

Opinion 532
September 2000
Tex. Comm. on Professional Ethics, Op. 532, V. 63 Tex. B.J. 8 (2000)

Question

Without the informed consent of the client, may a lawyer, who is retained by an insurance company to defend its insured, be required by the insurance company to submit fee statements to a third-party auditor describing legal services rendered by the lawyer on behalf of the client?

Statement of Facts

A lawyer is engaged in what is commonly referred to as insurance defense practice. Typically, the lawyer is retained by an insurance company to defend an insured who purchased and is covered by a liability insurance policy issued by the insurance company. The insured's insurance policy provides that the insurance company will pay the legal fees associated with defending the insured against any claims covered by the policy.

The insurance company that has retained the lawyer to represent its insured has notified the lawyer that he must submit all of his invoices or fee statements for legal services to an independent, third-party audit company retained by the insurance company. The guidelines of the audit company require the lawyer's fee statements to be in a certain format and set forth in detail the legal work performed in representing the insured. For example, if the representation involved a meeting or conference, the fee statement must list each person who participated and a description of the subject matter discussed; billing for legal research requires listing the subject matters researched; billing for writing letters requires identifying to whom the letter was sent and the purpose of the communication. Statements for legal services that do not comply with the guidelines will not be paid.

The stated purpose of the guidelines is to enable the outside auditor to determine and inform the insurance company whether the legal work performed by the lawyer in representing the insured was reasonably necessary and whether the time spent was reasonable.

The lawyer is concerned about his obligation to protect his client's confidential information and, in particular, whether sending his fee statements describing legal services on behalf of the insured to the insurance company's outside auditor would violate provisions of the Texas Disciplinary Rules of Professional Conduct (Texas Disciplinary Rules).

Discussion

Although a lawyer defending an insured is normally selected, employed, and paid by the insurance company, it is established Texas law that the lawyer's only client in that situation is the insured. See *Employer's Casualty Company v. Tilley*, 496 S.W.2d 552 (Tex. 1973). Moreover, because a lawyer owes unqualified loyalty to the insured, the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. *State Farm Mutual Automobile Ins. Co. v. Traver*, 980 S.W.2d 625, 628 (Tex. 1998);

Texas Disciplinary Rule 1.08(e) provides that a lawyer shall not accept compensation for representing a client from a person other than the client unless, among other requirements, there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship *and* information relating to the representation of a client is protected as required by Rule 1.05.

A lawyer's obligation to protect the confidential information of a current or former client is

set forth in Texas Disciplinary Rule 1.05(b), which provides:

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

- (1) Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.
- (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
- (4) Use privileged information of a client for the advantage of the lawyer or of the third person, unless the client consents after consultation.

The term confidential consultation is defined very broadly in Rule 1.05. It includes both information protected by the attorney-client privilege and unprivileged client information. The phrase unprivileged client information is defined to encompass all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client. If a lawyer's invoice or fee statement describes the legal services rendered, it includes information relating to a client acquired by reason of the representation. Therefore, it contains confidential information of the client as defined in Rule 1.05(a). Even the name of a lawyer's client can be confidential information protected by Rule 1.05. See Texas Professional Ethics Opinion No. 479 (August 1991).

The Committee believes that the submission to a third-party auditing company, at the instruction of the insurer, of fee statements describing legal services rendered by the insured's lawyer does not come within any of the exceptions set forth in sub-paragraphs (c), (d), (e), and (f) of Texas Disciplinary Rule 1.05.

Texas Disciplinary Rule 1.05 does permit a lawyer to reveal a client's confidential information if the client consents after consultation. Accordingly, in representing an insured, before a lawyer submits or releases any of his client's fee statements describing legal services rendered to an independent third-party audit company, the lawyer must consult with and obtain the client's informed consent. Consultation in this context involves informing the client of the implications or possible adverse consequences of disclosure, including the possibility that revealing a fee statement to a third-party auditor may result in a loss or waiver of the attorney-client privilege with respect to information described in such fee statement.

The Committee expresses no opinion as to the relationship between the insured and the insurer regarding contractual rights or duties they owe to each other, or what contractual obligations the insurance company has to pay for legal services rendered. Those matters involve legal issues this Committee has no authority to address. The Committee understands that an insured can enter into different types of contractual relationships with an insurance company; however, such agreements between the insured and the insurer cannot affect or diminish a lawyer's ethical responsibilities to the insured under the Texas Disciplinary Rules once the insured becomes the client of the lawyer.

Conclusion

When a lawyer is retained by an insurance company to represent an insured, the lawyer is obligated to protect the confidential information of the insured as defined in Texas Disciplinary Rule 1.05. A lawyer's invoice or fee statement describing legal services rendered by the lawyer constitutes confidential information.

Without first obtaining the informed consent of the insured, a lawyer cannot, at the request of the insurance company paying his fees for the representation, provide fee statements to a third-party auditor describing legal services rendered by the lawyer for the insured.