

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 98-03

Approved April 17, 1998

Issue: May a lawyer hired by an insurance company to defend an insured in a lawsuit submit billing statements to an outside audit service?

Opinion: Before a lawyer may submit billing statements to an outside audit service, the lawyer must have the client's consent. If the lawyer is relying on an insurance agreement for consent, the lawyer must review the agreement with the client to renew the client's consent before sending any billing statements to the outside audit service.

Facts: An insurance company hires a lawyer to represent an insured client. The lawyer routinely bills the insurance company for the representation. The lawyer's billing statements, as required by the insurance company, are detailed and specific as to the services done by the lawyer on behalf of the client. The insurance company requests that the lawyer submit the billing statements directly to an outside audit service.

Analysis: Rules 1.6, 1.7, and 1.8 of the Utah Rules of Professional Conduct govern the relationship among a lawyer, a client, and third party paying for the lawyer's services on behalf of the client. (fn1) Rule 1.8(f) states:

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 judgement or with the client-lawyer relationship; and
- (3) Information relating to representation is protected as required by Rule 1.6.

Rule 1.8(f) applies whenever an insurance company pays a lawyer to represent a client. (fn2) The client's consent is usually included in the agreement between the client and the insurance company. However, because Rule 1.8(f)

requires that the "client consents after consultation," the lawyer must consult with the client to make sure that the client understands and renews the consent.

Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure." (fn3) A lawyer's billing statement is "information relating to the representation of a client." This is especially true where the billing statement is detailed and specific as to the services done by the lawyer on behalf of the client. Therefore, unless one of the exceptions under Rule 1.6(a) applies, the lawyer may not reveal a billing statement to anyone other than the client "unless the client consents after disclosure."

The client's consent to release the billing statement to the insurance company is usually included in the agreement between the client and the insurance company. However, because the client must consent "after disclosure," the lawyer should review the insurance agreement with the client and renew the client's consent before sending any billing statements to the insurance company. (fn4) Whether the lawyer has an attorney-client duty to the insurance company in addition to the insured client is immaterial. Except as Rule 1.6(b) provides, a lawyer may not release information relating to the representation of a client to anyone, even another client, unless the first client consents after disclosure.

Likewise, before a lawyer may release any billing information to an outside audit service, the lawyer must have the client's consent. (fn5) However, if the lawyer relies upon an insurance agreement for consent, the lawyer must review the agreement with the client and renew the client's consent before sending any billing statements to the audit service.

Even where the lawyer has a consent from the client to release billing statements to an audit service, the lawyer should be careful about what information is included. For example, the lawyer may not want to include information that the client took and failed a lie detector test. The lawyer should make sure that no confidential information revealed by the client is in the billing statement.

Rule 1.6(a) is broader than the attorney-client privilege described in Utah Code Ann. § 78-24-8 and Utah Rules of Evidence 504. The attorney-client privilege protects only information revealed by the client to the lawyer in confidence. The Utah Supreme Court, holding that the attorney-client privilege did not protect a retainer agreement from discovery, noted:

The United States Supreme Court has stated that the purpose of the privilege is to "encourage clients to make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577, 48 L. Ed. 2d 39 (1976). The Court cautioned, however, that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice; which might not have been made absent the privilege." *Id.* This court has taken a similar view of the privilege, describing it as "necessary in the interest and administration of justice," but noting that the privilege should be "strictly construed in accordance with its object." (fn6)

However, Rule 1.6(a) protects all information relating to the representation of a client. The comment to Rule 1.6 notes:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. 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 lawyer through the 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 the source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Thus, a Utah case ordering the release of a retainer agreement in a discovery dispute does not allow a lawyer to send billing statements to an insurance company or an outside audit service without the client's consent.

Conclusion: A lawyer may submit billing statements to an insurance carrier's outside auditors only with the informed consent of the client.

Footnotes

1. *Person Paying for Lawyer's Services.* Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest.

Utah Rules of Professional Conduct 1.8, cmt.

2. *Interest of Person Paying for Lawyer's Service.* A lawyer may be paid from a source other than the client if the client

is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide separate counsel for the insured, the arrangement should assure the separate counsel's professional independence.

Utah Rules of Professional Conduct 1.7, cmt.

3. None of the exceptions in paragraph (b) apply.

4. This does not require a separate, affirmative assent for each occasion; only that there be direct confirmation in connection with the particular case or incident.

5. *See* S. Car. Bar Assoc., Ethics Op. 97-22, "Upon receipt of informed consent from the insurer as well as the insured, a lawyer would not be ethically prohibited from submitting his bill directly to a third-party auditing firm, unless the lawyer believes that doing so would substantially affect the representation."

6. *Gold Standard, Inc. v. American Barrick Resources Corp.*, 801 P.2d 909.

Rules Cited:

1.61.71.8