L.E.I. No. 2005-01

WHETHER AN AGREEMENT TO ABIDE BY INSURANCE COMPANY IMPOSED BILLING GUIDELINES VIOLATES THE RULES OF PROFESSIONAL CONDUCT?

The Lawyer Disciplinary Board has received a request for a formal advisory opinion "as to whether an agreement to accept and abide by billing requirements and guidelines imposed by a liability insurer for the client would violate the Rules of Professional Conduct."

The request summarizes the background as follows:

> In recent years, there has been a trend toward the adoption of ever more restrictive and onerous insurer policies, guidelines and programs of 'litigation management', presented as being for the purposes of cost containment, quality control or efficiency. They are usually unilaterally imposed on a 'take it or you do not get the work' scenario. Generally, the client is not a party to, or even aware of, the requirements or limits, unless the attorney informs them.
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> ...
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> "The insurer 'guidelines' typically include requirements that the attorney secure approval from a claims representative before undertaking activities such as employing experts, scheduling depositions, undertaking research and investigation, or filing motions and appeals. Some 'guidelines' dictate the use of personnel within the attorney's office as appropriate for certain tasks, and put limits on time to be devoted to discovery, research, investigation, motions or travel. In many areas and activities of legal services, the guidelines impose compliance with every requirement as a condition of payment. Any point of arguable 'non-compliance' then becomes the basis for a challenge or unilateral adjustment, imposed after the fact when the billing invoice has been submitted. ... As you can imagine, many West Virginia attorneys find themselves engage in a daily struggle to do what is appropriate and necessary for their clients, while avoiding any technicality or formality on which payment or reimbursement will be refused. That struggle has now reached such proportions that counsel's independence is

routinely put at risk, and the quality of the services being provided to our clients is being threatened on a daily basis."

DISCUSSION

The party submitting the request has provided to the Board copies of guidelines and policies from seven different insurers, as examples. Some of the guidelines supplied to the Board are relatively brief and, in some instances, general in content; others are quite extensive and specific.

Many of the insurance companies' guidelines pertain to the logistics of such things as reporting and billings. Those provisions are not at issue or addressed in this opinion.

At issue are the guidelines of insurance companies that directly affect, or indirectly tend to affect, the manner in which an attorney performs professional services and exercises professional judgment. Particularly troublesome are guidelines that limit discussions among attorneys in a law firm, curtail research and preparation of court filings, discourage travel whether reasonably necessary or not, or dictate who is to perform certain tasks. Examples of such troublesome guidelines are (quoting from the copies of various insurer's guidelines that the inquirer has submitted to the Board):

- "Routine, computerized pleadings ('boiler plate') should be billed at .10 hours or actual preparation time, whichever is less."
- "Time and expenses allocated to ... internal consults ... and interoffice conferences should not be charged."
- "Depositions, hearings, motion dockets, or meetings in preparation for trial should be covered by one attorney ... ."

- "[The insurer] will not pay fees and/or expenses associated with the following:

  ...

  Legal research and/or preparation of motions which exceed three total hours, unless approved in advance ...

  ...

  Proofreading, editing mistakes, reworking, redrafting, and textual changes necessitated by substandard work product (edits/revisions in work is only billable if new information is obtained or if requested by [the insurer].

  ...

  Work that could have been more cost effectively performed [by the insurer's] personnel, unless approved in advance ... ."

- "Counsel may engage outside investigative agencies only with specific, documented, direction by the claim representative in advance of the engagement."

- "Prior consultation with the claim representative is required for any of the following:

  ...

  Undertaking any research project;

  ...

  Preparing for trial."

- "[The insurer] considers local time spent traveling as part of a law firm's overhead, and will not pay for local travel time. **A claim representative cannot waive this guideline."** (Bold in original)

- "We require that you conduct prior consultation before scheduling any depositions."

- "You must consult with [the insurer] before conducting any legal research."

- "We should not be charged for routine legal research. Legal research concerning matters of common knowledge among reasonable experienced counsel in the locale is considered to be routine or elementary and, therefore, is non-chargeable."

- "It is expected that paralegals or junior associates will be utilized in research matters."

- "Local travel, defined as travel less than 100 miles roundtrip [is] a cost integral to running the law firm. It is therefore overhead."

- "[The insurer] will not pay for fees associated with time spent traveling unless outside counsel works on [the insurer's] business while doing so, or unless agreed to in advance by lead inside counsel."

- "[The insurer] will not pay any fees and/or expenses associated with or exceeding the following:

  ...

  Legal research and/or preparation of motions which exceeds [sic] .5 hours, unless approved in advance ...

  ...

  More than one attendee at a trial, hearing, court appearance, arbitration, mediation, deposition, third-party meeting, conference call, or any similar event unless approved in advance ..."

- "You must have approval prior to initiating any of the following:

  1. All discovery including depositions, interrogatories, requests to produce and requests for admissions;

  2. All motions;

  ...

  5. All legal research requiring more than 1/2 hour ... ."

At least three rules of the Rules of Professional Conduct are implicated in a review of such guidelines. Rule 1.8(f) provides as follows:

> (f) 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 client-lawyer relationship; and
> (3) Information relating to representation of a client is protected as required by Rule 1.6.

(Underlining added.) It is noted that the use of the conjunctive "and" requires that all three conditions be met. Included in the Comment to Rule 1.8 is the following:

> Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third-party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest.

Rule 1.7(b) provides:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third-party, or by the lawyer's own interests, unless:
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> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

(Underlining added.) Again, the use of the conjunctive "and" requires that both conditions be satisfied. The Comment to Rule 1.7 includes the following:

> Loyalty to a client is also impaired when a lawyer who cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. ... 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 in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
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> ...
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> A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide

> special counsel for the insured, the arrangement should assure the special counsel's professional independence.

Perhaps most pointedly pertinent to the issue is Rule 5.4(c):

> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The Comment to Rule 5.4 states, in part,

> When someone other than a client pays the lawyer's fee or salary, ... that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangement should not interfere with the lawyer's professional judgment.

In addition, the Comment to Rule 1.5, which relates to attorneys' fees, states as follows:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.

It might be suggested that the troublesome guidelines do not actually preclude the attorney from exercising unfettered professional judgment and undertaking activities and performing services contrary to the guidelines, because the only consequence to the attorney is nonpayment (or partial nonpayment) by the insurer and, perhaps, loss of future referrals from the insurer. But, such an argument ignores reality. In a utopian world, an attorney would not be influenced by economic considerations; in the real world, however, it would be naive to believe that economic consequences do not impinge upon an attorney's exercise of professional judgment. Indeed, albeit in a somewhat different context, the Lawyer

Disciplinary Board has previously discussed this dichotomy between an ideal world and reality, and the Board has recognized that in the real world personal economic considerations may affect an attorney's professional judgment: "decisions often involve the exercise of judgment that may be influenced, consciously or unconsciously, by the pressures inherent in an employer-employee relationship, particularly where the employment relationship is 'at will' and there are no guarantees of job security." See L.E.I. 99-01, "Ethical Proprietary of Insurance Company Captive Law Firms". Although that L.E.I. involved attorneys working for insurance companies' "captive" law firms, the logic is equally applicable to outside counsel who depend for their livelihood on payment from insurers.

Legal ethics authorities in several other jurisdictions have reviewed this issue. Some have recognized the attorney's conundrum, but have merely cautioned that attorneys need to exercise care without providing any practical resolution or specific guidance. See, for example, Formal Opinion 107 by the Ethics Committee of the Colorado Bar Association adopted September 18, 1999; Florida Bar Staff Opinion 20591, December 31, 1997; State Bar of Wisconsin Ethics Opinion E-99-1, "Ethical Risks Inherent In Representing Both Insureds And Insurers".

Others have opined that a lawyer may follow insurance companies' guidelines if the client consents after being informed. See, Informal Opinion No. 980188, from the Office of Chief Disciplinary Counsel of the Missouri Bar; 98 Formal Ethics Opinion 17, North Carolina State Bar, January 15, 1999; Ethics Opinion 1723. As the inquirer notes in his letter to the Board, however,

> This conclusion begs the question of whether a 'fully informed' discussion would have to include advice that many provisions are inherently restrictive and thus a recommendation against giving consent.

Legal ethics authorities in several states have concluded that guidelines of the sort quoted above do interfere with an attorney's independent professional judgment and, accordingly, an attorney may not ethically agree to abide by such guidelines. Opinion No. 99-18 of the Rhode Island Supreme Court Ethics Advisory Panel (issued October 27, 1999) states,

> The litigation management guidelines submitted to the Panel in this inquiry contain provisions which in the opinion of the Panel interfere with the independent professional judgment of defense counsel and ultimately with the quality of legal services provided to the insureds. As such, the inquiring attorney and his/her lawyer firm may not ethically agree to abide by these guidelines in their entirety.

In reaching it's conclusion, the Rhode Island Panel noted, "It is reasonably apparent to this Panel that certain of the guidelines under consideration, even though intended to achieve cost efficiency, infringe upon the independent judgment of counsel and induce violations of our rules."

In Opinion No. 99-01 of the Iowa Supreme Court Board of Professional Ethics and Conduct (dated September 8, 1999), it is stated,

> It is the opinion of the Board that: (1) it would be improper for an Iowa lawyer to agree to, accept or follow Guidelines which seek to direct, control or regulate the lawyer's professional judgment or details of the lawyer's performance; dictate the strategy or tactics to be employed; or limit the professional discretion and control of the lawyer.

The Legal Ethics Committee of the Indiana State Bar Association, in Opinion 3 of 1998, stated,

> The terms of the specific [insurance company] contract that prompts the ethical inquiry do infringe upon the professional and independent judgment of defense counsel, and upon the quality of legal services that may be provided. The defense attorney may not ethically enter into such an agreement.

And, in the very specific Syllabus of Opinion No. 2000-3 of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (dated June 1, 2000) it was stated,

> It is improper under D.R. 5-107(B) for an insurance defense attorney to abide by an insurance company's litigation management guidelines in the representation of an insured when the guidelines directly interfere with the professional judgment of the attorney. Attorneys must not yield professional control of their legal work to an insurer.
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> Guidelines that restrict or require prior approval before performing computerized or other legal research are an interference with the professional judgment of an attorney. ...
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> Guidelines that dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a paralegal, associate or senior attorney are an interference with an attorney's professional judgment. ...
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> Guidelines that require approval before conducting discovery, taking a deposition, or consulting with an expert witness are an interference with an attorney's professional judgment.

(The provision of the Code of Professional Responsibility cited in the Ohio decision — DR 5-107(B) — is identical to Rule 5.4(c) of the West Virginia Rules of Professional Conduct.)

Additionally, the Supreme Court of Appeals of West Virginia, stated in Barefield v. DPIC Companies, Inc., 215 W.Va. 544, 600 S.E.2d 256 (2004), amongst other things, that a defense attorney is ethically obligated to exercise independent professional judgment in the defense of a client. Moreover, the court stated that an insurance company possesses no right to control the methods or means chosen by the attorney to defend the insured.

The Lawyer Disciplinary Board concurs in the logic and conclusions of these opinions and the Barefield decision.

The guidelines that are quoted earlier in this opinion, by their very nature, interfere with an attorney's exercise of independent professional judgment. Although the apparent purpose of these guidelines is to effect economy, the ineluctable result is to constrain or limit an attorney's exercise of independent professional judgment, either by (1) precluding payment for certain activities (even if the attorney deems the activities to be appropriate) or (2) requiring the attorney to submit to "second guessing" of the attorney's judgment and decisions and then precluding payment if the attorney acts in a manner contrary to such "second guessing". Even those guidelines that provide that travel time is either non-payable or payable at a reduced rate create economic pressure on an attorney to elect to not engage in investigation, discovery, or motion practice that, in the absence of such pressure, the attorney might be more inclined to consider prudent and to undertake.

At first blush, Rules 1.8(f) and 1.7(b) might appear to allow an attorney to agree to and operate under insurance company guidelines of the sort in question if "the client consents after consultation". However, the use of the conjunctive "and" in both of those Rules requires that, in addition to obtaining client consent after consultation, there must also be "no interference with the lawyer's independence of professional judgment" (Rule 1.8(f)(2)) and the lawyer must reasonably believe "the representation will not be adversely affected" (Rule 1.7(b)(1)). Accordingly, merely obtaining client consent after consultation would not resolve the problem. Moreover, as the inquirer astutely observes in his letter to the Board, the appropriate scope and content of an attorney's "consultation" with a client regarding the issue would be extremely difficult to determine.

Furthermore, although Rules 1.8(f) and 1.7(b) might appear to provide some "wiggle room" by obtaining a client's consent, Rule 5.4(c) does not: "A lawyer shall not permit a person who ... pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

CONCLUSION

It is the opinion of the Lawyer Disciplinary Board that when an attorney is retained and paid by an insurance company to defend an insured, the attorney cannot ethically agree to adhere to insurance company guidelines of the sort that are quoted above in this opinion or, in a more general sense, guidelines that

(1) Dictate how work is to be allocated among defense team members by designating what tasks are to be performed by a secretary, paralegal, associate, or senior attorney;

(2) Restrict or require approval before conducting discovery, engaging in motion practice, preparing for trial, or otherwise performing substantive work with respect to the matter for which the attorney has been engaged; or

(3) Otherwise impose a financial penalty or create an economic disincentive with respect to the lawyer's exercise of independent professional judgment.

The Board cautions, however, that it is not the intent of this opinion to suggest that an attorney who is engaged and paid by an insurance company has, in essence, an open checkbook or unlimited carte blanche discretion. Rule 1.5(a) states, "A lawyer's fees shall be reasonable." Furthermore, an attorney is always obligated to exercise his or her professional judgment in a reasoned and reasonable manner.

Approved by the Lawyer Disciplinary Board this date, _____.

David A. Jividen, Vice -Chairperson
Lawyer Disciplinary Board