

# Insurance-Generated Ethical Concerns in Civil Litigation

© William J. Dyer 2009

## I. Introduction: The “Zealous Pursuit” of Interests “Within the Bounds of the Law” — But *Whose* Interests?

As the modern and local successor to the venerable Canons of Ethics (which celebrated their centennial in 2008), the Texas Disciplinary Rules of Professional Conduct<sup>1</sup> — together with their Commentary and various Texas appellate opinions that have interpreted and applied them — must be the starting place for any Texas lawyer who’s concerned about legal ethics. And drawing upon the language of the Canons, the Preamble to the Disciplinary Rules reminds us all, in its third numbered point, that “[i]n all professional functions, a lawyer should zealously pursue [his] client’s interests within the bounds of the law.” If you’re looking for a one-line description of what the practice of law is all about, you could hardly do better than that one.

But of course, in order to “zealously pursue your client’s interests within the bounds of the law,” you have to be certain who your client *is* before you can begin to determine how best to pursue your client’s interests.

In modern commercial litigation, the interests of the litigants are sometimes as simple and as obvious as what’s reflected on the clerk’s docket records for a given lawsuit: Here’s the plaintiff, and he’s who’s seeking relief from the court. Here’s the defendant, and he’s who the relief is being sought against. But quite often, there are entities who have very real and powerful interests in the results of any given lawsuit, and yet they’re not listed on the docket sheet nor otherwise named as formal parties.

The most obvious and familiar example is that of the liability insurer who may, by contract, owe duties to defend and indemnify the named defendant from claims brought against that named defendant by third parties like the named plaintiff. So does the lawyer who’s counsel of record for that named defendant *also* represent that liability insurer? Is the liability insurer *also* that lawyer’s client, along with the named defendant? And is any of this automatic, or does it vary from case to case?

Amazingly — despite many decades of litigation in which insurers have been involved in even these comparatively direct, simple, and obvious relationships with

---

<sup>1</sup> Tex. Disciplinary R. Prof’l Conduct 1.01-8.05, *reprinted in* Tex. Gov’t Code Ann., tit. 2, subtitle G, app. A (Vernon 2008) (Tex. State Bar R. art. X) [hereinafter cited simply as “Disciplinary Rule \_\_\_”]. It is a sad irony that these crucial rules are among the most awkward to cite and hardest to locate resources in Texas law.