

# ADVISORY ETHICS OPINION 1998-07

## SYNOPSIS:

1. A lawyer retained by an insurance company to represent a policy holder may not provide billings containing confidential information to an outside auditor employed by the insurance company without the client's informed consent, given after full disclosure as to the type of information which may be found in billing records.
2. A lawyer may not comply with insurance company "billing guidelines" without a full explanation of them to the client (insured) and only upon obtaining client's full and informed consent. Furnishing detailed information required by the guidelines directly to the insurance company with the knowledge that the billings will be forwarded to an outside auditing firm, would similarly require full and informed consent from the insured client.

## QUESTION:

1. Consistent with the duty of confidentiality, may a lawyer retained by an insurance carrier to represent a policy holder provide originals or copies of billings containing confidential information to an outside auditor retained by the insurance carrier?
2. May a lawyer comply with insurance company "billing guidelines" which appear to be designed to benefit the carrier more than the policy holder and which generally require lawyers to include detailed information concerning the precise nature of the work performed for which each charge is submitted.

## FACTS:

Under the insurance company guidelines referred to by the requesting attorney, the attorney may be required to identify a party (i.e. to the communication by name) and to provide details concerning the purpose and content of the communication. Obviously, such information frequently contains client confidences or other sensitive information bearing on the lawyer-client relationship and defense strategy. The guidelines similarly (1) discourage use of paralegals in favor of less qualified outside vendors to perform tasks that require more direct involvement and supervision by attorneys, and skill sets frequently not possessed by the outside vendors; (2) discourage use of more experienced, and therefore, presumably, more costly personnel in preliminary research; (3) refuse to pay for computerized legal research, while discouraging the type of extensive manual research that would be necessary to adequately replace computerized research; (4) forbid summarizing depositions; (5) mandate deferring any form of "trial preparation" until trial is imminent; and (6) refuse to pay for proofreading or revisions to first drafts of any written materials to produce a final product that is of suitable quality. In short, many of the guidelines seem designed to cut costs without regard for the ability of a lawyer to conduct a vigorous defense, and effectively depriving the lawyer of the opportunity to exercise professional judgement in determining how best to conduct such a defense.

## DISCUSSION:

For many years, insurance companies have routinely audited lawyers' bills internally. The audit was generally performed by the adjuster handling the case, who would review the lawyer's bill and confirm that the time spent appeared reasonably related to the work the lawyer and adjuster had agreed upon.

The significant change which generated the request for this opinion is the use of outside auditing firms to do the job formerly done more or less informally by the in-house adjuster. This use of outside auditors raises ethical concerns.

Disciplinary Rule 4-101 reads as follows:

### **DR 4-101 Preservation of Confidences and Secrets of a Client.**

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client.
  - (2) Use a confidence or secret of his client to the disadvantage of the client.

- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
- (C) A lawyer may reveal:
  - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
  - (2) confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
  - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
  - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

DR 4-101 applies to all information protected by the attorney-client privilege and to information “gained in” the professional relationship that “the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” EC4-4 adds that the duty differs from the evidentiary privilege in that it exists without regard to the nature or source of information or the fact that others share the knowledge.

*Opinion 91-6* states: “Information consisting of secrets or confidences contained in the client’s files maintained by a *special project* of the Vermont Legal Aid Project may not be disclosed to federal monitors examining the files of the project,” noting that the names and other personally identifiable information are secrets within the meaning of DR 4-101(A). In that opinion we also noted that the information requested could be disclosed if the client gave his/her express consent to the full disclosure. We said “Full disclosure must include a clear, precise and understandable explanation that the client is not obligated to consent to the disclosure, and that continued assistance from the program does not depend on consenting to the disclosure.”

*Opinion 91-6* also cited Informal Opinion 1443 issued by the American Bar Association Committee on Ethics and Professional Responsibility. That Opinion dealt with the statute creating the Legal Services Corporation requiring a local program to provide statistical information. The ABA Opinion stated that the Corporation should not have access to any reports or records subject to the attorney-client privilege.

All client information is confidential, and as a practical matter, obtaining the informed consent necessary to such a disclosure is highly problematic. The client’s consent to the release of confidential information has to be completely informed, based upon more than the mere fact that his or her billing records will be released to the auditors. The lawyer must make clear to the insured the kind of information to be found in the billing records, as well as the possible legal effects of the release of such information upon the insureds client’s rights.

A second Disciplinary Rule governs our Opinion, reading in part as follows:

**“DR 5-107 Avoiding Influence by Others Than the Client.**

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:
  - (1) Accept compensation for his legal services from one other than his client.
  - (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”
- (C) Omitted.

The defense lawyer’s client is the insured, not the insurance company. Therefore, the lawyer must inform the insured of the Company’s demands and/or restrictions with regard to trial preparation. Compliance with company guidelines without the client’s full knowledge and consent is not permitted by the Rule. Insistence by the company that the lawyer follow the guidelines would require that lawyer withdraw from the representation.

**CONCLUSION:**

1. A lawyer retained by an insurance company to represent a policy holder may not provide billings containing confidential information to an outside auditor employed by the insurance company without the client’s informed consent, after full disclosure as to the type of information which may be found in billing records.
2. A lawyer may not comply with insurance “company guidelines” without a full explanation of them to the client (insured) and only upon obtaining client’s full and informed consent. Furnishing detailed information required by the guidelines directly to the insurance company, with the knowledge that the billings will be forwarded to an outside auditing firm, would similarly require full and informed consent from the insured client.

Whether the insurance contract grants such permission to the insurer is a legal question upon which the Professional Responsibility Committee will not provide an opinion.

*The result reached in this Opinion is consistent with the Opinions issued by the Florida Bar Association, Florida Bar Staff Opinion 20591 (12/31/97) and Florida Staff Opinion 20762 (03/09/98); the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion No. 97-119 (10/7/97); the Utah Bar Association Opinion 98-03; and the South Carolina Bar Association Advisory Opinion 97-22.*