

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-409
Issued: September 1999

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rules 1.6(b) and 1.8, which were amended. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: If an attorney is defending an Insured with the defense being provided by an Insurer pursuant to an insurance contract between the Insurer and the Insured, and if that attorney is aware that the attorney's legal bills sent to the Insurer are forwarded to an outside auditing firm, what do the Kentucky Rules of Professional Conduct require of the attorney?

Answer: The attorney must obtain fully informed consent from the Insured, the client, before forwarding legal billing information to the Insurer if the attorney knows the Insurer will send the billing information to an outside auditor.

References: Kentucky Rule of Professional Conduct (KRPC) 1.6 (SCR 3.130(1.6)); KRPC 1.8(f); KRPC 5.4(c); KRPC 2.1; KBA E-404 (Sept. 1998); KBA E-378 (1995); KBA E-368 (1994); D.C. Op. 290 (1999); Oregon Op. 1999-157 (1999); Tenn. Op. 99-F-143 (1999); Utah Op. 98-03 (1998); S.C. Op. 97-22 (1997); Pa. Informal Op. 97-119 (1997); N.C. Op. 10 (1998); ABA Model Rules of Professional Conduct, *Terminology Section*.

OPINION

The Opinion of the Ethics Committee is drawn from some fundamental principles of the Rule of Law and its relation to the independence of both the Bench and Bar. The Rules of Professional Conduct are grounded in the need for such independence. This is made plain in Rule 1.8(f), Rule 5.4(c) and Rule 2.1. It is also made plain by the well-accepted refusal of the Supreme Court of Kentucky to surrender its power and responsibility for regulation of the practice of law to other branches of government.

The attorney represents the Insured, not the Insurer in the typical insurance defense arrangement, although the attorney may have significant economic or other allegiance to the Insurer. *See* KBA E-368 (1994); KBA E-378 (1995). The Insurer is a third-party payor and the situation is governed by Kentucky Rules of Professional Conduct (KRPC) 1.8(f), which states:

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

- (1) such compensation is in accordance with an agreement between the client and the third party or 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.

The confidentiality of client confidences is governed by KRPC 1.6, which states: 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).

Paragraph (b) sets out situations in which an attorney may reveal client confidences. These situations involve revealing information to prevent the client from committing a criminal act likely to result in imminent death or serious bodily harm, revealing information to establish a claim or defense for the lawyer in a controversy involving the client, and revealing information when required by law or court order. KRPC 1.6(b).

Recently, KBA E-404 (Sept. 1998) stated that a law firm could not ethically submit the bills for the costs of the defense of the Insured directly to an auditing company without fully informed consent of the client, the Insured. *See also* D.C. Op. 290 (1999) (informed consent necessary); Oregon Op. 1999-157 (1999) (same); Tenn. Op. 99-F-143 (1999)(same); Utah Op. 98-03 (1998) (same); S.C. Op. 97-22 (1997) (same); Pa. Informal Op. 97-119 (1997) (same); N.C. Op. 10 (1998) (informed consent required for disclosure to auditing company; because attorney represents Insurer as well as Insured, consent must be obtained according to the guidelines of 1.7). KBA E-404 was based on the fact that legal billing information in the insurance defense setting often is quite detailed and may reveal much about the client Insured and the representation itself. KBA E-404 took the position that the client, the Insured, should be informed of the implications that flow from making such legal billing information available to the auditing company. KBA E-404 specifically noted that the disclosure of such information may affect the application of the attorney-client privilege and the work product doctrine and that such implications should be discussed with the client in order to obtain informed consent to the disclosure.

If the attorney does not send the legal billing information directly to the auditing company but knows that the Insurer sends the legal billing information to an auditing company, the attorney's responsibilities to the client Insured are the same. The attorney should explain the implications of such a procedure to the client and obtain the client's *fully informed* consent before providing the Insurer with detailed billing information. In so doing, the attorney should also discuss with the Insured client the implications, with regard to the insurance contract between the Insurer and the Insured, that may flow from the Insured's failure to consent to the release of legal billing information. *See also* ABA Model Rules of Professional Conduct, Terminology Section (“‘consult’ or ‘consultation’ denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question”).

The parameters of the work product doctrine and the attorney-client privilege are matters of law, not ethics, and so we do not opine as to whether the disclosure of legal billing information to the auditing company by the Insurer affects these protections. If the attorney counsels the client Insured about the possible consequences of the disclosure of the legal billing information and the client consents to the disclosure, the attorney must follow the instruction of the client Insured and disclose the information. If the attorney believes disclosure to be contrary to the best interests of the client Insured, the attorney should counsel the client as to the attorney's belief. If the client consents to the disclosure contrary to the attorney's advice, the attorney may seek a permissive withdrawal from the representation pursuant to KRPC 1.16(b). *See also* D.C. Op. 290 (1999) (lawyer should advise client of risks of disclosure to Insurer if Insurer discloses information to auditor).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.