

Professional Ethics Committee  
For The State Bar of Texas

Opinion Number 552  
August 2004

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer, who has been retained by an insurance company to defend its insured, to (1) furnish to the insurance company's third-party auditor the lawyer's fee statements via electronic mail and (2) pay to the third-party auditor a percentage of the lawyer's fee for auditing such statements?

STATEMENT OF FACTS

A lawyer representing an insurance company's insured is required by the insurance company to submit the lawyer's fee statement via electronic mail to a third-party auditor in a specified computer format. The third-party auditor subjects the fee statement to a computer program for the purpose of determining if the lawyer's fees are in compliance with the insurance company's "claim-handling guidelines." The lawyer is also required by the insurance company to pay to the third-party auditor for conducting the audit a percentage of the lawyer's fee.

DISCUSSION

The question presented raises issues concerning disclosure of confidential information and fee splitting. Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules") addresses the disclosure of confidential information to a third party. Rule 5.04 addresses the issue of fee splitting.

Professional Ethics Committee Opinion 532 (September 2000) dealt with a fact situation very similar to that under consideration. Citing Rule 1.08(e), Opinion 532 states that a lawyer may not accept compensation from a person other than the client unless there is no interference with the lawyer's independent judgment or with the client-lawyer relationship and information relating to the relationship is protected as required by Rule 1.05.

Rule 1.05(b)(1)(ii) provides that, absent the consent of the client after consultation as provided by Rule 1.05(c)(2) and except as otherwise authorized by the provisions of paragraphs (c) and (d) or required by paragraphs (e) and (f) of Rule 1.05, a lawyer shall not knowingly reveal confidential information of a client to anyone other than the client, the client's representatives, or the members, associates or employees of the lawyer's law firm. The delivery or dissemination by any means or media of confidential information, in this instance the lawyer's fee statement, other than as permitted by Rule 1.05 is prohibited.

Under the facts presented, the lawyer must advise the insured that the delivery of confidential information to a third party may adversely affect the insured's legal position in order for the insured to be able to give an informed consent for the lawyer to send his fee statement to the auditor. A consent by the insured to the delivery of the lawyer's fee statement, or any other confidential information, to a third party obtained at the time the policy is purchased, or otherwise in advance, could not be an informed consent after consultation. In order that the client's consent be made on an informed basis, the lawyer's consultation necessarily must include a discussion of the disadvantages to the client's legal position which may arise should the confidential information lose its protected status through the lawyer's disclosure of the information to the auditor. The nature of the case and the fact situation must be known by the lawyer for this consultation to be effective.

A lawyer's payment of a percentage of the lawyer's fee to the third-party auditor for its audit is

prohibited by Rule 5.04(a), which states that, with exceptions not here applicable, "[a] lawyer or law firm shall not share or promise to share legal fees with a non-lawyer ...." The insurance company has not required the lawyer to pay part or all of the actual expense of the third-party audit, it has required that the lawyer split his or her fee with the third-party auditor on a percentage basis. The payment of a percentage of the lawyer's fee to the third-party auditor constitutes a violation of Rule 5.04(a).

The Committee expresses no opinion regarding the relationship between the insured and the insurer or regarding any contractual rights or duties owed by one to the other or contractual obligations of the insurance company to pay for legal services rendered to its insured. Those matters involve legal issues that this Committee is not authorized to address. Although an insurance company and its insured can enter into various forms of contracts, such agreements cannot diminish a lawyer's responsibilities to the insured under the Disciplinary Rules once the insured becomes a lawyer's client.

## CONCLUSION

A lawyer's fee statement or invoice is confidential information, which the lawyer must protect, notwithstanding the payment of the lawyer's fees by the insured's insurance company. The delivery of confidential information to a third party, by any means or media, without the informed consent of the insured client violates Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. The payment of a percentage of the lawyer's fee by the lawyer to a third-party auditor of the insurance company constitutes fee splitting in violation of Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct.