

ETHICS OPINION

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FACTS: A law firm would like to set up a billing system where the firm's billing statements for legal services rendered to its clients would be transferred to a local bank. The bank would send monthly invoices to the firm's clients. Before a client's billing statement is given to the bank, the firm would obtain the client's approval. Clients will have the options of paying legal fees directly to the firm in advance or of making specific payment arrangements to the firm.

QUESTION PRESENTED: Would the firm's proposed billing system violate client confidentiality under Rule 1.6?

SHORT ANSWER: Probably not, but we believe that the proposed billing system is imprudent. Such a billing system would violate Rule 1.6 unless the firm uses "sterilized" billing statements (containing no substantive information relating to the representation), discloses all possible detrimental effects of such disclosures to the client, and does not use the bank as a collection agency. In addition, as recognized by the requesting firm, a firm using the proposed system must continue to be administratively prepared to do direct billing.

DISCUSSION: The facts and question presented here involve Rule 1.6, Confidentiality of Information. Montana's Rule 1.6 states:

(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 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 representation of the client.

An attorney's duty of confidentiality is one of the pillars supporting the attorney-client relationship. This duty promotes a client's complete, open and truthful disclosure to his/her attorney.

Generally, information contained in a billing statement is confidential. In a typical opinion on the issue, the Texas State Bar's Ethics Committee expounded:

The amount due from a client to a lawyer for legal services typically involve to some degree "unprivileged client information" that is confidential under Rule 1.05(a). In some cases, the fact that the lawyer was engaged by the client may be confidential. In many cases, the nature of the legal services resulting in the fee statement would be confidential. In most cases, the amount of the fee owing and the fact that the fee has not been paid would be confidential.

Texas State Bar Professional Ethics Committee Opinion 464, 8/10/89.

Although information in a billing statement is confidential, it may not fall within the protection of attorney-client privilege. Courts generally hold that "information about fee arrangements is not protected because the payment of fees is not usually considered a confidential communication between a client and lawyer." ABA/BNA Manual on Professional Conduct 55:309 (1994). (See *Alexiou v. United States*, 39 F.3d 973 (1994) where the court held that attorney-client privilege does not ordinarily protect against disclosure of the identity of client and fee arrangement between attorney and client. There is an exception to this rule when the identification of a client conveys information that is itself privileged. *Id.* at 976.) We feel the best rule is to treat all billing information as confidential.

The proposed plan calls for consent to be obtained from the client prior to any disclosure to the bank. Rule 1.6 indicates that a client may waive the attorney's duty of confidentiality with regard to basic billing information. ABA Model Code of Professional Responsibility, EC 4-2, footnote 3, supports this idea. The footnote reads:

[W]here...[a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information.

ABA Opinion 320 (1968).

Although Montana's Rule 1.6 does not specifically approve of the client's ability to waive confidentiality, it does not expressly prohibit such a waiver. However, in an early opinion, Ethics Opinion 000003, this Committee discussed the limitations on the substance of disclosures made for billing purposes. This pre-Model Rules Opinion dealt with arranging credit card payment for legal services and stresses the importance of preserving the confidentiality and secrecy requirements of the attorney-client relationship. In this opinion, clients knowingly use credit cards to pay for legal services:

Unquestionably, the lawyer must preserve the secrecy and the confidentiality of the lawyer client relationship. If the charge for service stems from a legal action of the public record, perhaps the lawyer could refer to the title of the case such as 'A' vs. 'B'. the cause number, the date services were rendered, and the costs involved but not itemized.

Following the reasoning of that early opinion and the Model Code of Professional Responsibility, we believe that an attorney's duty of confidentiality may be waived by a client as it pertains to billing information. We also believe that any disclosures made to the bank should

similarly be sterilized to the extent that no substantive information relating to the representation is disclosed.

Having determined that a client may waive an attorney's duty of confidentiality in relation to non substantive billing information, we turn to the issue of responsibility.

Montana's Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, sections (b) and (c) state:

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligation of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

This Rule holds an the attorney directly responsible for any confidential information disclosed to a non-lawyer agency or employee. In a typical opinion on the issue, the New York Ethics Committee addressed a law firm's employment of a non- lawyer who prepared attorney bills, sending them to the client after they were signed by a partner:

[T]he rendition of bills is an important aspect of the fiduciary relationship between attorney and client, not a mere ministerial task.... While a lawyer of law firm may delegate the task of preparing and sending bills to clients...some measure of supervision is essential.

* * *

If a bill rendered by the supervisory billing clerk were found to violate DR 2- 106(a) for example, the lawyers would personally risk the imposition of professional discipline.

Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 1994-9 (7/27/94).

Although it would not be improper for a lawyer or law firm to delegate final billing authority to a non lawyer, the ultimate responsibility for improprieties would still reside with the attorneys in the firm.

Finally, while there is general ethical approval of the use of commercial debt collection agencies when the lawyer's private efforts to recover payment have failed, ABA/BNA 41:2002, lawyers

should do so only after private efforts to recover payment have failed. The Rules are clear that an attorney should attempt to remedy client billing disputes personally prior to turning the issue over to a collection agency. Further, addressing the issue of confidential information disclosed to a collection agency for the purpose of collecting delinquent accounts, the Georgia State Bar Disciplinary Board cautioned:

[The attorney] should reveal to the [collection] agency only such minimal background information about the client as is absolutely necessary for collection. Additionally, he must exercise reasonable care to ensure that agency employees disclose only such client confidences or secrets as are permitted under the standard. A failure in this regard subjects the lawyer to potential disbarment.....

Georgia State Bar Disciplinary Board, Opinion 49; 7/26/85. Montana's practitioners face the potential of a similar penalty under Rule 5.3. Be it a bank or collection agency, the attorney making the disclosure is responsible for the dissemination of confidential billing information by the entity and its employees.

CONCLUSION: Although it appears a client may waive the attorneys duty of confidentiality, the firm and/or attorney at issue should consider several factors in determining whether the proposed billing is prudent in light of Rule 1.6.

First, the firm should consider the overall responsibility in creating an ongoing system of disclosing confidential information and discuss this system and alternatives with the client.

Second, the firm should consider that billing information disclosed to the bank may be received by someone who knows the client or the situation personally. This "small town" factor should be considered by the firm and discussed thoroughly with the client.

Third, when services of a bank are used as proposed, the bill submitted via the bank must not be detailed and shall contain no information in excess of the name and address of the client, the date(s) services were rendered, the amount owed, and possibly a billing number.

Fourth, the attorney must consider the danger of disclosing billing information to a third party. Such disclosure may act as a waiver of attorney-client privilege to that information. The attorney should warn the client as to this possibility and the detrimental effects if the attorney-client privilege is waived.

Fifth, the Rules of Professional Conduct clearly state that the attorney should try to work billing disputes out personally with the client prior to turning information over to a collection agency. By placing the collection in the hands of the bank prior to a dispute arising, the client is potentially subject to collection treatment that is unprofessional within the meaning of the Rules of Professional Conduct. If the proposed system is utilized, the firm should make clear to the bank that it is not to act as collection agency and must give the lawyer the opportunity to resolve all billing disputes.

Sixth, the firm must warn the bank that the information is confidential and that any non-authorized disclosure would result in a breach of the attorney's duty of confidentiality.

Seventh, the attorney is professionally responsible for the disclosures made to the bank. If the bank or any of its employees act improperly with regard to billing information the attorney would be responsible under Rule 5.3(c) and potentially subject to discipline.

The proposed billing system is intended to promote efficiency in rendering bills to clients. In light of the Rule 1.6 and 5.3(c) issues the firm must address, we fail to see how this purpose will be achieved and do not advise the implementation of this billing system.

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