

Final

**RHODE ISLAND SUPREME COURT  
ETHICS ADVISORY PANEL  
Opinion No. 99-17, Request No. 763(A)  
Issued October 27, 1999**

Facts:

An insurance company hires the inquiring attorney and his/her law firm to represent its insured. The law firm's billing statements, as required by the insurer, are detailed and specific as to the services provided to the insured. The insurer has retained an outside company to audit the law firm's billing statements.

Issue Presented:

Does an attorney violate the Rules of Professional Conduct by submitting billing statements that may contain confidential or privileged information to an insurance carrier's outside auditing company?

Opinion:

The submission of billing statements containing confidential or privileged information to an outside auditor, without the express consent of the insured after consultation, is a breach of a lawyer's ethical obligation to maintain confidentiality under Rule 1.6.

Reasoning:

The inquiring attorney on behalf of his/her law firm requests the Panel's opinion regarding a lawyer's obligations to an insured when the insurance carrier has retained an independent company to audit its legal bills. The insurer requires the law firm to submit detailed billing information directly to the outside auditor. Pursuant to the insurer's billing requirements for defense counsel, legal bills must separately list each activity performed, and activities must be clearly described. According to one insurer's requirements which the inquiring attorney submitted to the Panel, "each activity must be adequately described so that a person unfamiliar with the case may determine what activity is being performed." Examples of the level of detail the insurer requires include the subject matter of all written or oral communication, the identity of participants including witnesses and clients, the specific issues researched, the identity of materials and documents reviewed, the specific trial preparation performed, and a description of the specific issues central to pleadings, motions, or memoranda prepared. There are others.

When an insured enters into a contract for insurance with an insurance company, the insurance company agrees to provide legal representation for the insured. Generally, the insurance company

selects a lawyer for the insured. The insurer has a contract with the lawyer for the representation of the insured. For its part, the insured agrees, among other things, to

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cooperate with the insurer in the defense of a claim and may also agree to the disclosure of information relating to the legal representation. However, neither the contract for insurance, nor the contract between the insurer and defense counsel, governs the lawyer's obligations to the insured. A lawyer's obligations to his/her client, the insured, are governed by the Rules of Professional Conduct. See ABA Standing Comm. on Professional Ethics, Formal Op. 96-403; R.I. Sup. Ct. Ethics Advisory Panel Op. 98-10 (1998). Thus, even though the insurance company is paying for the legal services, and enjoys some degree of control over the insured's defense, the lawyer's professional responsibility runs to the insured. See ABA Standing Comm. on Professional Ethics, Formal Op. 96-403.

Several Rhode Island Rules of Professional Conduct govern a lawyer's ethical obligations within the context of the tripartite relationship between and among a lawyer, a client-insured, and an insurance company that has agreed to provide legal representation to an insured. Rule 1.6 and Rule 1.8(f) are applicable to the issue of submitting detailed billing statements to independent auditors. Rule 1.6 states:

**Rule 1.6. Confidentiality of Information. -**

(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, but is not obligated to, reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; 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 the client.

Rule 1.8(f) provides:

**Rule 1.8. Conflict of Interest: Prohibited Transactions. -**

- (f) 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.

When an insurer requests that defense counsel submit billing statements to an independent auditor, the lawyer must determine as a threshold matter whether information contained in the statement is protected by Rule 1.6. The principle of confidentiality raised by this inquiry is given effect in two related bodies of law, the attorney-client privilege in the law of evidence, and the duty of confidentiality established in the Rules of Professional Conduct. See Comment to Rules 1.6. The comment explains:

The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

Thus, Rule 1.6 protects from disclosure a broader range of information. In re Ethics Advisory Panel, 627 A.2d 317, 322 (R.I. 1992). Whether a lawyer's billing statement is

privileged information is a substantive law question. Regardless, a lawyer's billing statement is information relating to the representation of a client, and is therefore protected by Rule 1.6.

Rule 1.6(a) provides that a lawyer is prohibited from revealing information related to the representation unless the client consents after consultation, or unless disclosure is impliedly authorized in order to carry out the representation. In various circumstances, other Rules of Professional Conduct may permit or require a lawyer to disclose information relating to the representation. See Comment to Rule 1.6. Additionally a lawyer may be obligated or permitted by law to reveal information about a client. Id. The two exceptions under Rule 1.6(b) which permit the disclosure of otherwise protected information are not applicable to this inquiry.

The facts presented to the Panel do not suggest that disclosing the requested information to an auditing company is necessary to the lawyer's carrying out the representation. The scope of "implied authorization" as it applies to Rule 1.6 is illustrated by two examples provided in the Comment to the Rule:

A lawyer is impliedly authorized to make disclosures about a client when appropriately carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.  
Comment, Rule 1.6.

The Comment makes clear that implied authorization is limited to situations in which disclosure is essential to the representation, and does not apply to the instant inquiry. See Indiana Bar Assoc. Legal Ethics Comm. Op. 4 (1998). The express mandate of Rule 1.8(f)(3) requiring protection of confidential information from disclosure to one who is paying for the legal services for a client supports this interpretation.

Further, the Panel has found no other provisions of the Rules or requirements of other law which expressly permit the disclosure of information protected under Rule 1.6 to an insurer's billing auditors. Thus, the Panel concludes that the inquiring attorney and his/her law firm may submit to such auditors an insured's billing statements only after obtaining the insured's consent after consultation.

Other ethics committees have concluded that an insured's consent after consultation is mandated before a lawyer may disclose the insured's billing statements to outside auditors. See, e.g. Alabama Bar Disciplinary Comm., Op. RO 98-02 (1998); D.C. Bar Legal Ethics Comm.

Op. 290 (1999); Florida Bar Professional Ethics Comm. Informal Op. 20591 (1997); Indiana Bar Assoc. Legal Ethics Comm. Op. 4 (1998); Kentucky Bar Assoc. Op. E-404 (1998); North Carolina Ethics Advisory Comm. Op. 97-22 (1997); Utah Ethics Advisory Comm. Op. 98-03 (1998).

The Rules define "consultation" to mean "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Rules of Professional Conduct, Terminology section. Under the circumstances of this inquiry, defense counsel must therefore evaluate and inform the client of the reasonably foreseeable consequences of disclosure. These consequences may include the effects of disclosure on the attorney-client privilege. See United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st. Cir. 1997) (privileged information given to auditors became discoverable). Similarly the effects of not consenting to the disclosure must be evaluated with the client. In sum, in order to obtain the client's informed consent, the lawyer must adequately and fairly identify the effects of disclosure and non-disclosure on the client's interests. See D.C. Bar Legal Ethics Comm. Op. 290 (1999).

The Panel is further of the opinion that counsel must obtain the insured's consent before disclosing the insured's billing statement notwithstanding anything to the contrary in either (1) the contract between the insurer and defense counsel, (2) the contract of insurance (which may or may not expressly provide for the insured's consent to the disclosure of confidential information,) or (3) a blanket authorization for disclosure given to the insurer by the insured without the benefit of his/her counsel. A lawyer has a separate and independent ethical obligation under the Rules to advise his/her client of the consequences of disclosure and non-disclosure before obtaining the client's consent to disclose billing statements to an outside auditor. See D.C. Bar Legal Ethics Comm. Op. 290 (1999); Utah Ethics Advisory Comm. Op. 98-03 (1998). But see Mass. Bar Ethics Comm. (11-22-97) (as long as auditor takes steps to protect confidential information, attorney's disclosure of protected information to auditor is permissible without obtaining client's consent if client has already consented to disclosure to insurer.)

Whether disclosure of an insured's billing statement to an outside auditor would result in a waiver of the attorney-client privilege is a substantive law question to be decided by a court and which is outside the jurisdiction of the Panel. Confronted with a privilege question that is unresolved, a lawyer must act cautiously and, together with the client, choose the option least likely to result in unintended waiver. See Alaska Bar Assoc. Ethics Comm. Op. 991 (1999).

The Panel concludes that a lawyer may submit billing statements containing confidential or privileged information to an inquirer's billing auditor only with the client's consent after consultation.