

LEGAL ETHICS OPINION 1723
REQUIRED

CONFIDENCES; ATTORNEY
FOLLOWING PROCEDURES

BY LIABILITY INSURANCE COMPANY
WHICH RESTRICT DISCOVERY, USE
OF THIRD PARTY VENDORS AND
REQUIRE REVIEW OF DETAILED
BILLING INVOICES BY A THIRD
PARTY WITHOUT INSURED/CLIENT'S
CONSENT OR KNOWLEDGE.

Your letter presented a hypothetical situation and questions similar to those received recently by another requester. The Committee has decided that guidance on the pertinent issues can best be provided via one combined opinion for the two inquiries.

The hypothetical situation presented involves a lawyer who represents clients who are insureds of several liability insurance carriers. The carriers require the attorney to follow certain billing and litigation management guidelines. These guidelines restrict discovery and the use of experts and other third party vendors. The guidelines also require pre-approval for time spent on research, travel and the taking and summarizing of depositions. The insureds have not been informed of the use of litigation management guidelines.

In addition to the litigation management guidelines, the carriers require the attorney to submit billing statements directly to outside auditing firms for review and approval. The insureds have no knowledge of this submission. These auditing firms provide this service to more than one insurance carrier. The billing statements provide detailed descriptions of the work the attorney has performed for the insured. One auditing firm has also requested information regarding the amount of the last settlement offer made prior to suit and the attorney's estimate of the insured's percentage or degree of liability exposure. Examples provided by the auditor of the level of detail to be provided include: information regarding what was discussed in the office and by whom, specific issues researched, specific non-deposition discovery prepared, specific trial work performed, and the identity of all materials and documents reviewed. Finally, the auditor has requested that the attorney attach all his work product to the billing statements.

Under the facts you have presented, you have asked the Committee to opine as to the propriety of 1) litigation management guidelines issued by an insurance carrier that restrict an attorney's representation of the insured, and 2) the submission by the insured's attorney of billing statements and information about the insured's case to an independent auditor.

The appropriate and controlling disciplinary rules relative to your inquiry are: DR 4-101, which deals with the preservation of confidences and secrets of a client; DR 5-106(B), which states that a lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services; DR 6-101(C), which states that a lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered; DR 7-101(A), which deals with a lawyer's duty to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, to carry out a contract of employment entered into with a client for professional services, and to not prejudice or damage his client during the course of the professional relationship; and DR 7-101(B), which states that with the express or implied

authority of his client, a lawyer may exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client, and that a lawyer may refuse to aid or participate in conduct or pursue an objective which he believes to be unlawful or which is repugnant or imprudent. See also EC 4-3.

While this Committee has not previously addressed these particular questions, it has previously analyzed the character of the relationship between an insured and the attorney hired by an insurance carrier to represent the insured. Most recently, the Committee summarized that relationship as follows:

"[A]lthough paid by the insurer, the lawyer must represent the insured with undivided loyalty. Legal Ethics Opinion No. 598 (Approved by the Virginia Supreme Court, March 8, 1985). *See also, Norman v. Insurance Co. Of North America*, 218 Va. 718, 727 (1978) (attorney employed to represent insured is bound by the same high standards which govern all attorneys in their representation of private clients). Thus the insured/client may presume that his attorney has no interest which will interfere with his devotion to the matter confided to him."

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That position is mirrored by that in ABA Formal Opinion 96-403, stating, "[w]hatever the rights and duties of the insurer and the insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to his client." In determining the propriety of an attorney agreeing to management guidelines as described in the hypothetical, the Committee considered the carrier to be a third-party payor, whose limited role is defined by DR 5-106(B). In the present hypothetical, the third-party payor (i.e., the carrier) seeks to limit the scope and/or level of the attorney's representation. While DR 7-101(A) does obligate an attorney to carry out the legal objectives of his client and to fulfill his employment contract, DR 7-101(B) also allows an attorney to limit his client's objectives, but only with the express or implied authority of the client. Based on those rules, the Committee has previously determined that for an attorney to limit the level or scope of legal services to be provided to a client, the attorney must have obtained, at the start of the representation, consent from the client after full disclosure and have determined that the restriction would not materially impair the client's rights. LEOs 1193, 1276. Specifically regarding an attorney hired by an insurance carrier to represent an insured, the Committee opined that the attorney must make full and adequate disclosure to his client insured of any limitation of the scope of the representation. LEO 598. Such disclosure is part of the attorney's continuing responsibility under DR 6-101(C) to keep his client informed.

The Florida State Bar has recently opined that an insured's attorney may not follow an insurance company's case management guidelines without the full knowledge and consent of the client. Florida Ethics Opinion 20591, Dec. 31, 1997. That opinion suggested that if the insured's attorney determines that the insurance company's restrictions are injurious to the client's case, the attorney could not continue to represent the client under those circumstances.

In related situations, other bars have expressed concern regarding improper influence of a third party over the activities of an attorney. Specifically, the Ohio Bar rejected the permissibility of a company established solely to negotiate fees between attorneys and their clients; the opinion states that such financial pressure constitutes undue influence by a third party in an attorney/client relationship. Ohio Ethics Opinion 97-5. The Ohio Bar joins a number of other state bars in finding that a fixed fee arrangement for an insured's attorney hired by a carrier could be set so low as to create an impermissible risk that the

carrier would be influencing the attorney to provide less than adequate representation; thus, an attorney would be ethically prohibited from agreeing to a such a contract. *See*, Ohio Ethic Opinion 97-7; Oregon State Bar, Op. 1991-98; and Kentucky Bar Ass'n Op. E-368 (1994), approved and adopted, *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996) (banning all fixed fee arrangements for insureds' attorneys hired by carriers). *See also*, New Hampshire Bar Ass'n, Formal Op. 1990-91/5 and State Bar of Wisconsin, Op. E-83-15 (each allowing fixed fee agreements in this context but expressing related caveats regarding fees set inadequately low).

This Committee shares the concern raised by those bars that the attorney/client relationship must remain free from undue influence from third parties, such as the insurance carrier in the present context. Moreover, this Committee, as highlighted in the discussion above, has previously established benchmarks for an attorney seeking to limit the scope or level of service to his client. The Committee agrees with the Florida Bar's application of those principles to the situation of the insured's attorney. Accordingly, this Committee opines that it is ethically impermissible for an attorney to agree to an insurance carrier's restrictions on the attorney's representation of the insured absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions.

Moreover, because client consent to restrictions delimits the scope and content of representation and thus affects significant interests of the client, as well as the lawyer, the Committee opines that such consent must be in writing to comport with the lawyer's duties of independent professional judgment, undiluted loyalty, and zealous representation.

In response to your second question, the Committee believes that its analysis of the submission of the information to the auditing firms must be based on respect for DR 4-101, which establishes a fundamental aspect of the attorney/client relationship: proper preservation of a client's confidences and secrets. Any audit of attorney's billing practices must in no way violate that rule.

Previously, the Committee has maintained that an insured's attorney must follow DR 4-101, even when the attorney is provided by the carrier. Legal Ethics Opinion 598 (insured's attorney must not reveal any defense to policy coverage to the carrier if such information was gained in the attorney/client relationship with the insured). However, in other opinions, this Committee has opined that EC 4-3 allows attorneys to provide limited information to outside auditors. *See*, Legal Ethics Opinions 859, 1016, 1573. The Committee established three requirements for such submissions: the information be of the limited nature contemplated in EC 4-3, that the billing agency be selected with due care, and that the billing agency be warned to maintain client confidentiality. Legal Ethics Opinion 1573.

The Committee opines that the present situation should be distinguished from the exception to 4-101 that is, in effect, carved out by EC 4-3 and those opinions. In the present situation, not one of the three requirements established in the above-cited authority is met. The information is not of a limited nature. The information is extensive; its submission to the auditing firms would involve disclosure of confidential information regarding both the facts of the insured's case and the attorney's representation of that insured. Also, the billing agency is not selected with due care as it is not selected by the attorney but by the carrier. Finally, as the auditing firm is contracting not with the attorney but with the carrier, the attorney is in no position to direct the auditing firm to exercise proper precautions to maintain client confidentiality. For these reasons, the Committee opines that the permissible release of information contemplated in EC 4-3 is

not permissible for the submission of the information to the auditing firms in the present hypothetical.

Many other states have reviewed similar auditing arrangements and found them ethically impermissible due to the absence of full and adequate disclosure to the client and consent from the client. *See*, Utah State Bar Opinion 98-003; Florida Bar Staff Opinion 20591, December 31, 1997; Alabama State Bar (unnumbered); South Carolina Ethics Advisory Opinion 97-22; Kentucky Bar Ass'n, KBA E-404; North Carolina Proposed 98 Formal Ethics Opinion 10; Louisiana State Bar Association (unnumbered); Indiana State Bar Ass'n, Opinion 4 of 1998. These opinions collectively are in line with the general principle established by DR 4-101 and with this Committee's history of applying that principle to an insured's attorney, even where the attorney is provided by the carrier. In contrast to above-cited opinions, the Massachusetts Bar opined that so long as the insured/client had provided consent to disclose the information to the carrier, that consent could be interpreted to extend to out-sourcing bill review activities to outside auditing firms, so long as the auditor would maintain client confidentiality. Massachusetts Bar Opinion Letter (unnumbered), November 20, 1997. For the reasons cited earlier in this opinion for not applying EC 4-3 to the present hypothetical, this Committee declines to adopt the conclusion of the Massachusetts Bar on this point.

The Committee opines that for the insured's attorney in this hypothetical to submit detailed information regarding the insured's case to an auditing firm would be ethically impermissible as the attorney has failed to provide the client with full and adequate disclosure and has failed to obtain consent from the client for the disclosure. Furthermore, the Committee notes that, pursuant to the attorney's duty of loyalty to the client, as prescribed by DR 7-101, the insured's attorney should not recommend that the client provide such consent if the disclosure to the auditors would in some way prejudice the client. *See*, Kentucky Bar Ass'n, KBA E-404; North Carolina Proposed 98 Formal Ethics Opinion 10.

Committee Opinion
November 23, 1998

Approved by Supreme Court
September 29, 1999