

January 2003

## A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemmas Raised by Insurers' Billing and Litigation Management Guidelines

Amy S. Moats  
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Insurance Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Amy S. Moats, *A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemmas Raised by Insurers' Billing and Litigation Management Guidelines*, 105 W. Va. L. Rev. (2003).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol105/iss2/9>

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

# A BERMUDA TRIANGLE IN THE TRIPARTITE RELATIONSHIP: ETHICAL DILEMMAS RAISED BY INSURERS' BILLING AND LITIGATION MANAGEMENT GUIDELINES

---

I.	INTRODUCTION.....	525
II.	BACKGROUND INFORMATION ON THE TRIPARTITE RELATIONSHIP .....	526
III.	THE DEVELOPMENT OF BILLING AND LITIGATION MANAGEMENT GUIDELINES.....	527
IV.	APPLICABLE ETHICS RULES .....	529
V.	BILLING GUIDELINES AND OUTSIDE AUDITORS .....	531
VI.	LITIGATION MANAGEMENT GUIDELINES.....	538
VII.	<i>IN RE RULES OF PROFESSIONAL CONDUCT AND INSURER IMPOSED BILLING RULES AND PROCEDURES.....</i>	540
	A. <i>Factual Background and Procedural History.....</i>	540
	B. <i>Litigation Management Guidelines.....</i>	540
	C. <i>Use of Outside Auditors and Billing Guidelines.....</i>	542
VIII.	ADVICE FOR WEST VIRGINIA DEFENSE COUNSEL .....	543
IX.	CONCLUSION .....	544

## I. INTRODUCTION<sup>†</sup>

The relationship between insurers, the defense counsel they hire to represent their insureds, and the insureds has been described as a “tripartite” relationship.<sup>1</sup> This “eternal triangle” creates a host of ethical issues for all involved in the defense and representation of insurance policyholders who find themselves in the middle of a lawsuit.<sup>2</sup> With the advent and increasing use of billing and litigation management guidelines, insurers gain more control and trim defense costs in the representation of their insureds.<sup>3</sup> Unfortunately, insureds are at the mercy of these measures which can result in less effective and restricted

---

<sup>†</sup> Copies of all state ethics opinions cited in this note are on file with the West Virginia Law Review. Most of these opinions, however, can be retrieved from legal databases on the internet.

<sup>1</sup> Connie Bauswell Saylor, *Restrictive Billing Guidelines: The Ethical Problems*, FOR THE DEFENSE, Jan. 1998, at 32.

<sup>2</sup> *Lawyer Liability in Insurance Defense Practice*, in 2001 ATTORNEYS' LIABILITY ASSURANCE SOCIETY LOSS PREVENTION MANUAL 1 (2001) [hereinafter MANUAL].

<sup>3</sup> Andrew G. Cooley, *Audits of Attorney Bills*, FOR THE DEFENSE, Feb. 1998, at 21.

representation. Furthermore, defense lawyers find themselves in ethical dilemmas which could result in violations of the ethics rules and/or no payment for their services. Finally, the use of billing and litigation directives further confuses the roles of the three actors in the tripartite relationship. The guidelines foster an atmosphere clouded by inconsistent ethics opinions and scholarly debate, which obscure an already muddled area of legal practice.

This note will address ethics decisions and advisory opinions concerning whether billing and litigation management guidelines violate the *Model Rules of Professional Conduct* and/or the relevant ethics code adopted in each state. The West Virginia Lawyer Disciplinary Board, the body responsible for authoring ethics opinions in West Virginia, has yet to address whether litigation management guidelines violate the *Model Rules of Professional Conduct*. However, the Board has made a decision concerning billing guidelines. This note argues that billing and litigation management guidelines which interfere with the independent professional judgment of attorneys and require disclosures of confidential client information inherently violate the *Model Rules of Professional Conduct*.

## II. BACKGROUND INFORMATION ON THE TRIPARTITE RELATIONSHIP

The tripartite relationship creates a triangle between the insurer, the insured, and the defense attorney. Most insurers retain the ability to control or influence their insureds' defense by providing legal counsel and paying legal expenses which result from the attorney's representation of the insured.<sup>4</sup> Language in the liability policy between the insured and the insurer often creates an active role for the insurer in an insured's defense irrespective of whether the insurer is also considered a client.<sup>5</sup> As an active participant, the insurer makes decisions about issues that arise during litigation including the types of discovery to be undertaken and whether to agree to a settlement.<sup>6</sup> While the insurer remains the decision-maker throughout the litigation, the attorney must also represent the insured's interests.<sup>7</sup> Problems can arise when the insurer and the lawyer disagree on the proper scope and course of the defense. The American Bar Association has suggested that an insurance defense counsel has an obligation to disclose to the insured the nature of the tripartite relationship and any limitations in representation that result due to the relationship.<sup>8</sup>

---

<sup>4</sup> Saylor, *supra* note 1, at 32.

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 (1996).

The tripartite relationship also raises an issue concerning which party is to be considered the client.<sup>9</sup> Determining who the client is helps define and clarify the duties and ethical obligations an attorney owes to the various persons and entities involved in the tripartite relationship. Historically, the insured and the insurer were considered dual clients.<sup>10</sup> Problems created by the eternal triangle are even more difficult in dual-client states because the attorney must fulfill ethical obligations to both the insured and the insurer.<sup>11</sup>

Some jurisdictions have altered the historical dual-client trend. Case law has redefined the relationship between defense counsel and the insurer by making defense counsel's primary obligation or duty of loyalty to the insured.<sup>12</sup> Other states now consider the insured the only client.<sup>13</sup> West Virginia considers the insured to be the sole client.<sup>14</sup> Even though the insurance company retains the lawyer, West Virginia defense counsel must protect the insured's interests as the sole client in the tripartite relationship.<sup>15</sup> This distinction makes it somewhat easier to resolve problems created by the eternal triangle.

### III. THE DEVELOPMENT OF BILLING AND LITIGATION MANAGEMENT GUIDELINES

In order to curtail ever-increasing defense costs, insurers have developed billing guidelines, auditing processes, and litigation management directives over the years.<sup>16</sup> The evolution of these cost-cutting and defense management techniques is important in understanding why billing guidelines and the use of outside auditors have caused such concern among bar associations. The use of outside auditors to review legal bills of insurance defense counsel has become more common within the insurance industry as a way to reduce costs associated with defense.<sup>17</sup> Beyond controlling and monitoring legal defense costs, insurance companies also have concerns about the possibility of billing fraud.<sup>18</sup> Outside auditors search for billing errors, abuses, and inefficiencies.<sup>19</sup>

---

<sup>9</sup> MANUAL, *supra* note 2, at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> West Virginia Lawyer Disciplinary Bd., L.E.I. 99-01 (1999).

<sup>15</sup> West Virginia Lawyer Disciplinary Bd., L.E.I. 99-02 (1999).

<sup>16</sup> See New Hampshire Ethics Op. 2000-01/05 (2000).

<sup>17</sup> See *id.*

<sup>18</sup> Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 2000-2 (2000).

<sup>19</sup> Colorado Bar Ass'n Ethics Comm., Formal Op. 107 (1999).

Popular wisdom holds that audit procedures have their roots in the 1980s.<sup>20</sup> During this time period, “insurance companies received very generous returns on interest-bearing bonds and other conservative investments.”<sup>21</sup> The positive financial picture increased demand for defense lawyers.<sup>22</sup> But at the beginning of the 1990s, conservative interest income dropped sharply, and insurance companies were faced with a dilemma.<sup>23</sup> The market for insurance became increasingly competitive, making it nearly impossible to raise insurance premiums.<sup>24</sup> In addition, claims and legal defense costs continued to increase.<sup>25</sup> Insurance companies found that curtailing and controlling legal defense costs was the easiest way to cut expenses.<sup>26</sup> Therefore, billing guidelines began to creep into the everyday world of insurance defense work.

Until recently, large insurance companies audited lawyers’ bills internally.<sup>27</sup> Typically, the claims adjuster would perform the audit.<sup>28</sup> The adjuster would review the bill and ensure that the time spent was reasonably related to the work the lawyer did.<sup>29</sup> In an effort to cut costs, more insurance companies started using outside auditing companies to review legal bills.<sup>30</sup> Various methods are used by third-party auditors to review and report their findings.<sup>31</sup> Irrespective of the methodology used, sending legal bills to an auditing firm for review only increases the delay between performing legal services and receiving payment.<sup>32</sup>

Litigation management guidelines have also been used by insurance companies as a way to limit the types of services performed by insurance defense counsel.<sup>33</sup> Specific examples of litigation management guidelines are treated under a separate section of this note. For now, it is important to realize that litigation management guidelines can impose unreasonable restraints on

---

<sup>20</sup> Cooley, *supra* note 3, at 21.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See* Colorado Bar Ass’n Ethics Comm., Formal Op. 107 (1999).

<sup>32</sup> Cooley, *supra* note 3, at 22.

<sup>33</sup> *See* MANUAL, *supra* note 2, at 11.

insurance defense counsel in the conduct of litigation, which could prejudice the insured's interests.<sup>34</sup>

#### IV. APPLICABLE ETHICS RULES

Billing and litigation management guidelines create dilemmas that implicate a host of ethical rules for insurance defense counsel. Many states have adopted the American Bar Association ("ABA") *Model Rules of Professional Conduct* either in an identical format or in one very similar.<sup>35</sup> In addition, comparable provisions to the *Model Rules* exist in the *ABA Model Code of Professional Responsibility* for those states still using the *Model Code* in identical or similar versions.<sup>36</sup> This discussion will focus on the *ABA Model Rules of Professional Conduct* since they generally establish the basis for state ethics codes.<sup>37</sup> In relation to billing and litigation management directives, the relevant rules which most often raise concerns in the tripartite relationship between the insured, insurer, and lawyer can be limited to the following four: ABA Model Rule 1.6, ABA Model Rule 1.7, ABA Model Rule 1.8, and ABA Model Rule 5.4.<sup>38</sup>

Confidentiality issues raised by the subject are often resolved by applying ABA Model Rule 1.6 – Confidentiality of Information.<sup>39</sup> Subsection (a) of this rule states, "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry on the representation, and except as stated in paragraph (b)." <sup>40</sup> The comparable *Model Code* provision is contained in DR 4-101.<sup>41</sup> This rule covers a wide array of information obtained by a lawyer about a client and his or her case,<sup>42</sup> providing much broader protection than the attorney-client privilege and the work product doctrine.<sup>43</sup> A lawyer cannot disclose this information unless such disclosure is authorized by the *Rules of Professional Conduct* or another law.<sup>44</sup> This rule is particularly appli-

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 9-10.

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

<sup>40</sup> *Id.* R. 1.6(a).

<sup>41</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1981).

<sup>42</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

cable to insurers' requests to defense counsel to submit bills directly to outside auditors.

Depending upon the jurisdiction in which one practices, the insurer in the tripartite relationship could either be considered a dual client or a third party payor.<sup>45</sup> Either situation raises the potential for inherent conflict. Conflicts of interest are mainly attributable to the duties of diligence, loyalty, confidentiality, and faithfulness to client objectives owed by lawyers to clients.<sup>46</sup> Model Rule 1.7 prohibits conflicts of interest.<sup>47</sup> Subsection (b) of this rule states:

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 person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.<sup>48</sup>

Conflicts of interest commonly occur whether the insurer is considered a client under the dual representation doctrine or merely a third party payor; thus, Rule 1.7(b) is applicable in either situation.<sup>49</sup>

The rule's relevancy is evident. It covers situations in which the lawyer's representation of the client could be affected by his responsibilities to the insurer resulting in a conflict of interest. For example, an Iowa ethics opinion listed sample litigation management guidelines which permitted a non-lawyer claims representative to perform tasks traditionally performed by a lawyer.<sup>50</sup> An attorney in this situation has a conflict of interest that threatens the relationship with his or her client and the insurer/employer. Allowing a claims representative to perform legal tasks could undermine and jeopardize an attorney's competent advocacy and his or her duty of loyalty to the client. On the other hand, refusing to cooperate with the insurer could result in a denial of payment for services rendered.

Two rules found in the *Model Rules of Professional Conduct* address potential disputes between insurers and defense counsel. First, Rule 1.8 regu-

---

<sup>45</sup> MANUAL, *supra* note 2, at 3-4.

<sup>46</sup> Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1, 4 (1997/1998).

<sup>47</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 (2000).

<sup>48</sup> *Id.* R. 1.7(a).

<sup>49</sup> Morgan, *supra* note 46, at 5.

<sup>50</sup> Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1 (1999)

lates prohibited transactions when conflicts of interest are involved.<sup>51</sup> The pertinent section states:

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 not interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by rule 1.6.<sup>52</sup>

Regarding billing and litigation management guidelines, Rule 1.8 encompasses both client confidentiality issues and the lawyer's exercise of independent professional judgment.<sup>53</sup> The rule is especially relevant because insurance companies typically pay defense counsels' fees on their insureds' behalf.

Second, Rule 5.4 deals with the professional judgment of a lawyer. Subsection (c) states, "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 legal services."<sup>54</sup> Given that insurers retain lawyers to defend their insureds and pay the legal costs associated with that representation, the relationship between defense counsel and insurers is covered by this rule. Through the use of billing and litigation management guidelines, the insurer attempts to exert indirect control over the independent professional judgment of defense counsel.<sup>55</sup> Since the insurer determines which legal services will be paid, the attorney allows the insurer a measure of control over the representation.<sup>56</sup> Tense situations can arise when an attorney feels pressured to forgo undertaking certain legal services, which he or she feels are necessary for an effective representation of the insured-client, simply because compensation is not guaranteed for that type of legal work.<sup>57</sup> These circumstances reduce legal expenditures at the cost of ineffective and inappropriately limited representation. Therefore, insurers should not interfere with a lawyer's professional judgment by giving directives which would regulate or interfere with such judgment.

The four *Model Rules of Professional Conduct* outlined above are those most frequently cited in the various ethics opinions relating to billing and litigation management guidelines. They provide guidance in determining what ethical

---

<sup>51</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8.

<sup>52</sup> *Id.* R. 1.8(f).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* R. 5.4(c).

<sup>55</sup> Saylor, *supra* note 1, at 34.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



responsibilities defense counsel owes to the client and the insurer. More importantly, they help to answer the question of whether or not the guidelines themselves are a violation of the *Rules of Professional Conduct*.

## V. BILLING GUIDELINES AND OUTSIDE AUDITORS

Over thirty states have issued ethical opinions relating to billing guidelines and the submission of legal billing statements to outside auditors.<sup>58</sup> These opinions cover many issues raised by billing guidelines and the review of legal bills by outside auditing companies. Some of the more common billing guidelines have been used as examples in the ethics opinions on the subject.<sup>59</sup>

Once insurance carriers have established billing guidelines, they frequently hire either internal or external auditors to review legal bills to ensure that defense counsel has complied with the mandated billing directives.<sup>60</sup> The level of detail required by these billing guidelines can be very extensive. "Identity of participants, the content of all communications (telephone calls, correspondence, meetings), specific issues researched, the specific trial preparation performed, and the identity of material or documents reviewed and written work

<sup>58</sup> Alabama Ethics Op. RO-98-02 (1998); Alaska Bar Ass'n Ethics Comm., Ethics Op. 99-1 (1999); Arizona State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 99-08 (1999); Colorado Bar Ass'n Ethics Comm., Formal Op. 107 (1999); Connecticut Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 00-20 (2000); District of Columbia Bar Legal Ethics Comm., Op. 290 (1999); Florida Bar Staff Op. 20762 (1998); Georgia State Bar Proposed Advisory Op. 99-R2 (2000); Hawaii Formal Ethics Comm., Op. 36 (1999); Idaho State Bar Formal Ethics Op. 136 (1999); Indiana State Bar Op. 4 (1998); Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1 (1999); Kentucky Advisory Ethics Op. KBA E-404 (1998); Louisiana Bar Ethics 45 La. B.J. 438 (1998); Maine Bar Ass'n Ethics Op. 164 (1998); Maryland State Bar Ass'n Comm. on Ethics, Op. 99-7 (1998); Massachusetts Bar Ethics Op. 2000-4 (2000); Mississippi State Bar Ass'n Op. 246 (1999); Missouri Informal Op. Summary 980188 (1998); *In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000); Nebraska Advisory Comm., Advisory Op. 00-1 (2000); New Hampshire Ethics Op. 2000-02/05 (2000); New Mexico State Bar Formal Advisory Op. 2000-02 (2000); New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716 (1998); North Carolina State Bar, Formal Ethics Op. 11 (2000); Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 2000-2 (2000); Oklahoma Bar Ass'n Legal Ethics Comm., Proposed Revised Advisory Op. 1998-04 (1998); Oregon Formal Op. 1999-157 (1999); Pennsylvania Informal Op. 97-119 (1997); Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17 (1999); South Carolina Bar Ethics Advisory Op. 98-36 (1998); State Bar of South Dakota Ethics Op. 99-2 (1999); Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999); Texas Ethics Op. 532 (2000); Utah State Bar Ethics Advisory Op. Comm., Op. 98-03 (1998); Vermont Bar Ass'n Ethics Op. 98-7 (1998); Virginia Bar Legal Ethics Op. LEO 1723 (1998); Washington State Bar Ass'n Formal Op. 195 (1999); West Virginia Lawyer Disciplinary Bd., L.E.I. 99-02 (1999); Wisconsin State Bar Prof'l Ethics Comm., Ethics Op. E-99-1 (1999).

<sup>59</sup> District of Columbia Bar Legal Ethics Comm., Op. 290; Indiana State Bar Op. 4; Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1; Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17; Vermont Bar Ass'n Ethics Op. 98-7; Virginia Bar Legal Ethics Op. LEO 1723.

<sup>60</sup> New Hampshire Ethics Op. 2000-02/05.

product generated in the representation of the client” are all examples of billing guideline requirements.<sup>61</sup>

Billing guidelines can influence the attorney’s personal judgment about what is best for the client. Lawyers may be discouraged or even prohibited from pursuing courses of action beneficial to the insured. Attorneys threatened with receiving no compensation for certain legal services could be deterred from performing appropriate legal tasks for their client. Financial disincentives resulting from restrictive billing guidelines only serve to create additional ethical dilemmas for attorneys.

Moreover, billing guidelines set the stage for a conflict of interest by threatening the duty of loyalty owed to the client as mandated by ABA Rule 1.7.<sup>62</sup> Short-term economic incentives and self-interest compel the attorney to continue to accept work from the insurance company even if it mandates certain billing requirements which could compromise his or her duty of loyalty to the client. Refusal to abide by restrictive guidelines and requests for outside auditing of legal bills will result in a loss of business from the insurer that can be a lucrative source of income.<sup>63</sup> If a failure to take the best course of action results in an adverse effect to the client, the attorney has violated the ethical standards of Rule 1.7.<sup>64</sup> Neither option is appealing or viable for defense counsel, and billing guidelines should not place an attorney in a position that requires the lawyer to choose between compensation and ethical behavior toward clients.

Outside auditors often have the authority to determine those services for which attorneys should be paid and which legal costs should be denied.<sup>65</sup> Auditors can also make downward adjustments in the legal bill.<sup>66</sup> When a dispute arises over whether a certain legal service will be compensated, the auditor often requests supplemental information from the attorney to justify the time spent or the service performed.<sup>67</sup> For example, supplemental materials requested have included

[s]pecific descriptions of work performed, settlement offers, and estimates of the insured’s percentage of liability. Specifically the auditing agency has requested such items as the identity of participants, as well as the substance of a variety of

---

<sup>61</sup> District of Columbia Bar Legal Ethics Comm., Op. 290.

<sup>62</sup> Saylor, *supra* note 1, at 33.

<sup>63</sup> *Id.* (explaining how human self-interest and short-term economic incentives combine to pressure attorneys into continuing to accept insurance defense work and abiding by billing guidelines because the firms need the business).

<sup>64</sup> *Id.*

<sup>65</sup> Ohio Supreme Court Bd. of Comm’rs on Grievances and Discipline, Op. 2000-2.

<sup>66</sup> Cooley, *supra* note 3, at 22.

<sup>67</sup> New Hampshire Ethics Op. 2000-02/05.

communications, specific issues researched, the identity of materials and documents reviewed, specific trial preparation performed and specific non-deposition discovery.<sup>68</sup>

Providing this type of detailed information puts legal counsel in an ethical dilemma given an attorney's duty to keep information related to representation of clients confidential.<sup>69</sup> Billing statements inevitably contain information relating to the representation of clients; thus, the attorney must either avoid giving billing statements to outside auditors or find a way to abide by the ethical rules and insurance carrier billing guidelines. Ethics committees have provided advice and guidance in resolving this problem.<sup>70</sup>

A majority of state ethics governing bodies have opined that defense counsel may not reveal confidential client information through submission of legal bills to an outside auditor without consent of the insured-client, who must be informed by consultation with the lawyer.<sup>71</sup> Within this general consensus, several important concerns and problems have been addressed. First, the feasibility of obtaining fully informed consent to reveal confidential client information is a potential problem.<sup>72</sup> State ethics opinions are not consistent when suggesting factors to be discussed with insureds or in recommending which process may be best in obtaining fully informed consent.<sup>73</sup>

<sup>68</sup> Maryland State Bar Ass'n Comm. on Ethics, Op. 99-7 (1998).

<sup>69</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2000).

<sup>70</sup> See *supra* note 58.

<sup>71</sup> Alabama Ethics Op. RO-98-02; Alaska Bar Ass'n Ethics Comm., Ethics Op. 99-1; Arizona State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 99-08; Connecticut Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 00-20; District of Columbia Bar Legal Ethics Comm., Op. 290; Indiana State Bar Op. 4; Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1; Kentucky Advisory Ethics Op. KBA E-404; Maryland State Bar Ass'n Comm. on Ethics, Op. 99-7; Massachusetts Bar Ethics Op. 2000-4; Mississippi State Bar Ass'n Op. 246; *In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000); Nebraska Advisory Comm., Advisory Op. 00-1; New Hampshire Ethics Op. 2000-02/05; New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716; North Carolina State Bar, Formal Ethics Op. 11; Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 2000-2; Oregon Formal Op. 1999-157; Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17; South Carolina Bar Ethics Advisory Op. 98-36; State Bar of South Dakota Ethics Op. 99-2; Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143; Texas Ethics Op. 532; Utah State Bar Ethics Advisory Op. Comm., Op. 98-03; Vermont Bar Ass'n Ethics Op. 98-7; Virginia Bar Legal Ethics Op. LEO 1723; Washington State Bar Ass'n Formal Op. 195; West Virginia Lawyer Disciplinary Bd., L.E.I. 99-02; Wisconsin State Bar Prof'l Ethics Comm., Ethics Op. E-99-1.

<sup>72</sup> District of Columbia Bar Legal Ethics Comm., Op. 290.

<sup>73</sup> New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716; North Carolina Proposed Formal Ethics Op. 10 (1998); Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17; Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143.

For those states using a version of the *Model Rules of Professional Conduct*, the consultation issue is fairly straightforward.<sup>74</sup> Consultation is defined as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”<sup>75</sup> To meet the requirements of this definition, states have proposed different factors for discussion with the client to ensure that all the proper information is conveyed.<sup>76</sup> New York directs attorneys to discuss the nature of the information found in billing records and relevant legal and nonlegal consequences of the client’s decision, including the extent of the client’s obligation under the insurance contract and the possibility that the insurance company might refuse to indemnify the client.<sup>77</sup> In Tennessee, defense counsel must notify the client of the disclosure request, provide the client with a list of all the advantages and disadvantages of disclosure, allow the client to seek independent legal advice, and permit access to the information only after the client gives consent.<sup>78</sup> Rhode Island provides that the lawyer “must adequately and fairly identify the effects of disclosure and non-disclosure on the client’s interests.”<sup>79</sup> Lawyers practicing in different jurisdictions should be aware of the varied techniques and processes proposed by each state to deal with the disclosure issue.

Several opinions have cautioned defense counsel that the insurance policy between the insured and the insurer, the contract between the lawyer and the insurer, or any blanket provision between the insured and the insurer are insufficient to constitute consent.<sup>80</sup> These opinions require an attorney to review and renew the consent afforded by these documents.<sup>81</sup> Consent can also become a continuing obligation if situations arise that were not originally discussed or covered in the prior fully informed consent agreement.<sup>82</sup>

---

<sup>74</sup> Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17.

<sup>75</sup> MODEL RULES OF PROF'L CONDUCT TERMINOLOGY SECTION (2000).

<sup>76</sup> See *supra* note 73.

<sup>77</sup> New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716 (1998).

<sup>78</sup> Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143 (1999).

<sup>79</sup> Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17.

<sup>80</sup> District of Columbia Bar Legal Ethics Comm., Op. 290 (1999); Indiana State Bar Op. 4 (1998); New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716; Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17; State Bar of South Dakota Ethics Op. 99-2 (1999); Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143; Utah State Bar Ethics Advisory Op. Comm., Op. 98-03 (1998); West Virginia Lawyer Disciplinary Bd., L.E.I. 99-02 (1999).

<sup>81</sup> District of Columbia Bar Legal Ethics Comm., Op. 290; New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716; Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-17; State Bar of South Dakota Ethics Op. 99-2; Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 99-F-143; Utah State Bar Ethics Advisory Op. Comm., Op. 98-03; West Virginia Lawyer Disciplinary Bd., L.E.I. 99-02.

<sup>82</sup> New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 716; West Virginia Lawyer Disci-

Requiring attorneys to review and renew consent recognizes the reality that many insureds do not know what is contained in the fine print of their insurance policies. Insurance contracts have often been characterized as contracts of adhesion because the insured does not have an opportunity to negotiate the terms.<sup>83</sup> The ABA Standing Committee on Ethics and Professional Responsibility states the dilemma succinctly: “[W]e cannot assume that the insured understands or remembers, if he ever read, the insurance policy, or that the insured understands that his lawyer will be acting on his behalf, but at the direction of the insurer without further consultation with the insured.”<sup>84</sup> While the insurance contract may disclose the duties between the insured and the insurer, it does not define the ethical responsibilities that the lawyer has to his client.<sup>85</sup> Therefore, the attorney owes a responsibility not only to his client, but also to himself, to adequately convey the appropriate information in obtaining consent and explaining the limitations on his representation.

A troubling and critical issue regarding the disclosure of confidential information is the possibility of waiver of the attorney-client privilege and/or the work product doctrine.<sup>86</sup> While ethics advisory boards are unable to decide this legal question, which is reserved for the courts, several state opinions include dire warnings to defense counsel about the potential waiver problem.<sup>87</sup> One fairly recent case has caused commentators and defense attorneys to pay considerable attention to the negative and unintended ramifications of disclosing information to outside auditors.<sup>88</sup>

In *United States v. MIT*,<sup>89</sup> a First Circuit Court of Appeals case decided in 1997, the court held that privileged information given to government auditors was indeed discoverable.<sup>90</sup> MIT waived the attorney-client privilege when it disclosed documents to government auditors, which the court considered outside the magic circle of others to which the privilege applies.<sup>91</sup> The court deemed the government audit agency to be a potential adversary in the event that controversies over disputed bills could lead to litigation between MIT and the auditors.<sup>92</sup>

---

plinary Bd., L.E.I. 99-02.

<sup>83</sup> MANUAL, *supra* note 2, at 10.

<sup>84</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 (1996).

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* note 71.

<sup>87</sup> *See id.*

<sup>88</sup> *See United States v. MIT*, 129 F.3d 681 (1st Cir. 1997).

<sup>89</sup> *Id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 684.

<sup>92</sup> *Id.* at 687.

Disclosure to auditors was construed as disclosure to an adversary, thereby forfeiting the work product protection.<sup>93</sup>

If other courts begin to hand down similar opinions, insureds, insurers, and defense counsel will find themselves in an unenviable position. Submitting bills to outside auditors is frequently required without the knowledge and/or consent of insureds. If these disclosures waive the attorney-client privilege and work product doctrine protections, other parties could discover information about the insured's case. In *MIT*, the court did note that a strong policy argument could be made for protecting against disclosure of the mental impressions and legal theories of an attorney.<sup>94</sup> However, it refused to consider the issue because it was not raised or briefed for the court's review.<sup>95</sup> Any attorney facing litigation concerning disclosures to auditors and the possible consequences of those disclosures would be wise to make the argument; however, it may not prevent those documents from becoming discoverable.

In obtaining consent for disclosure from the client, defense counsel should explain the potential waiver issue that could arise by disclosing legal bills and documents to outside auditors. Furthermore, attorneys may want to persuade insurance carriers to reconsider their outside auditing practices in light of the *MIT* ruling. If the insurance carrier insists on sending bills to outside auditors, lawyers may want to clearly mark all documents as "Privileged and/or Confidential, for internal use only."<sup>96</sup>

A final concern about the use of outside auditors relates to the ancillary uses of the cost information being provided for review. One ethics opinion noted that some auditing firms were building databases from billing information to serve other interests.<sup>97</sup> Some auditing companies have even required attorneys to buy billing software and send the computerized information to the outside auditing firm.<sup>98</sup> Lawyers have conjectured that the information is being used to create a national database that itemizes the lawyer's tasks and assigns an average charge to those tasks.<sup>99</sup>

Disclosure of legal invoices to outside auditors for compliance with billing guidelines can cause ethical dilemmas for defense counsel. It is recommended that attorneys become familiar with the applicable ethics opinions and the guidance they provide. Following the procedures set out in these opinions may help defense counsel if their motivations and disclosure processes are questioned.

---

<sup>93</sup> *Id.* at 681.

<sup>94</sup> *Id.* at 688.

<sup>95</sup> *Id.*

<sup>96</sup> Colorado Bar Ass'n Ethics Comm., Formal Op. 107 (1999).

<sup>97</sup> Kentucky Advisory Ethics Op. KBA E-404 (1998).

<sup>98</sup> Cooley, *supra* note 3, at 22.

<sup>99</sup> *Id.*

## VI. LITIGATION MANAGEMENT GUIDELINES

Two dozen states have issued ethical opinions relating to the use of litigation management guidelines or billing guidelines that place substantive restraints on the provision of certain legal services.<sup>100</sup> Various litigation management guidelines have been used as representative samples in the ethics opinions on the subject. Some sample guidelines/restrictions include: (1) identifying all witnesses interviewed and experts consulted as well as the subject matter discussed;<sup>101</sup> (2) discouraging the use of paralegals in favor of less qualified outside vendors to perform tasks, discouraging the use of more experienced and costly personnel in preliminary research, refusing to pay for computerized legal research while discouraging extensive manual research to replace it, forbidding summarizing depositions, mandating deferral of trial preparation until trial is imminent, and refusing to pay for proofreading or revisions of first drafts of any written materials to produce a final product of suitable quality;<sup>102</sup> (3) controlling how a law firm staffs a file, providing that a non-lawyer claims representative can perform tasks traditionally performed by a lawyer, requiring lawyers to rely upon unsupervised legal research, requiring prior approval for depositions or pleadings, curtailing interoffice meetings of lawyers working on files, limiting written communication with the insured-client, dictating use and type of discovery;<sup>103</sup> and (4) requiring pre-approval for time spent on research, travel, and the taking of depositions.<sup>104</sup> Given the breadth of these example restrictions, one cannot deny that they have a profound impact on the lawyer's planning and preparation of an insured's defense.

The state ethics opinions are divided into four categories, characterized by their treatment of litigation management guidelines in relation to the *Model*

---

<sup>100</sup> Alabama Ethics Op. RO-98-02 (1998); Arizona State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 99-08 (1999); Colorado Bar Ass'n Ethics Comm., Formal Op. 107; Florida Ethics Op. 97-1 (1997); Illinois State Bar Ass'n, Advisory Op. on Prof'l Conduct 98-08 (1998); Indiana State Bar Op. 3 (1998); Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1 (1999); Kentucky Ethics Op. KBA E-416 (1998); Michigan Ethics Op. RI-293 (1997); Mississippi State Bar Ass'n Op. 211 (1993); Missouri Informal Op. 980188 (1998); *In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000); Nebraska Advisory Comm., Advisory Op. 00-1 (2000); North Carolina Proposed Formal Ethics Op. 17 (1998); Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 2000-3 (2000); Oregon Formal Op. 2002-166 (2002); Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-18 (1999); Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2000-F-145 (2000); Texas Ethics Op. 533 (2000); Utah State Bar Ethics Advisory Op. Comm., Op. 02-03 (2002); Vermont Bar Ass'n Ethics Op. 98-7 (1998); Virginia Bar Legal Ethics Op. LEO 1723 (1998); Washington State Bar Ass'n Formal Op. 195 (1999); Wisconsin State Bar Prof'l Ethics Comm., Ethics Op. E-99-1 (1999).

<sup>101</sup> Indiana State Bar Op. 4 (1998).

<sup>102</sup> Vermont Bar Ass'n Ethics Op. 98-7.

<sup>103</sup> Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1.

<sup>104</sup> Virginia Bar Legal Ethics Op. LEO 1723.

*Rules of Professional Conduct.* Nine states determined that the guidelines inherently violated the *Rules of Professional Conduct*.<sup>105</sup> These states held that defense lawyers cannot ethically abide by programs that direct, regulate, or restrict the counsel's independent professional judgment.<sup>106</sup>

Kentucky, Michigan, and Washington also held that lawyers may not comply with litigation management guidelines that interfere with the exercise of independent professional judgment.<sup>107</sup> However, the opinions also provided that clients may consent to limitations imposed on the representation after receiving full disclosure and consulting with the lawyer.<sup>108</sup> In addition, six states opined that defense counsel may follow any litigation management guidelines if the client gives fully informed consent after disclosure of the possible risks and implications of the limitations.<sup>109</sup>

Finally, seven states held that, while litigation management guidelines may often interfere with the exercise of independent professional judgment, they are not a *per se* violation of the *Rules of Professional Conduct*.<sup>110</sup> These states proposed a case-by-case analysis of how the guidelines may affect the representation.<sup>111</sup> Unfortunately, these opinions offered no practical solution or resolution to the problem and continued to place defense counsel in ethical dilemmas. Once a lawyer finds him/herself in a conflict of interest situation or facing a potential ethical breach, the opinions merely suggested that the attorney may have to withdraw.<sup>112</sup> This course of action has negative consequences for all parties involved in the tripartite relationship.

---

<sup>105</sup> Arizona State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 99-08; Colorado Bar Ass'n Ethics Comm., Formal Op. 107; Iowa Supreme Court Bd. of Ethics and Conduct, Op. 99-1; Mississippi State Bar Ass'n Op. 211; *In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000); Nebraska Advisory Comm., Advisory Op. 00-1; Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 2000-3; Rhode Island Supreme Court Ethics Advisory Panel, Op. 99-18; Texas Ethics Op. 533.

<sup>106</sup> See *supra* note 105.

<sup>107</sup> Kentucky Ethics Op. KBA E-416; Michigan Ethics Op. RI-293; Washington State Bar Ass'n Formal Op. 195.

<sup>108</sup> See *supra* note 107.

<sup>109</sup> Missouri Informal Op. 980188; Mississippi State Bar Ass'n Op. 211; North Carolina Proposed Formal Ethics Op. 17; Tennessee Supreme Court Bd. of Prof'l Responsibility, Formal Ethics Op. 2000-F-145; Vermont Bar Ass'n Ethics Op. 98-7; Virginia Bar Legal Ethics Op. LEO 1723.

<sup>110</sup> Alabama Ethics Op. RO-98-02; Florida Ethics Op. 97-1; Illinois State Bar Ass'n, Advisory Op. on Prof'l Conduct 98-08; Indiana State Bar Op. 3; Oregon Formal Op. 2002-166; Utah State Bar Ethics Advisory Op. Comm., Op. 02-03; Wisconsin State Bar Prof'l Ethics Comm., Ethics Op. E-99-1.

<sup>111</sup> See *supra* note 110.

<sup>112</sup> See *id.*



VII. *IN RE RULES OF PROFESSIONAL CONDUCT AND INSURER IMPOSED BILLING RULES AND PROCEDURES*<sup>113</sup>

To date, the Montana Supreme Court has been the only state supreme court to decide whether disclosure of legal bills to third-party auditors and other litigation management guidelines violate the *Model Rules of Professional Conduct*. The Montana Supreme Court held that “defense counsel in Montana who submit to the requirement of prior approval violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds.”<sup>114</sup> In addition, defense counsel may not submit detailed descriptions of professional services to third-party auditors without first obtaining the contemporaneous fully informed consent of insureds.<sup>115</sup> If an attorney does not obtain the appropriate consent before disclosing legal bills to outside auditors for review, he or she has violated the rules of client confidentiality under the Montana Rules of Professional Conduct (based on the *Model Rules of Professional Conduct*).<sup>116</sup>

A. *Factual Background and Procedural History*

In November of 1998, petitioners filed an application with the court for original jurisdiction and declaratory relief.<sup>117</sup> The petitioners argued that insurer billing guidelines and practice rules violated the Montana Rules of Professional Conduct because they imposed conditions limiting or directing the scope and extent of the representation of clients and required submission of detailed legal bills to outside auditors without first obtaining consent from the insured-client.<sup>118</sup> The court reviewed over 1000 pages of billing guidelines and practice rules from different insurers practicing in Montana, read numerous amici briefs and expert opinions, and heard oral arguments before coming to a conclusion in April of 2000.<sup>119</sup>

B. *Litigation Management Guidelines*

The first issue concerned billing and practice rules that limited or directed the scope and extent of the representation prepared for insureds.<sup>120</sup> The

---

<sup>113</sup> 2 P.3d 806 (Mont. 2000).

<sup>114</sup> *Id.* at 817.

<sup>115</sup> *Id.* at 822.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 808.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 808-09.

<sup>120</sup> *Id.* at 809.

court set out several Montana Rules of Professional Conduct that were relevant to the issue, including Rule 1.1 regarding competence, Rule 1.8 prohibiting conflicts of interest, and Rules 2.1 and 5.4, which mandate the exercise of independent professional judgment.<sup>121</sup> It used a representative set of guidelines submitted by the St. Paul Companies, which initiate a “team approach” to the defense of an insured between the claim professional assigned to the case and the defense attorney hired to represent the insured.<sup>122</sup> The claim professional played a substantial role in the defense including initiating settlement negotiations and having input into development of the litigation strategy.<sup>123</sup> Particularly worrisome were guidelines that required defense counsel to obtain prior approval from the claim professional before an attorney could schedule depositions, conduct research, employ experts, and write motions.<sup>124</sup>

Respondent insurers argued that, as co-clients of defense counsel, they were entitled to require pre-approval of attorney activities.<sup>125</sup> The court held that respondents misconstrued past Montana decisions to support their argument regarding co-client status of insurers.<sup>126</sup> It concluded that the insured is the sole client of defense counsel and any contractual relationship existing between an insured and an insurer does not supersede or waive the defense attorney’s ethical obligations under the Rules of Professional Conduct.<sup>127</sup> Therefore, practice rules requiring prior approval fundamentally interfere with the exercise of independent judgment as required by Rule 1.8 and create a “substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense.”<sup>128</sup>

The Montana Supreme Court briefly described several other state opinions that rejected similar arrangements which hindered attorneys’ undivided duty of loyalty to their clients and interfered with attorneys’ independent professional judgment.<sup>129</sup> While not entirely on point factually, these other cases concerned similar issues and directives from insurers, thus supporting Montana’s decision.

---

<sup>121</sup> *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d at 809.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 810.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 814.

<sup>128</sup> *Id.* at 815.

<sup>129</sup> *Id.* at 815-17.

### C. *Use of Outside Auditors and Billing Guidelines*

The court then turned to the issue of outside auditors and whether submitting detailed descriptions of professional services to third-party auditors without first obtaining informed consent of the client violated client confidentiality.<sup>130</sup> Rule 1.6 (regarding client confidentiality) was set out by the court as a guiding principle in the decision.<sup>131</sup> Again, a representative set of billing guidelines from Zurich-American Insurance Group was used to demonstrate typical auditing conditions imposed on defense counsel.<sup>132</sup>

Petitioners argued that lawyers abiding by the billing rules would have to disclose confidential detailed descriptions of professional services to auditors which would not advance the representation of insureds.<sup>133</sup> In addition, petitioners posited that third-party auditors did not fall within a protective “magic circle” and disclosures of billing statements to outside auditors could only be made with informed consent of the client after consultation.<sup>134</sup>

Respondents countered that third-party auditors act as agents of insurers and share a common interest in reducing the costs of litigation, which makes them part of the privileged community. Furthermore, respondents argued that insureds’ consent was implied for disclosures reasonably necessary for representation and that insureds consented to disclosure in the insurance contract.<sup>135</sup> The court concluded that third-party auditors did not fall within the magic circle or community of interest that was recognized in *United States v. MIT*.<sup>136</sup> It also held that disclosure of detailed billing statements to outside auditors constituted disclosure to a potential adversary because the possibility of disputes between defense counsel and auditors could potentially result in litigation.<sup>137</sup> It rejected both arguments by respondents about consent by contract and by implied authorization.<sup>138</sup>

To allow disclosures of detailed professional billing statements and avoid violations of client confidentiality, the court mandated that attorneys obtain fully informed consent from insureds.<sup>139</sup> In describing this consent, the

---

<sup>130</sup> *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d at 817.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 820 (citing *United States v. MIT*, 129 F.3d 681 (1st Cir. 1997)).

<sup>137</sup> *Id.* at 821.

<sup>138</sup> *Id.* at 821-22.

<sup>139</sup> *Id.* at 822.

court stated, “the consent must be contemporaneous with the facts and circumstances of which the insured should be aware.”<sup>140</sup> Obtaining this type of fully informed consent would then prevent violations of the Montana Rules of Professional Conduct.

#### VIII. ADVICE FOR WEST VIRGINIA DEFENSE COUNSEL

While it has not yet reached an opinion as to whether litigation management guidelines violate the *Rules of Professional Conduct*, the West Virginia Lawyer Disciplinary Board has rendered an opinion on billing guidelines and submissions of legal bills to outside auditors.<sup>141</sup> West Virginia has already proposed the same type of consent required by the Montana Supreme Court in dealing with billing practices and the use of outside auditors.<sup>142</sup>

Defense counsel in West Virginia and the West Virginia Lawyer Disciplinary Board should take a close look at Montana’s ruling. Attorneys should not be faced with a choice that potentially advocates ethical violations and inadequate representation of clients in order to secure a paycheck from insurance companies. This type of conflict of interest will only serve to strain relations between insureds, defense counsel, and insurers in the eternal triangle.

Montana’s ruling recognizes that billing and litigation management guidelines which interfere with the independent professional judgment of attorneys and require disclosures of confidential client information inherently violate the *Model Rules of Professional Conduct*. If the West Virginia Lawyer Disciplinary Board would take a similar stance, defense counsel would be relieved from making what is truly an impossible decision. Insurers do have legitimate business concerns in trying to reduce the costs of legal representation. However, cost-cutting techniques cannot be employed if they encourage unethical behavior and ineffective assistance of counsel.

Options proposed by other state ethics boards are unsatisfactory.<sup>143</sup> Requiring an attorney to perform necessary legal service without compensation is an unfair and unrealistic financial disincentive to zealous representation. Seeking payment for services from the insured-client is equally problematic. Insureds may be financially unable to pay for the cost of a deposition or other legal task for which the insurer refuses to pay. Insureds have paid insurance premiums which should offset some costs of legal representation. Texas Supreme Court Justice Gonzalez addressed the representation issue when he stated,

---

<sup>140</sup> *Id.*

<sup>141</sup> West Virginia Lawyer Disciplinary Bd., L.E.I. 99-02 (1999).

<sup>142</sup> *Id.*

<sup>143</sup> Alabama Ethics Op. RO-98-02 (1998); Florida Ethics Op. 97-1 (1997); Illinois State Bar Ass’n, Advisory Op. on Prof’l Conduct 98-08 (1998); Indiana State Bar Op. 3 (1998); Wisconsin State Bar Prof’l Ethics Comm., Ethics Op. E-99-1 (1999).

Whether insureds are getting the value and the level of representation they are paying for deserves serious, thorough study. I do not mean to imply that all insureds are entitled to a "Cadillac" defense when all they paid for is a "Chevrolet." My concern, however, is that because of recent market changes in insurance defense practice, some insureds who have paid for a "Chevrolet" defense are getting a "Yugo" defense.<sup>144</sup>

Other states have proposed that attorneys withdraw from representation if a situation presents itself where the attorney cannot ethically abide by billing or litigation management guidelines.<sup>145</sup> Unfortunately, proposing withdrawal is easier said than done, given that most withdrawals must be approved by the court. A more feasible alternative would require lawyers to negotiate with insurance companies over the application of litigation management and billing guidelines where compliance would mean breaching the ethics rules. In these situations, attorneys may seek a modification of the guidelines. However, if an agreement cannot be reached, attorneys still face the possibility of withdrawal from representation.

## IX. CONCLUSION

Billing and litigation management guidelines will continue to be a source of dispute and scholarly debate. Insurers' cost-cutting techniques put the insureds' defenses at several disadvantages. In deterring beneficial legal services, billing restrictions reduce the effectiveness of the defense. Also, mandating the use of outside auditors could jeopardize the confidentiality of client information. Third-party review has the potential to waive the attorney-client privilege and work product doctrine. The most troubling aspect of the situation is that frequently insureds have no idea about what billing or litigation management guidelines control their representation. Damage is being done without the consent or knowledge of a majority of insureds. In summary, billing and litigation management guidelines which interfere with the independent professional judgment of attorneys and require disclosures of confidential client information inherently violate the *Model Rules of Professional Conduct*.

Attorneys should become familiar with the applicable ethics opinions in the state in which they practice. If defense lawyers abide by the restrictions and directives set out by insurers, they must still practice within the parameters of the applicable ethics rules. Difficulties in resolving the two will no doubt abound, but the attorney's first duty is to perform his or her duties in a manner

---

<sup>144</sup> State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 634 (Tex. 1998).

<sup>145</sup> See *supra* note 143.

that complies with the ethical obligations laid down by the state governing board. As succinctly stated by Justice Reid of the Supreme Court of Tennessee,

The loyalty and independent judgment required by the Code are absolute. They are essential to the integrity and accountability of the profession and the legal system. If the cost of legal representation is burdensome, . . . the profession must look to reforms which do not threaten the foundation of the profession and the system of justice.<sup>146</sup>

*Amy S. Moats\**

---

<sup>146</sup> *In re Youngblood*, 895 S.W.2d 322, 329 (Tenn. 1995).

\* J.D. Candidate, West Virginia University College of Law, May 2003; B.A., Political Science, West Virginia University, 2000. The author would like to thank her parents, Tom and Anita, for their love and support. Special thanks to my family and friends for their unceasing encouragement over the last three years.

