

## **Avoid This Underinsured Motorist Malpractice Trap**

*by Pete Gullett*

Your client is badly hurt by a careless driver. You file suit. Careless driver's insurer certifies his liability limits are \$25,000 and makes an offer of that amount. You check and learn that your client has underinsured motorist coverage of \$100,000. The injuries are sufficient to justify the entire amount.

Happy days. Few situations are more pleasing than a payday in hand with more to come. Beware, however, of the statutory hurdle you must clear before accepting the first part of the settlement. Before accepting settlement the injured party or injured party's representative must give notice of the proposed settlement to the underinsured motorist carrier. K.R.S. 304.39-320 requires written notice sent by registered or certified mail. The underinsured motorist carrier then has 30 days either to substitute payment, preserving its subrogation rights against careless driver, or to allow you to release careless driver and accept the proposed settlement.

Only by complying with this statute do you preserve your client's right to proceed against the underinsured carrier. If you do not do so, the underinsured motorist carrier likely will take the position that it has no duty to pay your client. Careless driver has received a full release and has no legal duty to respond further in damages.

K.R.S. 304.39-320 codifies the procedure first established in *Coots v. Allstate Insurance Company*, Ky., 853 S.W. 2d 895 (1993). Although it is irritating to give notice and wait 30 days, you may cost your clients all of their underinsured benefits by not carefully following this statute. Your clients will then look to you.

## **The Hot Potato Client**

An Iowa lawyer got suspended from practice for violating the Hot Potato Client rule. He was representing a client in a bankruptcy action at the time he accepted the defense of a new client involved in an automobile accident. Turns out that the plaintiff in this personal injury case was his bankruptcy client. The lawyer claimed that he did not realize this until after he had begun representing the second client. As there was only a little more to do to finish the bankruptcy action he unilaterally withdrew from representation. The lawyer said he believed the bankruptcy client could complete the bankruptcy on his own. Eureka ! By withdrawing the lawyer converted the bankruptcy client to a former client. Since there was no substantial relationship between the bankruptcy action and the personal injury case, no more conflict of interest - and the billing is good! (See Ky. RPC 1.9 Conflict of Interest: Former Client; *Concurrent Conflict, Unilateral Withdrawal Yield Two-Month Suspension for Iowa Lawyer*, Current Reports p.470, Vol. 15, No. 18, 9/29/99, ABA/BNA Lawyers' Manual On Professional Conduct.)

Unfortunately, the Iowa lawyer was unaware of the rule that you don't cure a conflict of interest by dropping a current client like a hot potato to accept a new client with a more lucrative matter. One ethics expert explanation of the rule is:

"The most obvious problem is a moral one: the lawyer's motivation is patently base and disloyal to the abandoned client. Courts, obviously motivated by concern over the lawyer's disloyalty, have spoken with one voice. The now widely accepted rule is that a lawyer who withdraws – whether otherwise in conformity with the lawyer code or rules or not – from representing a current client for the purpose of proceeding adversely to the client on behalf of another client does not thereby convert the representation into that of a former client." (*footnotes omitted*) (Wolfram, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677, 708(1998))

When a lawyer accepts a client there is a fiduciary obligation of loyalty to complete the work if at all possible. Withdrawal is appropriate only for compelling professional reasons. Fee optimization doesn't meet the test. If you inadvertently find yourself representing two clients resulting in an unconsented conflict of interest, your professional responsibility requires withdrawal from both representations. If you violate the Hot Potato Client rule, you risk a malpractice suit in addition to a conflict of interest disciplinary action. A lawyer's worst nightmare is a conflict of interest malpractice suit. The plaintiff stresses the lawyer's betrayal and the jury will do the rest.

### **Risk Managing A Firm Merger**

When law firms consider merging the primary effort usually focuses on financial and practice issues: How well do the two firms match up in expertise, client base, referral business, geographical reach, and assets? How will the new firm be organized and managed? What will it be named and where will it be located? How should compensation, retirement, and withdrawal plans be structured?

What can happen under the press of these critical concerns is that risk management of the merger process gets lost in the shuffle. Review of ethical considerations, malpractice exposure, and professional liability insurance coverage are just as important as any other merger issues. They must be thoroughly evaluated prior to merger.

The ABA/BNA Lawyers' Manual On Professional Conduct recently published an excellent short analysis on firm mergers that focuses on merger ethical considerations (*Merger of Law Firms* at 91:901, 7/21/99). Client confidentiality and conflicts of interest are the major ethical concerns when merging. The Manual covers them in the context of pre-merger, post-merger, resolving conflicts, and screening issues. While confidentiality of information issues can arise in several ways, confidentiality is most often the cause of a conflict of interest between clients of the firms considering merger. The Manual recommends using these questions to identify and resolve merger conflicts:

- Is a current client of one firm suing a current client of the other firm?
- Is a current client of one firm engaged in litigation with a person or entity related to or affiliated with a client of the other firm?

- Is a current client of one firm adverse to a client of the other firm in a matter, even if not yet involved in litigation?
- Is it necessary to advocate a legal position on one client's behalf that is at odds with the position to be taken on another client's behalf?
- Is a current client of one firm engaged in a negotiation or transaction with a current client of the other firm?
- Will a current client of one firm receive limited representation because of responsibilities to a current client of the other firm?
- Is a current client of one firm adverse to a former client of the other firm in a matter substantially related to the former representation?
- Is a current client of one firm adverse to a former client of the other firm in an unrelated matter about which the other firm has confidential client information that could be useful in the litigation?
- Will any lawyer's own interests limit the representation of a client of the other firm?"(ABA/BNA Lawyers' Manual On Professional Conduct, *Merger of Law Firms* 91:901 at 904)

In addition to an ethics review a careful review of each firm's risk management program and malpractice claims history is essential. Are there open claims? Are there claims that have not been reported to the professional liability insurer? Going forward, how will the merged firm be insured for professional liability? How much coverage and what deductible is appropriate for the merged firm? What is the risk management program for the merged firm? What work control and conflict check procedures will be followed? Are computer systems and data bases susceptible to smooth integration to avoid start up glitches that lead to missed deadlines?

You get the idea – there is a lot of detail to parse through to avoid gaps in insurance coverage and practice foul-ups for the newly merged firm. Longer term a comprehensive risk management program is essential. The new firm is bigger with a more players. The exposure to malpractice risk rises in geometrical proportion the larger a firm gets. Lawyers Mutual stands ready to help when the urge to merge hits you. Give us a call!