

Submitting Insurance Defense Legal Bills to Outside Auditors or Reviewers

The Lawyer Disciplinary Board has received requests for a formal advisory opinion on the ethical propriety of an insurance defense lawyer sending his/her bills to outside reviewers or auditors. The Board understands that some insurance companies which have retained a law firm to represent its insureds are either requesting or requiring that the law firm submit its bills to third parties for review and / or audit. The third party reviewers / auditors might have a contractual arrangement with the insurance company.

In an insurance defense representation, the insurance company retains the lawyer, but the insured is the primary client and the insured's interests must be protected. This obligation flows from Rules 1.8(f), 5.4(c), and 1.7(b) of the West Virginia Rules of Professional Conduct.¹ Lawyers

¹Rule 1.8(f) of the West Virginia Rules of Professional Conduct provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Similarly, Rule 5.4(c) says:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Rule 1.7(b) provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(continued...)

are required to maintain their clients' confidentiality. Rule 1.6 of the West Virginia Rules of Professional Conduct provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

Rule 1.6 has been given a broad construction; "information relat[ed] to the representation" protects much more than what is covered by the evidentiary attorney-client privilege. Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). The comment to Rule 1.6 explains that the rule protects "all information, whatever its source." Legal bills, particularly the itemized bills which insurance companies often require, contain information about legal work done for a client, and therefore contain information relating to the representation.

It is the opinion of the Lawyer Disciplinary Board that disclosure of legal bills to outside auditors, reviewers, or similar entities constitutes a release of confidential information and is governed by Rule 1.6. From the insured's perspective, submitting bills to auditors / reviewers does

¹(...continued)

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

nothing to further the progress of his/her case and the representation; thus, it is not "impliedly authorized to carry out the representation." Although there are exceptions found in Rule 1.6 which would permit a lawyer to release information without client consent, none of the exceptions apply to this situation.

Accordingly, pursuant to Rule 1.6 a lawyer may only submit legal bills to outside auditors, reviewers, or similar entities if the insured consents to this release. The consent may only be obtained after the lawyer consults with the insured.

The consent must be informed, after full disclosure by the lawyer to the insured. The consultation between the lawyer and insured should include an elaboration on and examples of the type of information which is included in the bills. The lawyer should explain the potential effects, if any, of releasing this information to third parties. For example, if information in the bill could correlate to a disputed coverage issue, or something detrimental to the insured's interests, the lawyer should carefully explain this to the insured and should advise against the release. The lawyer should also consider any legal consequences to the insured, such as whether the release could waive the attorney-client or work product privileges², and should advise the insured accordingly.

If the insurance company has already obtained consent from the insured for the release of information, perhaps in the insurance contract, the lawyer must nonetheless consult with the insured and obtain separate consent for the release. The Rules of Professional Conduct, not the insurance

²The attorney-client and work product privileges are creatures of the laws of evidence and civil procedure, not of the Rules of Professional Conduct. Whether these privileges would be waived by releasing legal bills to outside entities is a legal question which the Lawyer Disciplinary Board declines to address. Lawyers are encouraged to research this topic and examine each situation on a case by case basis. An often cited case in this area is United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997).

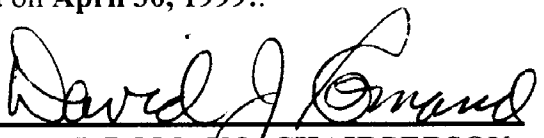
contract, govern a lawyer's ethical responsibilities. As set forth above, this consent must be informed and made after full disclosure by the lawyer to the insured.

As long as the insured gives informed consent to sending future bills for outside review, the Board does not anticipate that the lawyer would have to seek separate consent for each individual bill which is submitted for outside review during the course of the representation. However, even if the insured has previously consented, the lawyer must still be careful about what information is released. If the release of sensitive or potentially detrimental information was not contemplated when the lawyer consulted with his client, then the lawyer must seek new consent.

Furthermore, if the lawyer sends the bills to the insurer and then learns that the insurer is providing the bills to an outside auditor or reviewer without insured consent after consultation with the lawyer, then the lawyer should advise the insured and also request that the insurer cease releasing confidential information.

The Board has not located any court decisions on this issue, but notes that this opinion is consistent with both formal and informal opinions from the lawyer disciplinary authorities of Alabama, Florida, South Carolina, Utah, Kentucky, Indiana, Louisiana, Washington and Maryland.

APPROVED by the Lawyer Disciplinary Board on **April 30, 1999**..


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Lawyer Disciplinary Board
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