, 226 N.W.2d 666, 668 (Wis. 1975); **ABA**: ABA Formal Eth. Adv. Op. 03-430.

³ **Arkansas**: *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990); **Colorado**: Colo. Bar Ass’n, Formal Op. 91 (1993); **Connecticut**: *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 65 (Conn. 1999); **Kentucky**: *Settles v. Owners Ins. Co.*, 2015 WL 5095315 (Ky. 2015); **Michigan**: *Atlanta Int’l Ins. Co. v. Bell*, 475 N.W.2d 294, 297 (Mich. 1991); **Montana**: *In re Rules of Prof’l Conduct & Insurer Imposed Billing Rules & Procedures*, 2 P.3d 806, 814 (Mont. 2000); **South Carolina**: *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 826 S.E.2d 270, 271 (S.C. 2019); **Tennessee**: *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995); **West Virginia**: *Barefield v. DPIC Cos., Inc.*, 600 S.E.2d 256, 270 (W. Va. 2004).

⁴ Maine, New Mexico, North Dakota, Oklahoma, South Dakota, and Wyoming.

⁵ See Report of the Special Commission on Insurance Practices II, The Fla. Bar (Mar. 1, 2002), www.floridabar.org/news/publications/publications024/.

First, this Court adopted Rule 4-1.8(j)—which requires an insurance defense lawyer to provide the lawyer’s insured-clients with a document entitled the “Statement of Insured Client’s Rights” (the “Statement”). *Amend. R. Reg. Fla. Bar*, 820 So. 2d 210, 251-55 (Fla. 2002). The Comments to the Rule explain that the Statement is intended to assist the defense lawyer with the lawyer’s ethical responsibilities and to “assist laypersons in understanding their basic rights as clients.” *Id.* at 256.

The Comments also state: “When a lawyer undertakes the representation of an insured client at the expense of the insurer, the lawyer should ascertain whether the lawyer will be representing both the insured and the insurer, or only the insured. Communication with both the insured and the insurer promotes their mutual understanding of the role of the lawyer in the particular representation.” *Id.* (emphasis added). The Statement itself explains: “Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company.” Rule 4-1.8(j), Stmt. ¶ 6.

Second, this Court adopted Rule 4-1.7(e) as a distinct requirement. That Rule provides:

Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All

other Rules Regulating The Florida Bar related to conflicts of interests apply to the representation as they would in any other situation.

(Emphasis added.) The relevant Comments to Rule 4-1.7(e) state:

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

(Emphasis added).

Thus, Rule 4-1.7(e) expressly requires the defense lawyer—at the outset of the representation—to affirmatively determine and to affirmatively notify both the insurer and the insured whether defense counsel will represent both the insurer and the insured as co-clients or instead, represent only the insured. To be clear, the Rule 4-1.7(e) requirement is separate from the Rule 4-1.8(j) duty to provide the insured-client with the Statement; and providing a copy of the Statement does not relieve the defense lawyer of the distinct obligation to determine and inform both the insured and insurer of their client status under Rule 4-1.7(e).

D. A Firm Cannot Avoid A Malpractice Claim Based On Its Failure To Adhere To Its Ethical Duty To Determine Whether The Insurer Was A Client And Notify The Insurer If It Is Not—Especially Where, Pursuant To The General Rule, The Insurer Is A Co-Client.

In this case, the Firm failed to follow Rule 4-1.7(e) and did not advise either Arch or the insured whether the Firm was solely representing the insured or representing both Arch and the insured. The initial client letter from the Firm to the insured merely states: “Our firm has been retained by Arch Insurance Group to represent and defend you in the above-styled case. . . . Enclosed with this letter is a signed Statement of Insured Client’s Rights which discusses our firm’s representation in this matter.” [R. 320 (emphasis in original)].

As described above, the Statement advises that the insurer generally retains a lawyer to represent both the insured’s interests as well as those of the insurer. In addition, the Record reflects that the Firm itself believed it was representing the aligned interests of both Arch and the insured. [R. 960-61; see R. 1304-05]

In evaluating whether the Firm represented only the insured or both Arch and the insured, the trial court and the Fourth District accepted the Firm’s argument that, because there was no “affirmative” indication in the Record expressly stating that Arch was a client, there was nothing to establish that Arch had privity with the Firm and, therefore, had no standing to sue the Firm for

malpractice.⁶ However, to require an affirmative indication establishes a presumption that the insurer is a stranger to the relationship between the insured and the defense lawyer unless affirmatively brought into the relationship. This does not square with Florida case law. *In re Rules*, 220 So. 2d at 8.⁷ Any such presumption should operate in favor of the tripartite relationship because the insurer has a direct financial interest in the outcome of the litigation; is entwined in the creation of a tripartite relationship between the insurer, the insured, and the defense lawyer; seeks advice from the defense lawyer to make “client type” decisions; determines whether to settle the case within policy limits; and pays any damages up to the policy limits.

The record in this case confirms that Arch was far more than a “third-party payor” with no interest in the outcome of the litigation. A tripartite relationship existed among Arch, its insured, and the Firm, consistent with Florida law,

⁶ As pointed out in the Initial Brief, the Fourth District’s factual assumption regarding a lack of record evidence to establish a client relationship was mistaken. *See* Initial Br. at 15-17.

⁷ Moreover, the Fourth District’s decision is inconsistent with Florida law outside the insurance context. Under general Florida law, the existence of a formal retainer is not essential to establishing an attorney-client relationship. *Mansur v. Podhurst Orseck, P.A.*, 994 So. 2d 435, 438 (Fla. 3d DCA 2008). In the absence of a retainer, the test for determining the existence of the attorney-client relationship hinges upon the subjective belief of the alleged client. *Dean v. Dean*, 607 So. 2d 494, 497 (Fla. 4th DCA 1992). In this case, even the Firm itself believed Arch was a co-client. Initial Br. at 4.

including Florida’s Rules of Professional Conduct and the overwhelming majority of other jurisdictions. Arch was a “co-client” of the Firm. As noted in Arch’s Initial Brief, the Firm even informed its expert that Arch was its client. Initial Br. at 4. The instant action is exactly why Rule 4-1.7(e) requires the defense lawyer to determine the scope of the representation and notify the insurer and insured of co-client status at the beginning of that representation.

The defense lawyer’s failure to adhere to the ethical duty to follow Rule 4-1.7(e) should not give that lawyer an “out” to avoid a malpractice claim against it. Allowing the Firm to escape liability by breaching Florida’s Rules of Professional Conduct—leaving Arch without a remedy for any harm it sustained as a result of the Firm’s conduct—is contrary to the reason the practice of law is regulated—namely, to prevent harm. *See, e.g., The Fla. Bar v. Schramek*, 616 So. 2d 979, 987 (Fla. 1993) (purpose of regulating the practice of law is to prevent harm).

If anything, allowing an ethical violation to provide the basis for escaping malpractice liability would exacerbate the error. In this case, Arch was forced to pay \$3.5 million of its own funds to settle a case because the Firm allegedly failed to timely raise a statute of limitations defense. [R. 1240] When defense lawyers fail in their duty under the Rules of Professional Conduct—particularly where those rules were specifically crafted to address the insurance tripartite

relationship—public policy strongly favors treatment of Arch as a co-client entitled to bring a malpractice action against the Firm.

A majority of other jurisdictions having addressed the issue of whether an insurer can bring a malpractice claim against a defense firm agree that the insurer may do so.⁸ In fact, even in some “one-client” states where there is no attorney-

⁸ States allowing malpractice actions include: **Arizona:** *Paradigm Ins. Co.*, 24 P.3d at 600; **California:** *Unigard Ins. Co. v. O’Flaherty & Belgum*, 38 Cal. App. 4th 1229, 1236-37 (Cal. Ct. App. 1995); **Connecticut:** *Higgins v. Karp*, 687 A.2d 539, 543 (Conn. 1997); **Illinois:** *Nat’l Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1017, 1024 (N.D. Ill. 1998); **Louisiana:** *St. Paul Ins. Co. of Bellaire, Tex. v. AFIA Worldwide Ins. Co.*, 937 F.2d 274 (5th Cir. 1991) (allowing malpractice action by excess insurer via subrogation); **Massachusetts:** *N.H. Ins. Co., Inc. v. McCann*, 707 N.E.2d 332, 338 (Mass. 1999) (via voluntary assignment); **Michigan:** *Atlanta Int’l Ins. Co.*, 475 N.W.2d at 299 (via subrogation); **Mississippi:** *Great Am. E&S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 So. 3d 420, 424 (Miss. 2012) (allowing malpractice action by excess insurer via subrogation); **New York:** *Delos Ins. Co. v. Smith & Laquercia, LLP*, 84 A.D.3d 668, 669 (N.Y. Sup. Ct. 2011) (“Near” privity existed between insurer and defense attorney); **Ohio:** *Carolina Cas. Ins. Co. v. Sharp*, 940 F. Supp. 2d 569, 574 (N.D. Ohio 2013); **Pennsylvania:** *Gov’t Emps. Ins. Co. v. Forbes*, 1999 WL 371625, *1 (E.D. Pa. June 2, 1999); **South Carolina:** *Sentry Select Ins. Co.*, 826 S.E.2d at 271-72; **Virginia:** *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 957 (E.D. Va. Feb. 23, 2005); **West Virginia:** *State & Cty. Mut. Fire Ins. Co. v. Young*, 490 F. Supp. 2d 741, 743 (N.D.W. Va. 2007).

Two states, Arkansas and Minnesota, allow malpractice actions where the insured and/or defense attorney expressly acknowledge the tripartite relationship in writing. Ark. Stat. § 16-22-310 (third-party beneficiary of the attorney’s services may bring a malpractice action against the attorney if attorney identifies in writing to the third party that the party is entitled to rely on the attorney’s professional services (emphasis added)); *Pine Island Farmers Coop*, 649 N.W.2d at 449-50 (Insurer can sue defense attorney for malpractice if it establishes that insured consented to its being a co-client in the litigation.). One state, Texas, allows the insurer to bring claims of negligent misrepresentation and fraud against defense

client relationship between the insurer and the defense lawyer, public policy allows an insurer to bring a malpractice action against a defense lawyer where no conflict of interest exists between the insurer and the insured. *See, e.g., Sentry Select Ins. Co.*, 826 S.E.2d at 272; *Atlanta Int'l Ins. Co.*, 475 N.W.2d at 299.

In Florida, the predicate for a presumption that the insurer has co-client status and may bring a malpractice suit against the defense attorney under the facts of this case as sound public policy has been established in case law and reinforced by the Florida Rules of Professional Conduct.

counsel. *Safeway Managing Gen. Agency, Inc. v. Clark & Gamble*, 985 S.W.2d 166 (Tex. App. Dec. 9, 1998).

Only one state, Colorado, has and determined that the primary insurer may not bring a direct malpractice action against defense counsel. *State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063 (Colo. App. 2008).

The following states and the District of Columbia have not directly addressed this issue: Alabama, Alaska, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

Two states, Indiana and Kentucky, have determined that excess insurers may not bring these actions but have not addressed whether, as here, primary insurers can. *Querrey & Harrow, Ltd. v. Transcont'l Ins. Co.*, 861 N.E.2d 719, 723-24 (Ind. Ct. App. 2007), *aff'd* 885 N.E.2d 1235 (Ind. 2008); *Am. Cont'l Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12 (Ky. 1998).

CONCLUSION

For the reasons expressed, APCIA respectfully requests that this Court answer the certified question with a resounding “yes,” quash the Fourth District Court of Appeal’s decision and issue a decision holding that an insurer may bring a malpractice lawsuit against a defense lawyer where **(1)** the insurer is communicating with the lawyer about the case and is relying on the lawyer’s advice to make “client type” decisions; **(2)** the insurer has a direct financial interest in the outcome of the litigation based on its indemnity obligations; **(3)** there is no material conflict of interest between the insurer and the insured relevant to defense of a covered claim; and **(4)** the lawyer fails to notify the insured and insurer at the outset of the representation whether the defense lawyer will solely be representing the insured or both the insurer and the insured as co-clients.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2019 a true and correct copy of the foregoing has been electronically uploaded to the Supreme Court of Florida's ePortal and was furnished by E-Mail to all parties listed below.

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