Spencer M. Taylor
Balch and Bingham LLP
1901 Sixth Avenue North
Birmingham, Alabama 35203
staylor@balch.com

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THE RISE OF ATTORNEY MISTAKES IN LEGAL MALPRACTICE CLAIMS – BALANCING INSURER COST-CUTTING AND BILLING GUIDELINES WITH THE LAWYER'S DUTIES OF COMPETENCE AND DILIGENCE

Over twenty years ago, insurers introduced litigation and billing guidelines into the tri-partite relationship, seeking to control costs of litigation by specifying the legal services the attorney may provide to defend a case. Almost immediately, a debate ensued over the implications of these guidelines on the lawyer's professional responsibility requirements—including, particularly, counsel's ethical obligation to exercise independent judgment in representing a client. *See* Model Rule of Prof'l Conduct Rule 2.1 (Am. Bar. Ass'n 2016) ("In representing a client, a lawyer shall exercise independent professional judgment"). Despite many state bar and court rulings corroborating that insurer guidelines shall not be allowed to interfere with the lawyer's independent professional judgment, now, in 2017, litigation and billing guidelines are commonplace. Independent auditors employed by insurers review and kick-back legal bills that fail to conform to these guidelines.[1] The issue remains the same--if insurers impose restrictive, cost-cutting guidelines on their insured's attorneys, limiting their time and resources, the likelihood increases that their insured will be potentially liable for some or all of the judgment. One author referred to

[1] The issue whether insurers may properly submit legal bills to outside auditors without waiver of the attorney-client privilege is not discussed in this article, but certain courts and states have questioned or limited this practice. *See* In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures: Urgin, Alexander, Zadick & Higgins and James, Gray Bronson & Swanberg, 2000 MT 110 (Mont. 2000).

this situation as insurers "playing Russian roulette, with the barrel of the gun pointed at the policyholder's head."[2] But as discussed in this article, in this game of roulette the lawyers are the ones getting caught in the cross-hairs.

This article explores the effect these guidelines and other post-Great Recession cost-cutting measures may be having on attorneys trying to meet ever increasing client demands with fewer resources. It explores how client cost-cutting measures may be contributing to attorney malpractice claims and interfering with the lawyer's basic duties of competence and diligence. Finally, it concludes that attorneys must slow down, hold dearly to their independent professional judgment, and "do the due" for their clients regardless of whether a billing auditor says the work was not required.

The Problem – Cost-Cutting Measures

Insurers and now many corporate clients impose billing guidelines on their defense counsel and require outside review of the legal bills by third-party auditors. These auditors kick-back the bills or refuse to pay them when they do not conform to a specific guideline. Often the refusals are highly subjective—that a bill is too vague or ambiguous or involved duplicative, redundant or excessive work. Billing guidelines commonly provide the insurer will pay for only one attorney to attend a deposition or hearings or for only one attorney's time to participate in an inter-office conference. Lawyers lament this guideline especially, as often these brainstorming sessions result in the case winning strategy. This limitation also reduces any incentive for activities that might be considered training younger lawyers, even when their participation at a hearing is necessary because

[2] Robert D. Chesler, Lynda A. Bennett, & Christopher D. Hopkins, *An Insurer's Obligation to Provide a Quality Defense: An Analysis of Insurer Litigation Guidelines*, 13 ENVIRONMENTAL CLAIMS J. 5 (2001). Legal scholars long have debated the insurer's right to control its insured's defense and the relationship between attorneys, their clients, and the insurance companies paying the attorneys in defending legal actions potentially covered by liability insurance. *See* David A. Hyman, *Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353 n.4 (1997) for a list of articles exploring the tripartite relationship.

they are versed in the details of the case. In terms of strategy and associate development, it is comparable to refusing to compensate Nick Saban for a meeting with his offensive or defensive coordinator, or paying only one of them.[3]

Other prohibitions prevent reimbursement for electronic legal research or lawyers performing administrative tasks such as calendaring. The insurer's refusal to pay an attorney's time to calendar deadlines (referred to as an "administrative" function) is particularly interesting. As discussed below, missed deadlines are forming a growing percentage of litigation loss reserves in malpractice claims. Although attorneys keeping their own calendars is not valued by insurers or auditors, the risk and consequence of a calendaring error (and resulting cost to the client or attorney) is severe.

Since the Great Recession of 2008—law firms report increased pricing pressure from their clients.[4] According to a report released by the Center for the Study of the Legal Profession at the Georgetown University Law Center and Thomson Reuters' Peer Monitor, client insistence on predictable and manageable bills presents one of the most significant challenges to lawyers today.[5] These insurer pressures flow downhill to the coverage attorney. Many coverage attorneys representing insurers will have experienced this scenario or one very similar:

> Client insurer calls to request its Alabama coverage attorney to spend "an hour or so" reviewing an opinion letter prepared by its Louisiana coverage attorney concerning a tort claim pending in Louisiana and a policy issued to the insured in Alabama. The attorney is asked to confirm the opinions are consistent with Alabama law. No policy, much less a certified copy of the policy, is offered or provided. It is clear from the call the client insurer's expectation is a quick sign-off, with little, if any, independent research.

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[3] Such a rule would be void *ab initio* and as against public policy in Alabama.

[4] Neil Gluckman, *10 Years Out, Report Says Recessions Impact on Firms is Clear*, The American Lawyer (Jan. 12, 2017).

[5] *Id.*

Even in assignments where a certified policy is presented, clients often have unreasonable expectations of the time necessary to dig into the nuances of a coverage question, creating an environment that coerces less thoughtful review. The lawyer performing a coverage analysis feels the simultaneous pressure of providing first–rate analysis and advice in less time.

In addition to billing guidelines, insured defense attorneys describe greater scrutiny over matters historically within their discretion, such as the number of depositions taken in defense of the insured's case. Even when work is authorized, it is not uncommon for the insurer's auditor to reduce its reimbursement based on a determination that the assignment took longer than should have been required.

The Effect – the Rise of Legal Malpractice Claims Attributable to Attorney Mistakes

Given a client environment that seems hostile to paying for lawyers to focus on their deadlines, develop associates, or dig into the books for mastery of a legal issue, it is no surprise that malpractice insurers have been forced to steadily allocate a growing amount of their reserves to claims involving attorney mistakes, especially following the economic recession. The end result of these various restrictions is exactly what Chesler and others were concerned about. Lawyers are finding themselves more often in taxing circumstances.[6]

As reported by the Attorneys' Liability Assurance Society ("ALAS") at its Spring 2017 loss prevention conference,[7] attorney mistakes are now the number one cause of loss for reported claims against ALAS member firms. Drafting errors, incorrect advice, failures to advise, missed deadlines, and other discrete errors have become the forerunner of claims and insurer reserves, taking the lead over conflicts of interest and other causes traditionally associated with legal malpractice claims.

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[6] *See* Chesler, *supra* note 2, at 5-6.

[7] ALAS is the country's largest lawyer owned professional malpractice carrier insuring more than 200 law firms with over 61,000 lawyers located around the world.

For example, in litigation matters, mistake claims led ALAS loss reserves for the period 2011 to 2016.[8] Faster pace of law practice, 24/7 accessibility, technology, cost-cutting, and lawyers' managing their practice from out of the office are identified as just a few possible culprits contributing to these issues.

The Solution – the Return to Professional Responsibility

This article is not meant to whine or suggest a universal prohibition against billing guidelines (that ship has sailed), but these observations and the rise of malpractice claims should prompt consideration of how cost-cutting measures may be impacting the lawyer's duties of competence (Model Rule 1.1) and diligence (Model Rule 1.3).

Rule 1.1, appropriately the first rule of Professional Conduct, requires the attorney's competent representation of a client. It provides:

> Client-Lawyer Relationship
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> Rule 1.1 Competence
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> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[9]

The Comments to the Model Rule emphasize the lawyer's legal knowledge, skill, and experience necessary to handle a matter, as well as thoroughness and preparation:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. *It also includes adequate*

[8] The size of claims likewise is on the rise. Ames & Gough annually publishes surveys of trends amongst insurance companies that write Lawyer's Professional Liability insurance. The results vary year-to-year, but typically, the companies that respond to the survey cover around 80% of the AM Law 100 firms and over 40% of the AM Law 100 and NLJ 250 firms. In the last five years, Ames & Gough reports an increase in the severity of claims, with six of the nine insurers surveyed paying claims of $20 million or more, three paying $50 million or more, and one paying over $100 million. *Lawyer's Professional Liability Claims Trends: 2015*, Ames & Gough (2016), available by emailing requests to: info@amesgough.com. Additionally, two thirds of the insurers surveyed reported increases in the number of claims with reserves in excess of $500,000 in recent years.

[9] MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2016).

> *preparation.* The *required attention and preparation* are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Comments to Model Rule 1.1 (emphasis added). Attention and preparation, guided by what is at stake in a matter and its level of complexity, are counter to "off the cuff" advice. The coverage lawyer presented with the "quick look at coverage" scenario above must consider whether a "quick look" is enough. At a minimum, the assignment may warrant a call to the primary coverage attorney to determine the nature of the matter, the exposure it presents, and any other observations by the primary attorney. There is little to be gained by a 2-3 hour coverage review in a high-exposure matter for a client unwilling to provide a copy of the policy. Also, as a recent addition to the Comments to Rule 1.1, lawyers now must keep abreast of "the benefits and risks associated with relevant technology."

Another Model Rule seemingly at odds with insurer guidelines and audit policies is Rule 1.3, which addresses the coverage attorney's required diligence. It provides:

> Rule 1.3 Diligence
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> A lawyer shall act with reasonable diligence and promptness in representing a client.[10]

The Comments to Rule 1.3 include this interesting observation:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or *personal inconvenience to the lawyer*, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

Comments to Model Rule 1.1 (emphasis added). When entering the practice of law twenty years ago, advice given to the author by a prominent lawyer was to be sure to return phone calls from

[10] MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR. ASS'N 2016).

clients. Today, phone calls during office hours have been surpassed by the 24/7 inundation of email. Personal inconvenience is part of the attorney job description in 2017.

In addition, the Comments to Rule 1.1 provide the "lawyer's work load must be controlled so that each matter can be handled competently." Further, "a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued." As discussed earlier, many early state bar opinions expressed that insurer billing guidelines may not unnecessarily restrict the lawyer's authority to exercise independent professional judgment. *See* Model Rule of Prof'l Conduct Rule 2.1 (Am. Bar. Ass'n 2016); *see* Alabama State Bar Formal Opinion 1998-02 ("It is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer's independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect"). Even if only on a case-by-case basis, lawyers have firm ground to push back on guidelines or their application, especially in complex legal matters, where the lawyer in his or her professional judgment believes work is necessary to the defense of the case.

In addition to the lawyer's authority to exercise professional discretion and his or her duty to exercise independent judgment, Rules 5.1, 5.2, and 5.3 address the responsibilities of partners, subordinate lawyers, and concerning non-lawyer assistants, including responsibilities that the partner employ measures to assure his or her associates and non-lawyer assistants' conduct is compatible with the professional obligations of the lawyer. The Comments to Model Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance") recognize that lawyers may use non-lawyers outside the firm, such as "hiring a document management company to create and maintain a database for complex litigation." This trend has increased as lawyers (and clients) turn to third-

party service providers to assist with management of electronically stored information. Notably, the Comments to Rule 5.3 reference Model Rules 1.1 (competence), 1.2 (allocation of authority), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), among others, demonstrating that increased outsourcing associated with insurer or client cost management efforts multiply the attorney's obligation to be professionally responsible, but also to assure the professional responsibility of the attorney's employees and third-party vendors.

Conclusion

The Rules of Professional Conduct require thoroughness, adequate preparation, attention, communication, care, and prudent management, qualities arguably inconsistent with today's client cost-cutting measures. These rules apply in spite of cost containment pressures and attorney billing guidelines that, in many respects, discourage work that would tend to reduce attorney mistakes. Lawyers should, as appropriate, push back on unreasonable guidelines and the application of them, particularly to the extent they interfere with the attorney mandates of competence, diligence, and independent professional judgment. But in any case, the coverage lawyer must persist in taking the time and steps reasonably necessary to perform an analysis or manage a case, regardless of billing guidelines or client practices that may deny compensation. As the trends in professional liability insurance support, it is the lawyers, ultimately, who will pay the price one way or the other.