Conflict Awareness

Considerations Presented by Litigation Management Guidelines

By Ian A. Stewart and Gregory K. Lee

It is now commonplace for insurance companies to demand that defense counsel strictly adhere to litigation and billing guidelines designed for improving quality, uniformity and cost control. Successful insurance defense attorneys recognize the importance of diligently following these guidelines. Guidelines, however, can pose ethical dilemmas, due to diverging interests of an insurer and an insured. A typical insured wants the best defense possible, but has little knowledge of the defense costs involved. It goes without saying that an insurer also wants a strong defense, but costs are an important factor to the overall success of a claim. The competing interests in this relationship can create a conflict for an attorney.

Litigation and billing guidelines can create a conflict between the insurer and insured.

To control costs, litigation guidelines often restrict, or require approval for, defense activities, such as inspections, investigations, testing, the number and type of depositions, expert retention, motion practice and legal research. Guidelines may also direct that only paralegals or law clerks perform certain activities.

Notwithstanding the importance of controlling cost, the Model Rules of Professional Conduct hold that an attorney has an ethical obligation to prevent compromise of his or her independent judgment and to do no harm to an insured's interests. An attorney also has an ethical obligation to provide competent, diligent representation.

In some states, such as Kentucky, Michigan, Mississippi, Missouri, North Carolina, Tennessee, Vermont, Virginia and Washington, state ethics opinions allow attorneys to follow litigation management guidelines, even if those guidelines substantially limit defense activities, if an insured gives informed consent after the attorney discloses the possible risks implicit in the restrictions. Other states, such as Alabama, Florida, Illinois, Indiana, Oregon, Utah and Wisconsin, evaluate the reasonableness of particular guidelines on a case-by-case basis to analyze how the guidelines impact the attorney's representation. In these states, informed consent by an insured is not an option, and the relevant state ethics opinions suggest that an attorney should withdraw from representation in this type of conflict situation.

When complying with litigation guidelines means breaching ethical duties to an insured, a practical alternative for an attorney is to request that an insurer modify, amend, or waive the relevant guidelines to resolve the conflict. Many insurers' guidelines allow attorneys to request this permission when the attorney reasonably believes that it is in the best interests of the insured. Assuming that a good working relationship exists between an attorney and the insurer, a mutually satisfactory compromise should not ordinarily prove difficult to accomplish. As noted by John Conlon, "Working together to resolve problems in the best interests of the insured has been what insurers and defense attorneys have always done. Compliance with insurer litigation guidelines should not change this." *Insurer Litigation Guidelines: Attorney Ethical Considerations*, Res Gestae (Oct. 1998) at 11.

In the worst case scenario, if an attorney cannot persuade an insurer to modify, amend or waive a particular guideline that unreasonably interferes with the attorney's ethical obligations, the attorney may withdraw from representation.

Confidential Information Disclosed to Outside Auditors

Many insurers submit their outside counsel's legal bills to third-party auditors to control defense costs and improve the quality of defense. This practice can potentially disclose confidential information that is contained in the bills.

The Model Rules of Professional Conduct recognize that disclosure of bills containing confidential information may create an ethical issue. The duty to maintain confidentiality of information is broader than that imposed by the attorney-client privilege because the confidentiality rule applies not merely to matters com-

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municated in confidence by a client but also to all information relating to representation, regardless of the source.

Various state ethics opinions have addressed confidential information contained in legal bills, such as settlement offers, names of witnesses interviewed or experts consulted, estimates of liability, substantive communications, legal issues researched, discovery completed, identity of materials and documents reviewed, specific trial preparation performed and disclosure of defense strategy.

Submitting legal bills to outside auditors may result in a waiver of the attorney-client privilege or the work-product doctrine, rendering the documents discoverable. However, most states agree that an attorney does not breach client confidentiality by submitting legal bills to an outside auditor with the informed consent of the insured. Informed consent elements vary by state. Another option is for an auditor to sign a confidentiality agreement that appropriately protects the information.

A good practice is to redact confidential information prior to turning bills over to any third party, including an auditor. Another good practice is to clearly mark all documents sent to an outside auditor "privileged and confidential." Finally, using internal adjusters, as opposed to outside auditors, reduces confidential information disclosure risk. FD