Negotiating *Cumis* Rates and Billing the Insurer

By Elizabeth Brekhus

Most attorneys know that the first thing you do when handling a third party lawsuit for which there may be insurance coverage is tender the matter to the insurance company, and evaluate the client's right to coverage and *Cumis* counsel. The more complicated issues are determining the rate you are entitled to receive as *Cumis* counsel and deciding what billing practices are not in the client's best interest. (The term "*Cumis* counsel" comes from *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.* (1984) 162 Cal.App.3d 358 codified at Cal. Civil Code Section 2860.)

When I first started practicing law in Marin, one of our clients was an insurance company, and about one-third of my practice was dedicated to defending homeowners in disputes covered under a typical homeowner's insurance policy, such as trespass, nuisance and general negligence actions, as well as the occasional defamation case. Even back then, the insurance industry was paying a "below-market" rate to its insurance defense attorneys, notwithstanding its obligation to pay "market rate." Still, we accepted the work because they were generally interesting cases and the clients often went on to use us in other matters.

However once the company hired, as many did and some still do, an outside audit firm to "audit" our bills, we spent almost as much time trying to comply with the billing "guidelines" and writing and campaigning the audit firm to obtain reimbursement of our bills as we did working on the client's case. That's when I started really disliking insurance companies.

Examples of these billing "guidelines" include the rule that the attorney could not bill for more than one hour on a research task unless the attorney had prior authorization to do so. The insurance company implemented this rule by having us draft a "case plan" within 30 days of being assigned the case. Therein, we were required to advise on any legal research over an hour, and if we failed to advise the insurer, it balk at a bill for research in excess of the time identified at the outset of the case.

Of course, it is often hard to predict how much time it will take to research a matter because when you have not done the research, and you do not know if it is a simple research project

or one that requires more work. In theory, I could have called the adjuster 59 minutes into the research project and requested additional time but in reality, legal questions arise suddenly and you need the answer right away. The rule was frequently invoked and, from my standpoint, it appeared designed to prevent the attorney from handling the case in the manner that best advanced the client's case.

There was another rule that allowed the company to knock down time billed if it deemed that the task could have been performed by a paralegal or was clerical work. This was a frequently raised objection; the audit firm seemed to think the case could be handled entirely by a small army working in the attorney's office. Of course, if there was any time billed for an office conference or to review a memo from staff or review of the file, that time was also objectionable. We were left wondering how the audit firm thought the attorney was supposed to keep abreast of the litigation that was being handled by others.

Then there was the rule that every single task had to be described and billed separately. This of course was important because it enabled the audit firm to refuse to pay the bill if it decided the time spent on the particular task was too much.

Yet another rule required only one attorney in the firm to handle every matter. We sent letters back and forth to the audit firm explaining why we could not be in two court rooms, in two different counties, at the same time.

Finally, we had enough and told the insurance company to find some other firm to bicker with over fees and billing. Our contact with insurance companies is now limited to tendering matters, sometimes serving as *Cumis* counsel, and suing them for bad faith.

Recently, in a matter we were handling as *Cumis* counsel, we received a letter from a certain insurance company purporting to explain certain "billing practices" we were expected to follow and noting our obligation to "cooperate" with the insurer. The company further advised that we were to "come to an agreement" on a budget for handling the litigation. The company had rules about more than one attorney working on the matter, rules about segregating out tasks for billing purposes, rules about the handling of "routine matters," and rules about its willingness to pay "routine office expenses." Sound familiar?

In addition, the company advised that it would be paying us

half of what our regular hourly rate is, on the grounds that the insurer normally pays such rates to attorneys handling similar matters. Cal. Civil Code Section 2860(c).

If you get one of these letters, do not waive the white flag and do not agree to the practices the insurer is advocating. First, insist that the insurer prove, in writing, that the *highest rate* it pays panel attorneys, in the community where the claim arose or is being defended, is the amount it claims you should accept. If the insurer has in-house or panel counsel associating in on the case or coverage counsel, we often request disclosure of the rate that attorney is being paid. In addition, we argue that "in this local" means Marin County, or a comparable location, such as San Francisco or Oakland and not Sonoma or Lake County where the normal rates charged by attorneys, and firm overhead, are dramatically less than in Marin County. And, if the case is more complicated than a typical case of the same nature, point that out and argue that the rate should reflect the complexity of the case.

In a case handled in 2004, we succeeded in getting the insurer to pay $165 an hour, in a run of the mill trespass/easement case, instead of the $150 rate the insurer initially offered. The going rate in such cases may be even more now. (And note, there is no prohibition against requiring your client to pay you the difference between the *Cumis* rate and the rate you normally charge.)

Second, advise the insurer that there is no statutory or contractual right to insist on compliance with the insurer's billing practice, if it is onerous or arbitrary. Also advise that you will not comply with the billing practice to the extent it attempts to impede your independent judgment about how best to represent the insured. For example, requiring the attorney to have a paralegal perform all or even most of the discovery in the case is not advisable or acceptable, in most cases. There is some legal support for this position; we cite to and provide the insurer with a copy of the decision in *Dynamic Concepts, Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999, ft. 9 disapproving this practice.

Third, refuse to accept the insurer's definition of "routine office expenses." We have advised the insurer that we will bill for postage, couriers, and facsimiles. The fact that the insurer may insist that panel attorneys it hires absorb these expenses, as a condition of employment, does not obligate you to absorb these expenses. After all, it is not reasonable to insist that

the insured choose *Cumis* counsel who will agree not to bill for these expenses given that most law firms do bill for these expenses.

Fourth, we agree to comply with the request to provide a budget plan but advise the insurer, outright, that we do not agree that the budget plan will control when and if the case requires services in excess of the amount budgeted. We also point out that the budget plan is not "an agreement" between our firm and the insurer, as the carrier will attempt to call it. Our only agreement is to competently and zealously represent the insured and, as the insurer well knows, there are no rules that require us to defend the case for a set amount.

Fifth, explain you do not agree to follow the insurer's billing practices when it is not feasible to do so, such as when it is necessary for a different attorney to attend to a matter given the size of the firm and the press of other cases.

So far, this approach has worked. No insurer has responded, subsequently, by nitpicking the bills submitted or claiming we have some obligation to abide by its onerous "billing practices." Note however that there is very little legal authority dealing with this issue, and the arguments we have had success in making are, as yet, just arguments.

In terms of requesting reimbursement for expenses, the golden rule that an insured is only entitled to "post-tender" fees is also worth challenging. We have succeeded in getting the carrier to cover the cost of a survey that was obtained before the insured-client was sued by the other side. We argued that the carrier would have had to pay for a survey anyway since the case involved a property dispute and liability depended on the location of the boundary.

We have not had to do this, but you should note that if an attorney serving as *Cumis* counsel is in a dispute with the insurer over the fees being paid, either party has the right to request arbitration. Cal. Civil Code Section 2860(c).

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