**5.4: Financial Conflicts of Interest**

*I was gambling in Havana, I took a little risk. Send lawyers, guns, and money, Dad, get me out of this, hiyah!*[[1]](#footnote-0)

Under the Model Rules of Professional Conduct, special rules govern the attorney-client relationship in specific circumstances, and define obligations imposed by the attorney’s fiduciary duties. As discussed in Class 9, attorneys may engage in financial transactions with their clients only if the transaction is fair and reasonable to the client, and the attorney obtains the client’s informed consent to the transaction in writing. But Rule 1.8 also imposes other specific obligations on attorneys in relations to other potential agreements and transactions with their clients. For example, it requires attorneys to obtain informed consent before using confidential client information to the detriment of the client, and limits the ability of attorneys to receive gifts from or makes loans to their clients.

[**Rule 1.8: Current Clients: Specific Rules**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules/)

1. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
   1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
   2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
   3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
2. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
3. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
4. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
5. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
   1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
   2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
6. A lawyer shall not accept compensation for representing a client from one other than the client unless:
   1. the client gives informed consent;
   2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
   3. information relating to representation of a client is protected as required by Rule 1.6.
7. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
8. A lawyer shall not:
   1. make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
   2. settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

**Loans to Clients**

*In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.*[[2]](#footnote-1)

[***In re Morse*, 748 S.E.2d 921 (Ga. 2013)**](https://www.leagle.com/decision/ingaco20130923138)

**Summary:** Attorney Jack Morse lent a client $1,400 to avoid foreclosure and possible jail time for his violation probation. Even though his client repaid the loan in full, Morse admitted that this was a violation of Model Rule 1.8(e). Accordingly, the Supreme Court of Georgia imposed a voluntary reprimand on Morse.

PER CURIAM.  
  
This disciplinary matter is before the Court on a Petition for Voluntary Discipline filed by Respondent Jack O. Morse (State Bar No. 525800) pursuant to Bar Rule 4-227(b)(2) before a formal complaint was issued. In his petition, Morse admits violating Rule 1.8(e) of the Georgia Rules of Professional Conduct set forth in Bar Rule 4-102(d). Although such a violation is punishable by public reprimand, Morse requests the imposition of a Review Panel reprimand. The State Bar has no objection.  
  
Morse, who has been a member of the State Bar since 1972, admits that while representing a client in a personal injury claim, he lent the client $1,400 for the client's use in avoiding foreclosure and possible jail time for his violation of probation. Although the client repaid the loan in full, Morse admits that he violated Rule 1.8(e). He asserts that while he has had three instances of prior discipline (having received a 90-day suspension in 1996, and Review Panel reprimands in both 1993 and 1998 — one of which was for similar misconduct), he has had no disciplinary matters for an extended period of time. He further asserts that since 1998, he has shown a strong regard for the professional standards of conduct and asks that this Court consider, in mitigation, his cooperative attitude with disciplinary authorities and the fact that the violation occurred as a result of him attempting to assist the client, a longtime acquaintance.  
  
Under these specific circumstances, we agree that imposition of a Review Panel reprimand is an appropriate sanction. Accordingly, we accept Morse's petition for voluntary discipline and hereby order that Morse receive a Review Panel reprimand in accordance with Bar Rules 4-102(b)(4) and 4-220(b) for his admitted violation of Rule 1.8(e).  
  
Petition for voluntary discipline accepted. Review Panel reprimand.  
  
All the Justices concur.  
  
BLACKWELL, Justice, concurring.  
  
I concur fully in the opinion of the Court, but I write separately to remind our readers that a lawyer providing financial assistance to a litigation client is not always a violation of Rule 1.8(e). With two exceptions, Rule 1.8(e) provides that “a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation.” By its plain terms, the Rule only prohibits the provision of financial assistance to a litigation client to the extent of some “connection” between the financial assistance on the one hand, and the litigation or representation on the other. Absent such a “connection,” a lawyer may provide financial assistance to a litigation client without running afoul of Rule 1.8(e).  
  
This understanding not only is required by the plain terms of the Rule, but it also is perfectly consistent with the three purposes of Rule 1.8(e). First, Rule 1.8(e) is intended to preserve the loyalty and independence that the lawyer owes to the client, loyalty and independence that might be compromised if the lawyer obtained “too great a financial stake in the litigation.” Second, the Rule is intended to “prevent clients from selecting a lawyer based on improper factors,” considering that “unregulated lending to clients might generate unseemly bidding wars for cases.” Third, the Rule is intended to restrain the pernicious practices of barratry, maintenance, and champerty. As I see it, financial assistance to an existing client that has no connection whatsoever with the litigation or representation of the client does not offend any of the policies that the Rule is intended to promote.  
  
This case is a little troubling to me because it appears from the record that Morse has been a friend of his client for a long time, such that he might have provided financial assistance to his client independent of the attorney-client relationship or the litigation, and indeed, even in the absence of an attorney-client relationship or litigation. Lawyers can be generous, and it is not uncommon for lawyers to help out their kin, their friends, and their neighbors. Nevertheless, Morse has unequivocally admitted a violation of Rule 1.8(e), and as such, he has implicitly  
admitted a connection between the financial assistance he provided and the litigation in which he represented his client. For that reason, I am content to join the Court in accepting his petition for voluntary discipline, and I am satisfied with the discipline that the Court has seen fit to impose. I am authorized to state that Justice Hunstein joins in this concurrence.

[***State ex rel. Oklahoma Bar Ass’n v. Smolen,* 17 P.3d 456 (Okla. 2000)**](https://scholar.google.com/scholar_case?case=13877479355716573348&q=17+P.3d+456&hl=en&as_sdt=4000006)

**Summary:** The Oklahoma Bar Association brought an action against attorney Donald E. Smolen who made a loan to his client for living expenses in violation of Model Rule 1.8. Smolen challenged this action on the grounds that Model Rule 1.8 violated the equal protection clause of the Fourteenth Amendment because it treats similarly situated classes of litigants differently: those who need advances for living expenses and those who need advances for litigation costs. Accordingly, the Oklahoma Supreme Court applied the rational basis test to determine that this disparate treatment was rationally related to the legitimate goal of protecting clients and maintaining integrity of the Bar. Therefore, the Court imposed a 60 day suspension on Smolen.

I. OVERVIEW

Complainant, the Oklahoma Bar Association, alleged one count of misconduct warranting discipline against respondent attorney, Donald E. Smolen (Respondent). The complaint alleged that Respondent had violated rule 1.8(e) of the Oklahoma Rules of Professional Conduct (ORPC), Okla. Stat. tit. 5, ch. 1, app. 3-A (1991) (prohibition against providing financial assistance to a client in connection with pending or contemplated litigation). Respondent received a public reprimand in 1992 for loaning money to clients. In an unpublished reprimand issued in 1987, the respondent received an eight-month suspension from the practice of law. The 1987 suspension was imposed for violations of DR 1-102(A)(3) ("engaging in illegal conduct involving moral turpitude"), DR 1-102(A)(4) (engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation"), DR 9-102(B) (failing to preserve the "identity of funds and property of a client"), and rule 1.3 of the Rules Governing Disciplinary Proceedings (acting in a manner "contrary to prescribed standards of conduct").  
  
In the present matter, the parties have stipulated to the facts and recommended discipline. The Professional Responsibility Tribunal (PRT) accepted the stipulations of fact, found that Respondent had violated rule 1.8(e), and recommended Respondent be publicly censured.  
  
II. FACTS

During Respondent's representation of Mr. Miles in a case before the Workers' Compensation Court, Respondent loaned Mr. Miles $1,200. The check to Mr. Miles recited that the money was for travel expenses. Respondent admitted that the true purpose of the loan was for living expenses because Mr. Miles' home had been destroyed by fire. Without the loan, Mr. Miles indicated he would have to move to Indiana and would be unable to continue his medical treatment or make court appearances. At the time of the loan, Mr. Miles was receiving temporary total disability benefits of $426.00 a week from which Respondent's attorney fee was subtracted. Mr. Miles received $384.00 a week before loan payments.  
  
Respondent's loan to Mr. Miles was interest free and without penalty or cost other than the amount of the principal. Mr. Miles was to repay the loan at $100.00 a week from his temporary total disability benefits. Mr. Miles made three $100.00 payments on the loan. One of the payments was returned to Mr. Miles resulting in his paying only $200.00 on the loan. Respondent agreed to forego further repayment until final settlement of the Workers' Compensation case.  
  
When Mr. Miles became involved in other legal matters, he sought an attorney to handle the additional matters together with the workers' compensation claim. After learning of Mr. Miles search for a new attorney, Respondent terminated the attorney-client relationship with Mr. Miles. Thereafter, Mr. Miles hired Mr. Elias to represent him. During mediation over a fee dispute between Mr. Miles and Mr. Elias, the Tulsa County Bar Association learned of Respondent's loan and reported Respondent's conduct to the Oklahoma Bar Association.  
  
Respondent admits the loan to Mr. Miles is not an isolated incident. He testified that he had consulted lawyers whose opinions are well respected in legal ethics, and it was their belief that Respondent's conduct would not violate rule 1.8(e). Respondent admits that his actions violate the express language of rule 1.8(e). However, Respondent submits that he has not violated the intent of rule 1.8(e), and that rule 1.8(e) unconstitutionally treats clients who need humanitarian loans differently than clients who receive advances of litigation expenses and court costs.  
  
III. ANALYSIS  
  
Rule 1.8(e) of the ORPC under which Respondent was disciplined in 1992 for giving financial assistance to clients, provided:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to a client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Based on the Model Rules adopted by the American Bar Association, rule 1.8(e) was amended in 1993 to provide:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

The primary change under the Model Rules is that the repayment of litigation expenses and court costs may be contingent on the outcome of the case. Both the 1992 and 1993 versions of rule 1.8(e) unambiguously prohibit a lawyer from advancing living expenses to clients. In this case, Respondent advanced funds for living expenses to be repaid from the client's worker's compensation benefits, an action admittedly prohibited by rule 1.8(e).  
  
Most authorities prohibit a lawyer from providing financial assistance to clients for living expenses during representation. In 1991, a draft of a provision of the Restatement of Law would have allowed a lawyer to make or guarantee a loan to a client "if the loan was needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits." However, in 1996 the American Law Institute Council decided the rule was ill-advised, and, in 1998, the provision was removed. The final draft of the Restatement would not allow a lawyer to make or guarantee a loan to a client except for litigation expenses and court costs. Rule 1.8(e) of the American Bar Association's Model Rules of Professional Conduct adopted in 1983 prohibits a lawyer from advancing funds to a client for living expenses. A proposal to allow lawyers to advance clients funds for living expenses was rejected by the American Bar Association House of Delegates.  
  
Twenty-nine states have adopted the current version of ABA Model Rule 1.8(e) which allows repayment of litigation costs to be contingent on the outcome of the case but forbids advances for living expenses. Fourteen other states follow the ABA Model Code of Professional Responsibility, adopted in 1969, or a version of the Model Rules or Model Code that requires the client remain liable for litigation expenses and court costs and prohibits advances for living expenses. Only eight states explicitly allow lawyers to advance or guarantee loans to clients for living expenses: Alabama, California, Louisiana, Minnesota, Mississippi, Montana, North Dakota, and Texas.  
  
Only one state has refused to discipline a lawyer for advancing funds to clients for living expenses during representation. The Louisiana State Supreme Court stated that advancing money to an indigent client for necessary living expenses during representation did not violate the Louisiana rules of legal ethics. Even though the court questioned the constitutionality of the rule, the court based its conclusion on a finding that the conduct did not violate the rule's intent. The lawyer was disciplined for making advances which were not based on the client's needs. In The Alaska Supreme Court held the rule did not unconstitutionally deny or interfere with the client's access to the courts. Further, no court has invalidated rule 1.8(e) based on a constitutional infirmity.  
  
We have previously disciplined lawyers for providing financial assistance to clients for purposes other than litigation expenses and court costs. Several other courts addressing the question have also imposed discipline on lawyers for like conduct. The Mississippi Supreme Court expressed its concern that allowing a lawyer to advance funds to a client for living expenses would “generate unseemly bidding wars for cases and inevitably lead to further denigration of our civil justice system.”  
  
A. INTENT OF THE RULE

Respondent admits violating rule 1.8(e) but argues that he should not be disciplined because he did not violate the intent of the rule. What Respondent in reality requests is that we adopt an exception to the rule that allows attorneys to make loans to clients for necessary living expenses after the attorney-client relationship is established.  
  
The rule against attorneys providing financial assistance to clients for living expenses is based on the common-law prohibitions against practice of champerty and maintenance. The evils associated with champerty and maintenance intended to be prevented by rule 1.8(e)'s prohibition are: (1) clients selecting a lawyer based on improper factors, and (2) conflicts of interest, including compromising a lawyer's independent judgment in the case and creating the potentially conflicting roles of the lawyer as both lawyer and creditor with divergent interests.  
  
Respondent argues that he advanced the funds only after the attorney-client relationship was established with repayment to be made from benefits which had already been awarded, and the loan was for humanitarian purposes. Thus, he posits that the evils of champerty and maintenance are absent here and that he should not be disciplined because he did not violate the intent of the rule. We reject this argument as have most other states. First, Mr. Miles' workers' compensation claim had not been completely resolved. He was receiving only temporary benefits at the time Respondent made the loan, and, at least, a potential settlement regarding permanent disability remained pending. Second, it would be unrealistic to conclude that even if Respondent does not publicize that he makes loans to clients for living expenses, potential clients would not learn of Respondent's practice from existing and past clients. Thus, potential clients may base their decision to retain Respondent on improper inducements. The fact that the loan was for humanitarian purposes may be a mitigating factor. Nonetheless, Respondent violated rule 1.8(e).  
  
Given that the Restatement and the ABA have rejected the same exception tendered by Respondent and an overwhelming number of courts have also declined to adopt Respondent's proposed exception, we also decline to make the ad hoc exception to rule 1.8(e) advocated by Respondent. We are not unsympathetic to the plight of litigants. However, because of the potential ethical problems which can arise from a lawyer advancing clients money for living expenses, the explicit prohibition against such conduct in the Oklahoma Rules of Professional Conduct, we believe Respondent should be disciplined.  
  
B. CONSTITUTIONALITY

Respondent asserts that rule 1.8(e) is invalid because it does not treat similarly situated classes of litigants equally. The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." This same prohibition is present in article 2, section 7 of the Oklahoma Constitution. The two classes of clients proposed by Respondent are those who need advances for living expenses and those who need advances for litigation costs.  
  
The deferential rational basis test is applied in constitutional challenges based on the equal protection clause when the classification is not based upon an inherently suspect characteristic or jeopardizes a fundamental right. The divergent treatment must have only "some relevance to the purpose for which the classification is made." Respondent does not argue that the classification is based on an inherently suspect characteristic or that a fundamental right is jeopardized. Thus, Respondent's challenge is analyzed under the rational basis test.  
  
Assuming for purposes of argument that the two classes posed by Respondent are similarly situated, rule 1.8(e)'s disparate treatment of advances for litigation expenses and court costs and advances for all other expenses is based on legitimate goals and reflects the differences in living expenses and litigation expenses and court costs. First, litigation expenses and court costs are directly related to the actual litigation. Living and other expenses are not. Second, litigation expenses and court costs are within a lawyer's expertise. Other expenses of clients are not considered part of a lawyer's expertise. Third, it is a lawyer's duty to advise his client on which litigation expenses and court costs are necessary for the litigation. It is not generally the lawyer's duty to advise his clients as to what other expenses are necessary. Fourth, a lawyer generally pays the litigation expenses and costs directly to the provider. In the case of other expenses, the lawyer generally would give the money to the client, and there would be no guarantee that the money would be utilized for the loan's intended purpose.  
  
We agree with the drafters of the Restatement and the ABA Model Rules that a rule allowing lawyers to make loans to clients for reasons other than advancing litigation expenses and court costs is ill-advised. Because of the potentially inherent abuses in allowing lawyers to make loans to clients for reasons other than litigation expenses and court costs, the divergent treatment is rationally related to a legitimate goal of protecting clients and maintaining the integrity of the Bar. Respondent has failed to show that rule 1.8(e) is unconstitutional.  
  
IV. APPROPRIATE DISCIPLINE

Respondent has been previously disciplined by this Court, once in 1987 and again in 1992. In 1992, Respondent was publicly censured for the same misconduct with which he is presently charged. He admits that the current loan is not an isolated incident. One of the purposes of discipline is "deterrence of like behavior by both the respondent and other members of the bar." This Court is not bound by the stipulated discipline of the parties. Because Respondent was previously disciplined in 1987 for violations of ethical standards, was publicly censured in 1992 for the same misconduct for which he is being disciplined in this matter, and has admitted that the current violation is not an isolated incident, we deem the appropriate discipline is a sixty-day suspension.

**Fixed-Fee Agreements**

[***American Ins. Ass’n v. Kentucky Bar Ass’n,* 917 S.W.2d 568 (Ky. 1996)**](https://scholar.google.com/scholar_case?case=14635324789281041698&q=917+S.W.2d+568&hl=en&as_sdt=4000006)

**Summary:** The American Insurance Association and other insurance associations sought review of a Court of Advisory Ethics Opinion prohibiting any lawyer from entering into a contract with an insurer to do all of the insurer’s defense work for a set fee. The Supreme Court held that such set fee arrangements are prohibited, because under rule 1.8(f)(2), it interferes with the exercise of the attorney’s independent professional judgment. Instead, “the insurance company must hire members of the private bar to undertake representation of their insured.”

STUMBO, Justice.  
  
In this consolidated action, Complainants — American Insurance Association, National Association of Independent Insurers, and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company — timely filed a motion seeking review by this Court of Advisory Ethics Opinion E-368 which was issued by the Board of Governors of Respondent, Kentucky Bar Association, and which appeared in the Fall 1994 issue of Kentucky Bench & Bar. In addition, State Farm requests that this Court review that portion of Unauthorized Practice of Law Opinion U-36 which proscribes the use, by insurance companies, of salaried attorneys to provide defense services under the insurers' policies of insurance.  
  
After carefully evaluating the opinions at issue, and the briefs filed and arguments advanced by both Complainants and Respondent, we hereby approve and adopt E-368 as written, and choose not to disturb U-36.  
  
At issue in this action is the following question presented in E-368:

(1) May a lawyer enter into a contract with a liability insurer in which the lawyer or his firm agrees to do all of the insurer's defense work for a set fee?

The Board of Governors answered “no” to this question, and stated that the arrangement at issue would violate Kentucky Rules of Professional Conduct 1.7(b)[1] and 1.8(f)(2)[2], stating therein “to some extent the lawyer becomes the insurer; and the lawyer stands to gain by limiting the services rendered to the client.” The Board, indicating that the lawyer’s duty to the insured client was a function of the attorney-client relationship and not governed by or limited by the terms of the insurance contract, expressed concern that this set fee arrangement would result in the loss of control of the insured client vis-a-vis actions taken by counsel in the course of representation. The Board also noted that the insurer would take on a dual role in such a situation, in that “the insurer wants to continue to promise the insured a defense in the contract of insurance, while limiting the extent of its undertaking in a side contract between the insured's lawyer and the insurer to which the insured is not a party.” The Board characterized the circumstance presented in E-368 as but the latest issue to arise from attempts by insurers to cut costs. One such cost-cutting measure, referenced in the “Background” section of E-368 and more fully discussed in U-36, involved the practice of insurers to attempt to provide defense services directly through salaried attorney employees — a practice, the Board concluded, that “is not permitted in Kentucky, for in addition to the obvious conflicts of interest that would be presented by such an arrangement, the practice would violate the law governing unauthorized practice.”  
  
More specifically, this issue was addressed in U-36 through the following question:

May an insurance company employ in-house counsel (salaried employees) to represent their insured after a lawsuit has been filed?

This question was answered in the negative. The opinion relied upon both Canon 3 of the ABA Code of Professional Responsibility, which governs the areas of unauthorized practice of law, and SCR 3.020, which defines the practice of law in Kentucky and recognizes that “nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor.” The opinion also cited to long-standing Kentucky case law which proscribes a corporation from being licensed to practice a learned profession, such as law. Ethical rules and legal precedent were merged in the opinion to reach the conclusion that in the typical action on an insurance contract, the insured, and not the insurer, was the party-defendant, and that, therefore, “the insurance company must hire members of the private bar to undertake representation of their insured.”  
  
Complainants contend that not only did the Board paint with too broad a brush in applying U-36 to E-368, but, that the former opinion, of itself, represents only a minority view of the interpretation of the ABA Code of Professional Responsibility, and is, in fact, antithetical to the precedent which attempts to follow the intent of the Code. Complainants seek support from the ethics opinions and case law of other jurisdictions which allow house counsel to provide insurance defense services. Additionally, State Farm asserts that *Gardner v. North Carolina State Bar*, which is referenced in E-368 and which this Complainant terms “the sole court decision holding that the use of claim litigation counsel constitutes the unauthorized practice of law,” lacks substance. State Farm points out that this decision has been rejected by every court to consider it.  
  
In its attack upon U-36, State Farm goes so far as to characterize the opinion as “inconsistent with law and logic.” The “law,” to which State Farm refers, appears to be contained in those decisions of other jurisdictions which allow insurers to provide insurance defense services through salaried attorney employees. Such precedent, as State Farm explains, is based upon "the identity or community of financial interest between the insured and insurer in defending the claim and because of the insurer's contractual obligation to defend the insured at the insurer's expense." The "logic," to which this Complainant refers, appears to lie within this rubric of "community of interest." For example, State Farm indicates that it is contradictory for U-36 to require the insurer to hire outside counsel to represent the insured once a complaint has been filed, and yet to allow an insurer's employees, including attorneys, to take actions necessary to protect the interests of both the insurer and its insured prior to the filing of a complaint, as this latter activity is "inextricably intertwined with any defense of the insured." State Farm also asserts that as the prohibition against the unauthorized practice of law is designed to protect the public "from the incompetent, the untrained and the unscrupulous in the practice of law," who could be more competent, trained and scrupulous therein than claims litigation counsel employed by insurance companies who, because their practice is concentrated in automobile and premises liability law, are able to specialize and become more proficient in the disposition of such matters. State Farm implies that the legal system as a whole would benefit from such house counsel, in that, as the compensation of these attorneys is not tied to billable hours, they may be apt to dispose of these cases more quickly.  
  
Notwithstanding the trends of other jurisdictions, any alleged nonsensical application of the prohibition against the unauthorized practice of law, and the untapped resource of "competent, trained and scrupulous" in-house insurance defense counsel as pipe cleaners for a clogged legal system, we do not feel that U-36 deserves review. The age-old adage of "if it ain't broke, don't fix it" seems appropriate in disposing of Complainants' argument herein, especially in light of the fact that U-36 first surfaced nearly fifteen years ago and there is now no compelling reason to overrule the more than fifty years of legal precedent which recognizes the principles outlined in that opinion. "There is scarcely any judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law." Moreover, "a corporation cannot obtain license to practice law, since it is wholly incapable of acquiring the educational qualifications necessary to obtain such license, nor can it possess in its corporate name the necessary moral character required therefor." Nothing has changed since the rendering of Kendall and Hobson, or since the adoption of U-36, to assuage the moral dilemmas and ethical concerns connected to the unauthorized practice of law. In fact, no situation is more illustrative of the inherent pitfalls and conflicts therein than that in which house counsel defends the insured while remaining on the payroll of the insurer. "No man can serve two masters," regardless here of either any perceived "community of interest," or Complainants' Pollyanna postulate that house counsel will continue to provide undivided loyalty to the insured. Complainants' pleas for logic are unpersuasive, as we are inclined to view U-36 in the way in which Respondent characterizes the opinion — as a prophylactic measure, not unlike the imputed disqualification rules. See Rule 1.10. As such, we believe that U-36 logically discerns when house counsel would fall into that precarious position between employee of insurer and advocate of insured, and, thus, logically prevents the occurrence of such a happening, and its onerous fallout.  
  
Moreover, we are unswayed by Complainants' reliance on the practices of other jurisdictions and what amounts to an “everyone else is doing it, why can’t we” argument. In *State Farm Mut. Auto. Ins. Co. v. Reeder*, the task of this Court was to evaluate our state’s Unfair Claims Settlement Practices Act to determine if a third-party claimant injured by an insurance company’s violation of that statute could maintain a private right of action for damages. In our decision, we were unaffected by the “substantial split in authority among other states as to whether individuals can maintain an action under their respective state laws.” In determining that such a cause of action did exist in the Commonwealth, we concluded that “whether other states permit private individuals to maintain claims is based upon their particular statutory system and is of no consequence here. Our decision must be based on the language of the Kentucky law.” Likewise, the Kentucky Rules of Professional Conduct and the means by which this state oversees the conduct of its attorneys are personal to Kentucky. “The right to prescribe such rules as are necessary to qualify, regulate, and control attorneys as officers of the court is a right of self-preservation.” That other jurisdictions govern the practice of law differently, or even allow for the unauthorized practice of law, is of no concern to us in this matter.  
  
As for E-368, Complainants assert that there is no language within our Rules of Professional Conduct which prevents an attorney and an insurer from entering into an agreement whereby the attorney agrees to perform all of the insurer’s defense work for a set fee. In support, Complainants analogize the set fee to other alternative billing methods — such as retainers and contingency fees — and argue that there exists no real difference between these latter, more accepted arrangements, and the set fee. Moreover, American and National contend that if any type of fee arrangement is to be viewed as suspect, it is the hourly-based fee, which, these Complainants argue, is vulnerable to “padding,” and even creates a conflict of interest wherein the client has incentive to control costs by controlling counsel. The necessity to be free to exercise independent judgment in order that the attorney may adequately represent the insured is not, according to Complainants, jeopardized by the set fee arrangement, as the form of compensation is not as significant a factor in evaluating the propriety of the attorney-client relationship as, for example, whether or not the attorney has a personal interest in the outcome of the litigation. American and National assert that the high standards of ethical conduct with which attorneys must comply do not mandate a per se prohibition on set fee arrangements as such “a blanket prohibition is overbroad and does nothing to protect the integrity of the profession.” Likewise, State Farm maintains that these ethical standards, which include counsel’s implied duty of loyalty, mandate zealous representation of the insured, even if the set fee has been exhausted. Complainants remind us that not only does this Court have the power to defend the attorney-client relationship, but that, should this relationship break down and the insured incur damage, the insured would most likely have a cause of action against the attorney or the insurer or both.  
  
Taking these latter propositions first, we agree that this Court does indeed have the power to protect the attorney-client relationship, and is, herein, exercising such power by adopting E-368 as written. Moreover, we do not take comfort, as Complainants do, in knowing that the insured, aggrieved by inadequate representation occasioned by the set fee arrangement, could proceed against the attorney and/or the insurer. Such recourse requires that the insured first suffer a harm, a circumstance which cannot be reconciled with this Court’s view that the interest of the insured is to be protected. We also do not agree with Complainants' contention that the form of compensation has little relevance in examining the attorney-client relationship. To the contrary, a set fee arrangement enables the insurer to constrain counsel for the insured by, in effect, limiting the defense budget — a practice that Respondent cautioned, in E-331, could create ethical problems similar to those herein. We agree with Respondent that the pressures exerted by the insurer through the set fee interferes with the exercise of the attorney's independent professional judgment, in contravention of Rule 1.8(f)(2). The set fee arrangement also clashes with Rule 1.7(b) in that it creates a situation whereby the attorney has an interest in the outcome of the action which conflicts with the duties owed to the client: quite simply, in easy cases, counsel will take a financial windfall; in difficult cases, counsel will take a financial loss. Finally, Complainants' rationale that other, more commonly used and less restricted billing methods are not as bad as, just as bad as, or worse, than the set fee does not influence us in our review of E-368.  
  
Complainants maintain that set fee arrangements do not create impermissible conflicts of interest between the insurance defense attorney and the insured. In support, Complainants again take solace with our Rules of Professional Conduct and contend that ethical constraints do not allow for the scope of representation to be dependent upon the fee counsel is to be paid. Additionally, Allstate and National retreat to the abstract and assert that potential conflicts of interest are everywhere, and not just confined to set fee arrangements. These Complainants argue that there is no rational basis which would support a conclusion that one form of employment is more likely to generate conflicts than another, especially after considering that there is no guarantee that the attorney stands to substantially profit from a set fee arrangement. Moreover, State Farm contends that the potential for conflict is very often lacking, because in general, the interests of the insurer and the insured are aligned. According to State Farm, only when the coverage is in dispute is there any real conflict between these parties.  
  
We dispose of these arguments by first stressing that the mere appearance of impropriety is just as egregious as any actual or real conflict. Therefore, E-368, in the same manner as U-36, acts as a prophylactic device to eliminate the potential for a conflict of interest or the compromise of an attorney’s ethical and professional duties. Furthermore, we do not wear the blinders that Complainants apparently have in place, for we view the situation surrounding the set fee agreement as ripe with potential conflicts. Respondent was able to cite to nineteen such conflicts, including representation of the insured which becomes more complex than anticipated, resulting in financial hardship for the attorney; policy and/or coverage defenses asserted by the insurer against the insured; and disagreement between the insured and the insurer with regard to settlement negotiations. Moreover, we do not believe that in most instances the interests of the insured and the insurer are alike, but are more apt to agree with Respondent’s contention that while the insured and the insurer may share some common interests, the two parties are subject to complete divergence at any time. Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is controlling the legal representation.  
  
Finally, Complainants attack the case law and ethics opinions upon which E-368 is founded. In particular, State Farm contends that E-368 cites to decisions which have either been overruled, are inapposite as silent on the ethical issues addressed in E-368, or lack a basis in law and precedent. Complainants also attack E-368 as overbroad and lacking any factual predicate. In arguing that a reasoned, fact-based analysis is required in order to evaluate potential conflicts of interest, State Farm relies on the commentary to the Kentucky Rules of Professional Conduct, which states, in part: “A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment.” Additionally, Allstate and National contend that the Board adopted the wrong version of E-368, in that a revised draft of the opinion better articulates the ethical standard which should apply to counsel involved in set fee arrangements. These Complainants note that the ethics opinions referenced in E-368 — such as E-331 and E-340 — bear out the assertion that blanket prohibitions are unnecessary where sufficient reliance is placed upon counsel's ability to comply with the ethical obligations owed to the client, including the requirement that counsel act in the best interest of the client.  
  
First, we believe that the ethics opinions and case law cited in E-368 are on point, and defer to our previous discussion on the inapplicability of the decisions of other jurisdictions to Kentucky's own governance of professional responsibility. Moreover, we are convinced by Respondent's assertion that few of the other jurisdictions to which Complainants cite have conducted any meaningful analysis of the issues presented, nor do these jurisdictions share our state's aversion to the practice of law by corporations. For example, Respondent distinguishes the Tennessee opinion of *Youngblood*, from the North Carolina opinion of *Gardner*, by noting that Tennessee does not proscribe a corporation from practicing law for the public, whereas North Carolina does prohibit this practice, as does Kentucky. Finally, notwithstanding the language of other ethics opinions issued by Respondent, or Complainants' argument regarding the alleged inadequacy of the language of the ethics opinion at issue, we find, as discussed above, that the language of E-368 is complete and articulate, and hold that the opinion clearly presents its stated purpose and rationale.  
  
For the foregoing reasons, we approve E-368 as written, and do not disturb U-36.

[***In re State Grand Jury Investigation,* 983 A.2d 1097 (N.J. 2009)**](https://scholar.google.com/scholar_case?case=6722306057388909227&q=983+A.2d+1097&hl=en&as_sdt=4000006)

**Summary:** In a grand jury proceeding investigating an employer for fraud, the state moved to disqualify the counsel of the employees on the grounds that the employer had selected the counsel and was paying them. The Supreme Court held that the employees’ counsel was not required to be disqualified under RPC 1.7(a) or 1.8(f) because the counsel had no present relationship to the employer, were barred from disclosing any information to the employer, and were to be paid unless the court granted the employer leave to discontinue payment.

Justice RIVERA-SOTO delivered the opinion of the Court.  
  
Confronted with a grand jury inquiry that commanded the testimony of several of its employees, an employer elected to provide and pay for counsel to those employees for purposes of that investigation. Fearing that having individual employees/grand jury witnesses represented by counsel retained and compensated by the putative target of the grand jury inquiry violated several of the Rules of Professional Conduct, the State moved to disqualify those counsel. The trial court denied that application, limited the amount of information to be transmitted by such counsel to the employer, and, further, imposed restrictions both on the ability of the employer to discontinue paying the fees of counsel for the employees as well as on the ability of those counsel to discontinue representing the subpoenaed employees.  
  
Regardless of the setting—whether administrative, criminal or civil, either as part of an investigation, during grand jury proceedings, or before, during and after trial—whether an attorney may be compensated for his services by someone other than his client is governed in large measure by RPC 1.8(f) and, to a lesser extent, RPC 1.7(a) and RPC 5.4(c). The overarching Rule, which purposely is written in the negative, forbids a lawyer from “accepting compensation for representing a client from one other than the client unless three factors coalesce: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and (3) information relating to representation of a client is protected" as provided in the RPCs. A straightforward application of RPCs 1.7(a), 1.8(f) and 5.4(c) requires that we affirm the order of the trial court.  
  
I.

The operative facts on which this appeal arise are readily stated. The State commenced a grand jury investigation into whether a corporate contractor had submitted fraudulent invoices for services purportedly rendered to a county government. That inquiry focused primarily on the contractor and three of its employees. In response, the company arranged for counsel for its employees. The company entered into four separate retainer agreements with four separate lawyers, three of whom were assigned to represent, respectively, the three specific employees noted, and the fourth was retained to represent “all non-target current and former employees of the company in connection with the current state grand jury investigation.”  
  
The retainer agreements with each of the four lawyers, however, shared common characteristics and were, in all substantive and material respects, indistinguishable. A typical retainer agreement provided (1) that the company “will be ultimately responsible to the law firm for all reasonable and necessary legal fees and expenses incurred in this matter”; (2) that the “undertaking by the company is made with the express understanding that the sole professional obligation of the law firm will be to the named employee”; (3) that the “law firm is not required to disclose any legal strategy, theory, plan of action, or the like, to the company”; (4) that “payment of legal fees by the company to the law firm in no way depends upon any such disclosure”; (5) that “no professional relationship will arise between the company and the law firm as a result of the rendering of legal services by the law firm or the payment of legal fees and expenses by the company”; (6) that “the reimbursement of legal fees and expenses is neither conditioned upon nor dependent upon the law firm's cooperation with the company or any other party”; (7) that while “detailed invoices will be provided to the represented employee, to preserve the attorney/client privilege, only summary invoices will be submitted to the company”; and (8) that the company would be responsible to pay those invoices “upon receipt.”  
  
Based on the company's retention of separate counsel for each of three employees identified by the State, the company wrote to each such employee, informing them that:

As you know, the New Jersey Attorney General's office served the company with a Grand Jury subpoena seeking various billing and payroll records related to the company’s contract with the specified county government. The company has been fully cooperative with the State's investigation.

Recently the Attorney General’s office has begun interviewing some of our employees at the identified project. Given your position with the company and involvement in this project, and based upon the advice of our attorneys in New Jersey, we believe it would be prudent to retain separate counsel to represent you personally in connection with the State’s investigation. Accordingly, the company has retained a specially retained lawyer to represent you in connection with the State’s investigation. You do not have to use that specially retained lawyer as your attorney. You are free to hire your own attorney, at your own costs.

You should not interpret this decision to mean that the company believes there to have been any illegal activity in this matter on the part of any company employee. Rather, it is based upon the recognition that your personal rights may conflict with the interests of the company. While the company agrees to pay for your legal representation in this matter, please understand that it has no obligation to do so and may stop paying those legal fees and costs at any time, should it believe it appropriate to do so.

Your specially retained lawyer may be reached at [\_\_\_\_]. His firm address is: [\_\_\_\_\_].  
Please expect your specially retained lawyer to contact you directly to arrange a convenient time to meet and discuss this matter. Please feel free to contact me directly or speak with the company's local counsel if you have any questions regarding this matter.

Very truly yours,  
/s/ Senior Vice President and General Counsel

The company also announced to all other employees that the company had retained a lawyer—free of charge to the employees—with whom those employees could consult and who was available to represent those employees in respect of the grand jury inquiry.  
  
In time, two of the four lawyers retained by the company to represent its employees were subpoenaed to appear before the grand jury; they declined to appear, and the State later withdrew those subpoenas. The State then notified the company that it, along with several unnamed employees, had been designated as targets of the grand jury’s investigation, and later served grand jury subpoenas for the company's records in respect of the retention of counsel for its employees. The company complied with that subpoena by producing responsive but non-privileged documents.  
  
The State moved before the Superior Court to disqualify the counsel retained by the company to represent its employees “from further participation in this matter, pursuant to RPC 1.7, RPC 1.8 and RPC 1.10.” In response, each of the employees to whom the company had provided counsel to date—the three identified “target” employees and two additional “nontarget” employees—submitted certifications asserting that none of them could afford to retain separate counsel, and that each was satisfied with and wished to remain with their then counsel.  
  
The trial court noted at the outset that it “viewed the company’s conduct as one that is certainly to be appreciated.” Addressing the caliber of the lawyers retained by the company for its employees, the trial court explained that “as a major corporation, the company didn’t go out and hire some low-level attorney. They went out and hired competent, knowledgeable, respected attorneys.” Focusing on the application of the Rules of Professional Conduct to the State's motion for disqualification, the court first observed that RPC 1.5 “talks about fees being reasonable and that is not an issue before the Court.” Moving on to the application of RPC 1.6, which addresses the confidentiality of information between a lawyer and his client, the trial court remarked that the retained lawyers had provided certifications and sample redacted bills. Agreeing that the procedure employed was proper, the trial court emphasized that “the only thing that I would require going forward is that all of the bills sent to the company be redacted and that no specific information be detailed in the billing.”  
  
Turning to RPC 1.7, the general conflict of interest rule, the trial court concluded that, “at least at this point, there's been no demonstration that there is even a conflict and even if there were, these employees have the right to waive that conflict.” It also declared itself “satisfied that there has been informed consent given by all of the employees by way of what they have put in the certifications.” It concluded that

The Court finds nothing improper about the attorneys that have been retained by the company. In fact, the Court would go further and say that the company acted responsibly, quite frankly, and with corporate policy and, quite frankly, having been advised of the reputation of these attorneys. And clearly the understanding between the company and these attorneys was spelled out in not only the retainer agreements, but in previous letters before all this was signed.

It added, however, some restrictions: “that the company and the individual attorneys, prior to ending any relationship for payment, would have to make application to the Court,” and that counsel were to “redact the billings to cure any notion that the State may have that somehow the billings will reveal significant aspects of the grand jury investigation.”  
  
The trial court entered an order that denied the State's motion to disqualify counsel. More specifically, it

FURTHER ORDERED that before the company may cease paying any of the attorney’s legal fees and costs, the company shall provide notice to the Court and all parties, and the Court shall conduct a hearing on the issue of whether the company may cease paying such legal fees and costs; and

IT IS FURTHER ORDERED that before any of the attorneys may withdraw from this case based upon the refusal of the company to pay the attorney’s legal fees and costs, such attorney shall provide notice to the Court and all parties, and the Court shall conduct a hearing on the issue of the attorney's request to withdraw; and

IT IS FURTHER ORDERED that the attorneys henceforth shall submit to the company legal bills either in summary form or with all detailed information redacted therefrom.

The State sought leave to appeal that determination and, in an unpublished order, the Appellate Division denied that application. It then moved before this Court, seeking leave to appeal the trial court’s order and other ancillary relief. Those motions were granted. We also granted leave to the Association of Criminal Defense Lawyers of New Jersey to appear as amicus curiae. For the reasons that follow, we affirm the order of the trial court.

II.

According to the State, a per se conflict of interest arises whenever, as here, two facts contemporaneously appear: a target in a grand jury investigation unilaterally selects and retains a lawyer to represent potential witnesses against it, and the lawyer relies on the target for payment of legal fees. In the State’s view, that arrangement will split the attorney's loyalty and will discourage the lawyer from counseling the client to cooperate with the State, even when cooperation might be in the client's best interest. It asserts that the perceived effect of allowing a target to select and pay for counsel for the witnesses against it is to irreparably taint the proceedings. The State also claims that such a conflict cannot be waived and that, even if it could be waived, a waiver could only be demonstrated through the live testimony of the witnesses, and not, as was done here, via certifications.  
  
The lawyers whose disqualification is sought counter that RPC 1.8(f) clearly contemplates an employer designated as a grand jury “target” providing and paying for separate counsel for its employees during that grand jury inquiry. They reject the State's claim that, in the criminal law setting, the better rule is the imposition of a per se conflict. Finally, they assert that, even if a potential conflict of interest exists, it has been effectively waived. Amicus ACDL-NJ repeats those arguments.  
  
The company echoes the arguments advanced both by the lawyers whose disqualification is sought and by amicus, and further asserts that, under the laws of its place of incorporation, it has an obligation to provide counsel to its employees, noting that, absent counsel provided by and paid for by the company, most of its employees would be unable to afford a lawyer.  
  
III.  
A.

Our evaluation of an actual or apparent conflict does not take place in a vacuum, but is, instead, highly fact specific. In that respect, the Court’s attention is directed to something more than a fanciful possibility. To warrant disqualification in this setting, the asserted conflict must have some reasonable basis.  
  
The State asserts that a target of a grand jury inquiry providing and paying for the lawyers who will represent the target's employees before the very grand jury considering the target's culpability creates an insoluble conflict not subject to waiver. Although the State's arguments possess considerable initial appeal, in light of modern changes in the manner in which attorney-client relationships are to be viewed, we are constrained to disagree.  
  
No doubt, it long has been the law of this State that it is “improper for the attorney for an employee to have accepted the organization’s promise to pay his bill, for such an arrangement has the inherent risk of dividing an attorney’s loyalty between his client and his client’s employer who will pay for the services.” In those instances, we have concluded that “a conflict of interest inheres in every such situation,” one that cannot be waived “when the subject matter is crime and when the public interest in the disclosure of criminal activities might thereby be hindered.” Reasoning that “an attorney must realize that the employer who agrees to pay him is motivated by the expectation that he will be protected," we have concluded that

It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony.

See also *Wood v. Georgia*, 450 U.S. 261, 268-69 (1981) (emphasizing that “courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer’s interest”).  
  
B.

That said, effective September 10, 1984, New Jersey replaced its then extant Canons of Professional Ethics and Disciplinary Rules with the more modern Rules of Professional Conduct. Among these was RPC 1.8(f), which then provided that

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship and (3) information relating to representation of a client is protected as required by RPC 1.6.

Thereafter, starting in 2001 and continuing for almost two years, New Jersey engaged in a “review of the existing Rules of Professional Conduct in light of the work of the American Bar Association's Commission on Evaluation of the Rules of Professional Conduct.” This process culminated in yet another round of modifications to the Rules of Professional Conduct. In respect of RPC 1.8(f), however, only minor changes were made; it now provides in full as follows:

A lawyer shall not accept compensation for representing a client from one other than the client unless:  
(1) the client gives informed consent;  
(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and  
(3) information relating to representation of a client is protected as required by RPC 1.6.

C.

However, RPC 1.8(f) does not exist in a vacuum: two other RPCs directly touch on the question presented. First, RPC 1.7(a) forbids a lawyer from representing a client “if the representation involves a concurrent conflict of interest.” That RPC recognizes “a concurrent conflict of interest if: there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to a third person or by a personal interest of the lawyer.” Second, RPC 5.4(c) provides that “a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”  
  
Our task, then, is to harmonize RPCs 1.7(a)(2), 1.8(f) and 5.4(c) seemingly overlapping mandates so as to give proper guidance on whether, and under what circumstances, a lawyer may represent a client when the fees and costs incurred are being paid by another.  
  
D.

The starting point for analysis must be the RPC that most specifically addresses the question of when a lawyer can represent a client while being paid by another: RPC 1.8(f). That RPC makes clear that three factors must coalesce in order to allow a lawyer paid by a third party to represent a client: the client must give informed consent; the lawyer’s independent professional judgment and the lawyer-client relationship must be maintained sacrosanct; and no improper disclosures relating or referring to the representation can be made. However, the considerations that animate RPC 1.7(a)(2)—that there be no concurrent conflict of interest—and RPC 5.4(c)—that no third party may influence the lawyer's professional judgment— also are relevant and must be addressed.  
  
A synthesis of RPCs 1.7(a)(2), 1.8(f) and 5.4(c) yields a salutary, yet practical principle: a lawyer may represent a client but accept payment, directly or indirectly, from a third party provided each of the six conditions is satisfied. Those conditions are:

(1) The informed consent of the client is secured. In this regard, “‘informed consent’ is defined as the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”  
  
(2) The third-party payer is prohibited from, in any way, directing, regulating or interfering with the lawyer’s professional judgment in representing his client.  
  
(3) There cannot be any current attorney-client relationship between the lawyer and the third-party payer.  
  
(4) The lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation of his client. The breadth of this prohibition includes, but is not limited to, the careful and conscientious redaction of all detail from any billings submitted to the third-party payer.  
  
(5) The third-party payer shall process and pay all such invoices within the regular course of its business, consistent with manner, speed and frequency it pays its own counsel.  
  
(6) Once a third-party payer commits to pay for the representation of another, the third-party payer shall not be relieved of its continuing obligations to pay without leave of court brought on prior written notice to the lawyer and the client. In such an application, the third-party payer shall bear the burden of proving that its obligation to continue to pay for the representation should cease; the fact that the lawyer and the client have elected to pursue a course of conduct deemed in the client's best interests but disadvantageous to the third-party payer shall not be sufficient reason to discontinue the third-party payer's continuing obligation of payment. If a third-party payer fails to pay an employee's legal fees and expenses when due, the employee shall have the right, via a summary action, for an order to show cause why the third-party payer should not be ordered to pay those fees and expenses.

E.

We now apply this principle, and its conditions, to the case on appeal.  
  
Informed consent. Each of the letters from the company to the individual employees provided that the employee “did not have to use the assigned counsel as your attorney. You are free to hire your own attorney, at your own costs.” As conceded by counsel for the company during oral argument, that “take-it-or-leave-it” approach, on its face, does not satisfy the requirement that the employee's acceptance of counsel be based on informed consent. Therefore, presumptively, the retention of counsel here does not comply with RPC 1.8(f)(1). However, as acknowledged by the trial court, each of the employees certified that he was satisfied with the assigned counsel and wished to remain as that counsel’s client. Therefore, we conclude that the arrangement approved by the trial court below is satisfactory, albeit with the caveat that, in the future, no such limitations on the choice of counsel should be communicated or imposed on the employee/client save for reasonable limitations on fees and expenses.  
  
Interference with the lawyer’s professional judgment. As clearly set forth in the separate retention letters between the lawyers and the company, each of the lawyers explained that “the sole professional obligation of the law firm will be to the assigned client.” For the avoidance of future doubt, such retention letters should clearly and conspicuously note that nothing in the representation shall limit the lawyer’s responsibilities to the client, as provided in RPC 1.8(f)(2), and that the third-party payer shall not, in any way, seek to “direct or regulate the lawyer's professional judgment in rendering such legal services.” RPC 5.4(c).  
  
Current representation. The record is clear that none of the lawyers selected to represent the individual employees had any current relationship with the company, and that “no professional relationship will arise between the company and the law firm as a result of the rendering of legal services by the assigned lawyer or the payment of legal fees and expenses by the company.” Those facts, standing alone, constitute a sufficient showing in favor of permitting this representation. Again, as an aid in future matters, the retention letters should clearly spell out that the lawyer does not have a professional relationship with the third-party payer.  
  
Prohibited communications. Each of the retention letters made clear that the lawyer “is not required to disclose any legal strategy, theory, plan of action, or the like, to the company and payment of legal fees by the company to the law firm in no way depends upon any such disclosure.” In this respect, the better practice is to affirmatively state that the lawyer will not disclose any part of the substance of the representation of the client to the third-party payer. Consistent with that representation, all billings from the lawyer to the third-party payer must have any detail information redacted, simply stating the sum due for services rendered and the sum due for expenses incurred. Because these latter conditions were imposed by the trial court, the retention letters, as modified by the trial court, clearly comply with the requirements we have imposed.  
  
Prompt and continued payment. Once an employer commits to paying the legal fees and expenses of its employees, it scrupulously must honor that commitment. Also, if the employer wishes to discontinue paying the legal fees and expenses of one or more of its employees, it may only do so by leave of court granted. Because this condition also was imposed by the trial court and was agreed to by all parties, the arrangements at issue are satisfactory.  
  
In sum, through the combined product of the good faith of an employer, the diligence of competent counsel and the exercise of a trial court's supervisory authority, the net result of the company's retention and payment of counsel for its employees complies with the Rules of Professional Conduct. For these reasons, the trial court properly denied the State's motion to disqualify counsel.  
  
IV.

The order of the Law Division denying the State's motion to disqualify the counsel retained to represent the company's employees before the grand jury is affirmed.

1. Warren Zevon, *Lawyers, Guns and Money*, Excitable Boy (1978). [↑](#footnote-ref-0)
2. Anatole France, *The Red Lily* (1894). [↑](#footnote-ref-1)