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The Marriage of Insurers and Defense Counsel: Renewal of Vows or Trial Separation?

by Mitch Orpett

"Things aren't what they used to be." (Common tag line)

Among lawyers who litigate for and on behalf of insurance companies and their insureds there is is not merely a wistful or nostalgic yearning for the simpler days. Rather, in the past several years an ever increasing number of defense counsel have protested a number of insurance company practices which impact the insurer-counsel relationship, practices which many contend have precipitated a dramatic erosion in that relationship. Foremost among the issues fueling recent debates are insurers use of outside companies to monitor legal bills and the use of litigation "guidelines" to control the manner and cost of the work performed by outside counsel.

The American Bar Association Tort & Insurance Practice Section (TIPS) has grown increasingly concerned about these controversies and what some consider to be a state of open warfare between these erstwhile business partners. TIPS has launched an initiative designed to bring the insurance industry and defense bar associations together and to rediscover the common ground and mutual interests that exist between companies and outside counsel. It has held a series of meetings with insurance industry trade associations, bar associations and other involved companies and firms to discuss how the relationship can be salvaged and improved. By opening up these lines of communication, TIPS hopes to reconcile the partners in what demonstrates all the symptoms of a strained marriage that is nonetheless worth saving.

Insurers use outside auditors to monitor attorney fees and invoices in order to help control costs and to outsource a labor-intensive process that had typically taken the time of claims professionals. To many attorneys, however, this practice poses an irreconcilable conflict with their clients' interests by breaching the confidentiality of the attorneys' work and the protections afforded by the attorney-client privilege. Several states have issued ethics opinions that largely support the attorneys' arguments.

A series of ethical and practice questions arise for the counsel in this controversy. What is an attorney to do in light of these ethical concerns when confronted by the directive of the company retaining his or her services to send bills to an outside auditor? What liabilities might that lawyer encounter in the event that invoices are indeed sent to an entity other than the insurer? Does the

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September 6-8, 2000
Fall National Legal Malpractice Conference
Loews Ventana Resort
Tucson

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Marriage of Insurers

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insured then have a cause of action against the attorney for breaching confidences? Can the lawyer properly obtain "informed consent" to this practice from the insured? If so, what details about the insurer-outside counsel relationship must be revealed? These and similar questions are currently unanswered, but are of vital importance to any lawyer practicing in the tripartite relationship.

Insurers' use of litigation guidelines has also come under attack for what some consider an improper infringement on independent professional judgment. Some argue that the lawyer retained by an insurer to represent an insured owes his or her duty to the insured above all others, and, therefore, that lawyer must be able to exercise independent professional judgment in the insured's behalf. What then is the attorney to do if the insurer's guidelines limit the number of depositions that may be taken in any given case? What if the claims professional refuses to authorize the retention of an expert consultant or witness whom the lawyer believes is crucial to the insured's case? Again, what liabilities does a lawyer face when following the dictates of litigation guidelines if contrary to his or her reasoned view of what legal work is needed?

Insurers also have legitimate and important questions. Not every attempt to control costs or improve the claims-handling process is an improper infringement on attorneys. Some companies' belief that defense counsel have long abused the trust placed in them is undoubtedly justified at some level. In any event, these issues must be addressed and lawyers and companies alike should be very concerned.

With the cooperation and participation of the leadership of the insurance industry and the defense bar, TIPS has begun to douse the rhetoric of conflict and started us on the road back to the days of peaceful and mutually beneficial relationships between insurers and their outside counsel. If you would like to join in this important and ongoing endeavor, please contact me at the address listed below.

Mitch Orpett is the chair-elect of the ABA Tort & Insurance Practice Section and its liaison to the ABA Standing Committee on Lawyers' Professional Liability. He may be reached at maorpett@tribler.com

Editor's Note: Comments on this issue can also be sent to jnosbisch@staff.abanet.org *for forwarding to TIPS.*

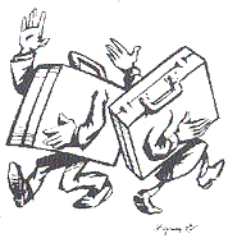
Comings, Goings and Rare Stayings

by G. Michael Bourgeois

The world of insurance has entered, according to one wag who follows such items, the 15th year of the typical three year cycle. Business cycles don't quite fit into the "new economy" and this has made it most difficult on an industry that used the three-year business cycle to smooth out difficult pricing and coverage issues – at least until 1986. About 1992, I first saw a cartoon on an underwriter's desk which said, in bold letter: "Dear God, send me just one more hard market and I promise you I won't mess it up." As we all know, both the sentiment of the cartoon and the substance of the prayer have gone unanswered.

How does this affect the women and men who manage the LPL business? It's put additional pressures on their performance. The same strong leaders, though, have faced up to demands from new underwriters and the already tested older ones.

At Reliance National, Lucille Sgaglione has ascended to senior management at this 14-year mainstay of the LPL market and is the claims officer in charge of all its E&O claims. Vincent Vitiello has been promoted to Vice President and succeeds Lucille as the head of LPL claims. Robyn Golden remains in charge of underwriting.



Fred Fontein and Jim O'Brien spent many profitable years at Westport. But their act became storied and TIG lured them away to build up its LPL business. Fred is now in charge of E&O underwriting at TIG and Jim is in charge of all E&O claims there.

Interstate Insurance Company has asked Lorrie Vick to expand her management capability and Lorrie now is the officer in charge of medical malpractice claims there. Todd Hogan has assumed part of Lorrie's past portfolio supervising the Company's defense panel.

Jeff Bossart, formerly the officer in charge of LPL claims at CNA-PRO, was enticed to assume the senior management position in charge of E&O claims at Kemper, a new writer in the LPL market. Don Allard, formerly of Great American, is the new underwriter there.

Jim Curwood has returned to his former haunt of overseeing all LPL claims in New York and New England. Jim and I fall into the "old dogs and new tricks" category. Glen Olson, formerly a partner at Long & Levit, now oversees LPL claims nationwide for CNA-PRO. He joins another Long & Levit alum, Chris Borgeson, in the daunting task of imposing intelligence on chaos in the E&O claims arena. Chris DePuy remains the lead underwriter for LPL business ably assisted by Sam Slome.

Liberty International Underwriters, a Division of Liberty Mutual, has started up an E&O facility in New York City. Dan Vaughn, formerly of Tamarack American, is the new LPL underwriter there; he works with Nick Conca, formerly of Reliance National, who heads up the E&O claims operation.

And some just do the same good job day in and day out. Damiano Servidio remains as the officer in charge of LPL claims at Zurich American where John Soughan heads up the underwriting. Vince Biancomanno still oversees LPL claims at AIG.

Unbundling of Legal Services: A Model for Limited Legal Representation

by William B. McGuire and Marianne M. DeMarco

Traditionally, attorneys have provided legal services to clients through a "full service representation" model. Under this model, an attorney is responsible for all aspects of a matter including rendering advice, undertaking factual investigation, negotiating, performing research and discovery, preparing correspondence, drafting pleadings and other documents and appearing in court. Such legal representation, however, only serves clients who are willing and able to pay attorneys to perform such varied and broad services.

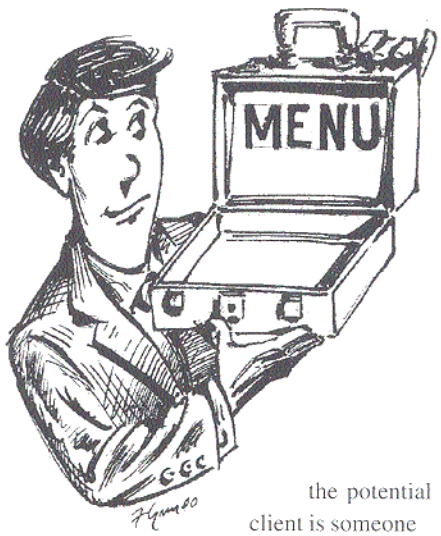
Both the desire of clients to obtain affordable legal services, and the recognition in the legal profession that the relationship between attorneys and clients is changing, have prompted the adoption of an alternative model for the rendering of legal services known as "unbundling." "Unbundling," also known as "limited service representation" or "discrete task representation," is based on a team approach in which the client chooses tasks, drawn from a menu of available legal services, which the attorney is retained specifically to perform.

For example, an attorney rendering "unbundled" services may be retained only to render legal advice to a client, conduct research to assist a pro se client, or draft pleadings or other papers to be filed with the court.

Because the rendering of "unbundled" legal services differs from the traditional full service representation model, attorneys may have concerns about their potential liability to clients for whom they provide limited representation. Attorneys choosing to become involved in "unbundling" can avoid potential pitfalls by adopting certain practices addressed to limited scope representation.

An attorney who intends to offer an "unbundled" legal service to a potential client should determine, as a preliminary matter, whether that individual has the capacity to carry out the remaining legal work, alone. This determination may involve not only issues of mental capacity but emotional and physical capacity, as well. Additionally, the attorney should be convinced that the potential client is an individual who he or she can closely work with and who fully understands, and will abide by, the terms of the limited representation.

Even when a determination is made that



the potential client is someone for whom "unbundled" legal services could be rendered, the attorney additionally should consider whether the legal matter, presented by that client, is one which lends itself to an attorney's limited involvement. For example, an attorney should consider whether the representation could be broken down into discrete tasks that can be divided, in some manner, between attorney and client. Also to be considered is whether any complex legal issues have been or will be raised and what time constraints are presented.

Potential future liability, also can be avoided by an attorney's preparation of a carefully drafted engagement agreement which:

- memorializes the scope of the legal services to be rendered;
- specifies what will and **will not** be done by the attorney; and
- reflects the fact that the client has been adequately apprised of the limited nature of the retention, as well as the legal services to be performed by the attorney, and has given his or her informed consent to same.

It is best to have the potential client review the engagement letter and return it, in an executed form, after careful consideration.

Once an attorney begins working on "unbundled" legal services, he or she should ensure that potential conflicts are checked, lines of communication with the client are kept open and the file is properly documented with evidence of such communications, and the work which has been undertaken and any absence of cooperation on the client's part.

Finally, once an attorney has completed the limited work which he or she was retained to perform, a disengagement letter should be written promptly to the client which:

- specifies the "unbundled" legal services which have been completed,
- identifies the remaining work which needs to be accomplished to achieve the client's goal, and
- emphasizes the consequences if the remaining work is not done in a **timely** fashion.

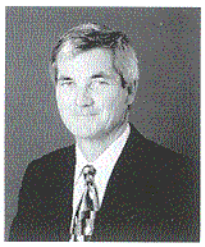
Although "unbundling" may be a legal service model that is unfamiliar to some, it is one that is likely to be more broadly accepted as attorneys seek alternative means to provide representation to the public.

William B. McGuire and Marianne M. DeMarco are partners at Tompkins, McGuire & Wachenfeld in Newark, New Jersey.

LPL Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

Message From the Chair

Welcome to New York! The Spring Conference promises to be an outstanding educational program under the leadership of George Kryder. The program has something for all of our members, claims professionals, claims executives, and defense counsel. You will also have the opportunity to network and socialize with your peers. We attempt to balance the educational activities with the necessary networking that we all look forward to at these meetings.



Your committee has accomplished great things this last year with the help of many of you. Our Spring Program the "Trial of a Legal Malpractice Action" in New Orleans this past month was excellent. Ed Mendrzycki organized an outstanding program. All of us were fascinated by the jury's deliberation and its fixation on the Rules of Professional Conduct. We should make this a regular event for the committee.

We are pleased to announce the winner of the Levit essay contest, Kevin D Hartzell from the Kutak Rock law firm. Our subcommittee designed a unique writing exercise requiring the contestants to assume the role of a judge in deciding the issue of whether an excess carrier can receive an assignment of a potential claim against the attorney for the defendant and whether the excess carrier can pursue the attorney on an equitable subrogation theory. Congratulations Kevin and please welcome him to our conference.

Our publications are a great hit. The new revised *Lawyer's Desk Guide to Preventing Legal Malpractice* is now available for sale and is a great success. Our next project will be the regular publication of the Legal Malpractice Data so that we all can utilize this publication in our loss prevention activities.

Stop us in the hall and tell us what you think. We listen to you more than you know.

—Joseph P. McMonigle

Kutak Rock Associate Wins 2000 Levit Essay Contest

Kevin D. Hartzell an associate at Kutak Rock LLP, Omaha Nebraska is the winner of the 2000 Levit Essay Competition. The award is named for the late Bert W. Levit, distinguished co-founder of the San Francisco law firm of Long & Levit LLP.

This year's competition placed the contestants as a judge on the trial court bench in a state court system. The writing submission was the majority opinion for the two-judge majority in a three judge court ruling on a motion for summary judgement.

Kevin is the third winner of the Levit Essay Contest and he receives a cash prize of $5,000 and an all-expense paid trip to the Spring 2000 National Legal Malpractice Conference in New York City.

The award competition, open to law students and young lawyers, is co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and San Francisco firm of Long & Levit LLP.

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Lawyers' Professional Liability
American Bar Association
541 North Fairbanks Court
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