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| | <p style="text-align: center;">THE INSURER AGREED TO DEFEND NOW WHAT???</p> <p style="text-align: center;">ETHICAL ISSUES FOR THE INSURER- RETAINED ENVIRONMENTAL DEFENSE ATTORNEY</p> <p style="text-align: center;">Christopher R. Mosley Sherman & Howard L.L.C. December 5, 2006</p> |

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| | <p>TOPICS</p> |
| | <ul style="list-style-type: none"> ■ Attorney/Client/Insured Relationship ■ Ethical Issues Related To Defending The Lawsuit |

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| | <p>Attorney/Client/Insured Relationship</p> |
| | <ul style="list-style-type: none"> ■ Tri-Partite Relationship <ul style="list-style-type: none"> - Attorney - Client - Insurer |

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| | <h3>Attorney/Client/Insured Relationship</h3> |
| | <ul style="list-style-type: none"> ■ Question: Who is the attorney's client? ■ Answer: Only the insured ■ Ethics Opinion 91 – "This Committee has concluded that in the context of this tripartite relationship, the better rule is that <u><i>the lawyer's client is the insured and not the carrier.</i></u>" |

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| | <h3>Attorney/Client/Insured Relationship</h3> |
| | <ul style="list-style-type: none"> ■ Scope Of Legal Relationships <ul style="list-style-type: none"> – Attorney/Client - Attorney/client relationship – Client/Insurer - Contractual relationship – Attorney/Insurer - Contractual relationship |

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| | <h3>Attorney's Duty Of Loyalty</h3> |
| | <ul style="list-style-type: none"> ■ Focus on advancing client's interests, regardless of the impact on the insurer ■ "The lawyer's duty of loyalty and duty to exercise independent professional judgment on behalf of the insured <u><i>may compel defense counsel to disagree with the insurer regarding the strategy or procedures to be followed in the case,</i></u> even though the insurer is paying defense costs." (Ethics Opinion 91) |

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| | Initial Meeting With Client |
| | <ul style="list-style-type: none"> ■ Need To Discuss Several Issues <ul style="list-style-type: none"> – Scope Of Representation – Strategy Conflicts With Insurer – Potential Coverage Issues ■ Topics Should Be Addressed In Engagement Letter |

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| | Initial Meeting With Client |
| | <ul style="list-style-type: none"> ■ Scope Of Representation <ul style="list-style-type: none"> – Only those matters covered by the insurer's defense obligation – All matters related to the litigation <ul style="list-style-type: none"> ■ Uncovered claims ■ Affirmative claims ■ Coverage issues |

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| | Initial Meeting With Client |
| | <ul style="list-style-type: none"> ■ Strategy Conflicts With Insurer <ul style="list-style-type: none"> – Procedures to resolve – Who will pay – Will discuss further later in presentation |

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| | Initial Meeting With Client |
| | <ul style="list-style-type: none"> ■ Potential Coverage Issues ■ Types Of Coverage Issues <ul style="list-style-type: none"> – Covered/uncovered claims (reservation of rights letter) – Defense costs included in liability limits – Potential for excess exposure ■ Note: Insurer will not pay for coverage advice |

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| | Defending The Client |
| | <ul style="list-style-type: none"> ■ Control Over Defense ■ Communicating With Insurer ■ Pursuing Affirmative Claims |

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| | Insurer Control Over Defense |
| | <ul style="list-style-type: none"> ■ Policy generally grants insurer right to control the defense ■ Ethics Opinion 91 recognizes insurer's right to control defense ■ Colorado Supreme Court recognizes insurer's right to control defense (<u>Farmers Group, Inc. v. Trimble</u>, 691 P.2d 1138, 1141 (Colo. 1984)) |

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| | <h3>Scope Of Insurer's Control</h3> |
| | <ul style="list-style-type: none"> ■ Staffing issues ■ Litigation strategy (depositions, experts, etc.) ■ All other aspects of defense |

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| | <h3>How Insurer's Assert Control</h3> |
| | <ul style="list-style-type: none"> ■ Directives from claims handlers ■ Litigation guidelines |

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| | <h3>Attorney's Responsibilities</h3> |
| | <ul style="list-style-type: none"> ■ Principles <ul style="list-style-type: none"> – Attorney owes client duty of loyalty – Attorney must protect insured's right to obtain a proper defense – Attorney must use independent professional judgment in handling the defense (Rules Of Professional Conduct Rules 1.7 and 5.4) |

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| | Attorney's Responsibilities |
| | <ul style="list-style-type: none"> ■ Attorney must advise insurer (and the client) if the attorney disagrees with the insurer's defense strategy ■ Ethics Opinion 91 - "The lawyer's duty of loyalty and duty to exercise independent professional judgment on behalf of the insured <u>may compel defense counsel to disagree with the insurer regarding the strategy or procedures to be followed in the case</u>, even though the insurer is paying defense costs." |

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| | Conflicts Regarding Defense Strategy |
| | <ul style="list-style-type: none"> ■ Ethics Opinion 91 - Procedure to handle conflicts regarding defense strategy ■ Step 1: Consult with insurer <ul style="list-style-type: none"> – Explain concerns to insurer (in writing) – Seek insurer consent to attorney's recommended course of action (in writing) |

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| | Conflicts Regarding Defense Strategy |
| | <ul style="list-style-type: none"> ■ Step 2: Consult with client <ul style="list-style-type: none"> – Explain concerns to insured and the insurer's refusal to alter position – Request client consent to fund defense without compensation from insurer – Advise client to seek independent counsel (to address the insurer's refusal to pay the defense costs) |

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| | Conflicts Regarding Defense Strategy |
| | <ul style="list-style-type: none"> ■ Step 3: Withdraw representation if <ul style="list-style-type: none"> – Client refuses to consent to insurer's course of action; and – Client refuses to fund recommended course of action |

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| | Dismissing Covered Claims |
| | <ul style="list-style-type: none"> ■ Scenario <ul style="list-style-type: none"> – Plaintiff asserts covered and uncovered claims (i.e., negligence and fraud) – The covered claim is subject to a complete defense (i.e., statute of limitations/economic loss rule/etc.) – Insurer requests counsel to file dispositive motion ■ Problem - Filing motion will eliminate coverage |

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| | Dismissing Covered Claims |
| | <ul style="list-style-type: none"> ■ Rule - Attorney may not dismiss claim without the client's reasonable consent ■ Ethics Opinion 91 - "[W]here the insurer has a duty to defend and pay on one claim only, <u>the attorney cannot file a motion to dismiss or for summary judgment on the only covered claim</u>, effectively leaving the insured without coverage on the remaining claim(s) . . . unless the insured consents after full disclosure." |

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| | <h3>Dismissing Covered Claims</h3> |
| | <ul style="list-style-type: none"> ■ Potential Strategy <ul style="list-style-type: none"> – Obtain insurer's written agreement to continue providing defense should motion be successful – Issue only arises if non-covered claims remain |

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| | <h3>Communicating With The Insurer</h3> |
| | <ul style="list-style-type: none"> ■ Types Of Contacts <ul style="list-style-type: none"> – Case Evaluations And Status Reports – Invoices ■ Issues <ul style="list-style-type: none"> – Protection Of Privileged Communications – Disclosure Of Information Adverse To Coverage |

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| | <h3>Case Evaluations/ Status Reports</h3> |
| | <ul style="list-style-type: none"> ■ Insurer is entitled to litigation reports <ul style="list-style-type: none"> – Required by duty to cooperate clause – Ethics Opinion 107 - "The Ethics Committee recognizes that the insurer has a legitimate interest in obtaining information needed to monitor the . . . defense." ■ Are these communications protected? |

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| | <h3>Protection Of Communications</h3> |
| | <ul style="list-style-type: none"> ■ Attorney-Client Privilege ■ Work Product Doctrine |

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| | <h3>Attorney-Client Privilege</h3> |
| | <ul style="list-style-type: none"> ■ There is no attorney-client privilege between the attorney and the insurer <ul style="list-style-type: none"> – Attorney only represents the insured – Ethics Opinion 91 – "This Committee has concluded that in the context of this tripartite relationship, the better rule is that <u><i>the lawyer's client is the insured and not the carrier.</i></u>" |

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| | <h3>Attorney-Client Privilege</h3> |
| | <ul style="list-style-type: none"> ■ There is no attorney-client privilege between the client and the insurer ■ <u>Lazar v. Riggs</u>, 79 P.3d 105, 108 (Colo. 2003) ("No insurer/insured privilege has been recognized by this court or the General Assembly") ■ Conclusion – Communications with the insurer are not protected by the attorney/client privilege |

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| | Attorney-Client Privilege |
| | <ul style="list-style-type: none"> ■ Consequence: Attorney cannot disclose privileged information to the insurer ■ Ethics Opinion 91 - "Where the insured discloses information to the attorney within the attorney-client relationship, <i>the attorney cannot disclose that information to the carrier without the insured's express or implied consent.</i>" |

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| | Work Product Doctrine |
| | <ul style="list-style-type: none"> ■ Protects documents prepared in connection with the client's defense ■ C.R.C.P. 26(b)(3) - Work Product Rule ■ Defines work product to include "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (<i>including the party's . . . insurer. . .</i>)" |

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| | Work Product Doctrine |
| | <ul style="list-style-type: none"> ■ Ethics Opinion 107 recognizes the applicability of work product doctrine ■ "Colorado Rule of Civil Procedure 26(b)(3) recognizes this principle by extending the work product privilege to include disclosures made to an insurer" |

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| | Billing Records |
| | <ul style="list-style-type: none"> ■ Billing records may contain confidential or privileged information ■ Insurers sometimes engage third party billing auditors to review defense invoices |

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| | Billing records |
| | <ul style="list-style-type: none"> ■ Ethics Opinion 107 ■ Insurer is entitled to billing information to the extent necessary to assist client's defense ■ Third party billing auditors are not entitled to detailed bills because they do not assist in the client's defense ■ Lesson: Confirm that insurer does not intend to submit invoices to an outside auditor |

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| | Disclosing Information Adverse To Coverage |
| | <ul style="list-style-type: none"> ■ Information Which May Be Adverse To Coverage <ul style="list-style-type: none"> – Information showing fraudulent conduct or other intentional acts – Other information related to applicable exclusions, etc. which may result in non-coverage |

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| | <h3>Disclosing Information Adverse To Coverage</h3> |
| | <ul style="list-style-type: none"> ■ Underlying Principles ■ Attorney cannot take any action adverse to the client's interests <ul style="list-style-type: none"> – Actions which are detrimental to coverage are adverse to the client's interests ■ Insurer has a right to information under duty to cooperate clause ■ Question: How do you resolve this conflict??? |

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| | <h3>Disclosing Information Adverse To Coverage</h3> |
| | <ul style="list-style-type: none"> ■ Answer: Follow the road map given in Ethics Opinion 91 ■ General Rule - Attorney may not disclose information adverse to the client's coverage interests absent the client's consent ■ Ethics Opinion 91 provides a three step process to address this issue |

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| | <h3>Disclosing Information Adverse To Coverage</h3> |
| | <ul style="list-style-type: none"> ■ Step 1: Advise client about the potential impacts of disclosing/not disclosing information <ul style="list-style-type: none"> – Disclosing information might void coverage – Failing to disclose information may result in breach of the duty to cooperate clause |

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| | <h3>Disclosing Information Adverse To Coverage</h3> |
| | <ul style="list-style-type: none"> ■ Step 2: If the client consents to disclosure, provide information to insurer without addressing potential impact on coverage ■ Step 3: If the client does not consent, recommend that the insured retain separate counsel to address the coverage issues with the client and the insurer |

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| | <h3>Disclosing Information Adverse To Coverage</h3> |
| | <ul style="list-style-type: none"> ■ Key Point: The attorney cannot disclose information adverse to coverage without the client's consent, even if the information is necessary to the carrier's evaluation of the case ■ Withdraw if failure to disclose information compromises your independent judgment and ability to represent the client |

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| | <h3>Disclosing Information Adverse To Coverage</h3> |
| | <ul style="list-style-type: none"> ■ Note: This rule requires the attorney to have some familiarity with coverage issues ■ What must you do? <ul style="list-style-type: none"> – Read policy – Consult with coverage attorney if necessary |

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| | Pursuing Affirmative Claims |
| | <ul style="list-style-type: none"> ■ What Are Affirmative Claims? <ul style="list-style-type: none"> – Counterclaims – Cross Claims – Third Party Claims – Claims In Other Lawsuits (Indemnification/Contribution) ■ Claims insured pursues against third parties |

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| | Pursuing Affirmative Claims |
| | <ul style="list-style-type: none"> ■ General Rule: Insurer has no obligation to cover affirmative claims ■ Insurer's obligations extend to "defense" only |

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| | Pursuing Affirmative Claims |
| | <ul style="list-style-type: none"> ■ All Hope Is Not Lost!!! ■ Some "affirmative claims" may be covered <ul style="list-style-type: none"> – Intertwining Doctrine – "Defensive In Nature" Doctrine |

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| | Pursuing Affirmative Claims |
| | <ul style="list-style-type: none"> ■ Intertwining Doctrine – "Affirmative Claims" are inherently intertwined with the claims asserted against the client ■ Rationale – Client would have incurred same fees and costs even in absence of affirmative claims |

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| | Pursuing Affirmative Claims |
| | <ul style="list-style-type: none"> ■ "Defensive In Nature" Doctrine – "Affirmative Claims" seeking to shift liability to third parties (i.e., indemnification/contribution claims) are covered ■ Rationale – Such claims are part and parcel of the insured's defense |

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| | Pursuing Affirmative Claims |
| | <ul style="list-style-type: none"> ■ Sample Cases ■ <u>Great West Cas. Co. v. Marathon Oil Co.</u>, 315 F.Supp.2d 879, 881-883 (N.D.Ill. 2003) ■ <u>Smart Style Industries, Inc. v. Pennsylvania General Ins. Co.</u>, 930 F.Supp. 159, 164-165 (S.D.N.Y. 1996) |

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| | <p>Thank You!!!</p> <p>Christopher R. Mosley Sherman & Howard L.L.C.</p> |
