Nebraska Ethics Advisory Opinion for Lawyers
No. 00-1

THE OPINION OF THE ADVISORY COMMITTEE HAS BEEN REQUESTED CONCERNING THE ETHICAL CONSIDERATIONS INVOLVED IN THE SUBMISSION TO OUTSIDE AUDITORS BY INSURANCE COMPANIES OF STATEMENTS FOR LEGAL SERVICES PERFORMED FOR THEIR INSUREDS, AND INSURANCE COMPANY BILLING GUIDELINES.

RESTATEMENT OF FACTS

1. The first question presented involves the outside auditing of statements for legal services rendered to insurance company's insureds. Specifically, the insurance carrier has required that a lawyer's statements for services be sent to an independent auditing firm which will review the statements and a wide range of required supporting data to determine if the statements are appropriate and in conformance with the guidelines adopted by the carrier.

2. The second question relates to the first and deals with the ethical considerations of insurance company imposed billing guidelines and the impact of guidelines on the legal services performed.

STATEMENT OF ISSUES

Whether the audit by outside auditing firms of bills submitted by lawyers hired by insurance companies to defend their insureds violates the Code of Professional Responsibility.

Whether adherence to insurance company imposed billing guidelines violates the Code of Professional Responsibility.

STATEMENT OF APPLICABLE CANONS, ETHICAL CONSIDERATIONS AND DISCIPLINARY RULES RELIED ON

Canon 4. A lawyer should preserve the confidences and secrets of a client.

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 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 the lawyer's client.
> (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client.
> (3) Use a confidence or secret of the lawyer's client for the advantage of himself of herself 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 necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

EC 4-3. Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his or her files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes provided

the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

Canon 5. A lawyer should exercise independent professional judgment on behalf of a client.

DR 5-105. Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.

(A) A lawyer shall decline pro-offered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the pro-offered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extend permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his or her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.

DR 5-107. Avoiding influence of others than the client.

. . . .

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

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the lawyer's client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients or the desires of third persons should be permitted to dilute the lawyer's loyalty to his or her client.

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of his or her client requires that the lawyer disregard the desires of others that might impair the lawyer's free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressures upon the lawyer. These influences are often subtle, and the lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his or her client; and if the lawyer or client believes that the effectiveness of his or her representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

EC 5-23. A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political or social goals without regard to the professional responsibility of the lawyer to his or her individual client...Since a lawyer must always be free to exercise his or her professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his or her professional freedom.

DISCUSSION

1. Outside Auditing of Billing Statements

The threshold question is the relationship between the lawyer and the insured. The ABA Lawyer's Manual on

Professional Conduct, in its discussion of conflicts of interest on multiple representation, states as follows:

> A lawyer hired or employed by an insurance company to Represent an insured must represent the insured as his client With undivided loyalty. S1:309

The manual cites several ethics opinions, articles and cases for this statement. This Committee has previously stated that a lawyer hired by an insurance company to represent an insured has an attorney-client relationship with the insured. Therefore, because the insured is the client, it must be determined if the billing statement contents constitute "confidences" or "secrets" which cannot be revealed by an attorney under the dictates of DR 4-101.

A "confidence" of the client is protected by the attorney-client privilege under applicable law. One case from the 9th Circuit has held that billing statements are not privileged. In Clarke vs. American Commerce National Bank, 974 F. 2d 127 (CA9, 1993), the district court held that billing statements did not in fact contain privileged communications. This holding was affirmed on appeal wherein it was held that information on the identity of the client, the case name for which payment was made, the amount of the fee and the general nature of the services performed did not constitute privileged information. Under this holding, attorney billing statements are not privileged is such statements disclose only the afore referenced items. It is apparent that lawyers are being required to do far more than describe the "general nature" of the services performed. Thus we find no safe island here and suggest that detailed descriptions of services rendered often with supporting information may fall within the DR definitions of confidences and secrets.

We are aware of twenty-three other states that have opinions that deal with third party audits authored by the appropriate ethics committee or similar body. Some conclude that the practice is unethical. Others caution lawyers about the breach of confidentiality and/or the

waiver of the attorney-client privilege. We are aware of none that bless the procedure.

Whether a state uses the model code of the model rules appears to make no difference in the results. With respect to the confidentiality issue, the code permits disclosure of confidences and secrets necessary to establish or collect the lawyer's fee. DR 4-101(C)(4). Model Rule 1.6(a) allows disclosures that are impliedly authorized in order to carry out the representation. The DR provisions is intended, we believe, for situations where a lawyer is engaged in collection action against a client over a fee. The model rule provisions could be interpreted to permit disclosure as a necessary element of what has been called the "tripartite" relationship theory brings EC 5-15 and EC 5-16 in to play and the possibility that the lawyer will have to withdraw.

Many states focus on obtaining the client's consent to the disclosure of confidences and secrets. The consent would be required by both the code and the model rules to be given after "full disclosure" by the lawyer. Thus the lawyer is in the position of explaining to, and arguably trying to convince the client that, giving the consent would not be adverse to the client's interests. Perhaps the best answer to this approach is contained in the Iowa and Washington opinions: " ... it is almost inconceivable that it would ever be in the client's best interests to disclose confidences and secrets to a third party."

In informal Opinion #1821, we concluded that disclosure of confidences and secrets can be ethically made for the purpose of collecting fees. We stated that we saw no distinction from the context of an attorney suing a client to collect a fee to the context of an insurance company submitting a bill to an outside auditor. This we now believe to be incorrect. It is now obvious that billing criteria utilized by most insurance companies require detailed information and often supporting documentation. Thus Informal Opinion #1821 is limited to the precise facts it addressed. We cautioned in that opinion that a lawyer should prepare bills limiting or

eliminating confidences and secrets.

Based on the lawyer's obligation to protect the confidences and secrets of the client as set forth in DR 4-101(B), we hold that a lawyer may not ethically submit a bill (with or without supporting information) for legal services rendered for an insured to a third party auditor designated by the insurer that contains detail or information that constitute confidences or secrets of the client. Furthermore, if the lawyer knows or should know that the insurer is submitting the bill to third party auditors, the bills must not contain confidences or secrets.

It has been suggested that a third party auditor should be considered the agent of the insurer. Until a court decision so determines, we do not accept that proposition. We do not believe that the relationship between the insurer and a third party auditor is relevant to the matter because there is no relationship between the auditor and the insured. Furthermore, the lawyer and the auditor may well be at cross purposes.

2. Billing Guidelines

We see two levels of concern here: first, billing guidelines requiring the submission of supporting information not normally contained in a statement for services; and, second, billing guidelines which are tantamount to practice guidelines that encroach upon the lawyer's exercise of independent professional judgment.

The first level of concern is answered in our response to the first question posed.

The second level is much more difficult to deal with and creates a genuine dilemma for lawyers. The dictates of DR 5-105 and 5-107 go to the core of the attorney-client relationship. If, for example, the lawyer believes in the exercise of his or her independent professional judgment that a particular strategy should be employed, a specific deposition taken or a certain expert witness used, and the insurance company refuses to pay the

cost of so doing, then the Code requires the attorney to withdraw or to proceed with the matter at his or her own expense. While neither alternative holds any appeal, we see no other ethical alternative. Hopefully, insurance companies understand the predicament such a situation creates for the lawyer.

We must also mention the concern of the inadvertent waiver of the attorney client privilege. It is quite possible that information disclosed to a third party auditor could be the subject of discovery by the adversary. If the insurer is not the client, then there may be no privilege with respect to matter disclosed to the company. These issues have yet to be decided by the courts and constitute questions of law and are therefore outside of the scope of the charge given to this Committee by the Nebraska Supreme Court.

CONCLUSIONS

1. A lawyer violates the Code of Professional Responsibility by submitting a bill to an insurance company for representing its insureds which are often submitted to an outside auditor for review or which the lawyer is directed to submit directly to the auditor is such bill contains information which constitutes confidences or secrets of the client. Thus the lawyer has the responsibility to determine whether the bill contains any such information.

2. Following insurance company billing guidelines that encroach on the lawyer's exercise of independent professional judgment violates the Code.