IDAHO STATE BAR
FORMAL ETHICS OPINION #136[1]

The Idaho State Bar has received several requests to address issues related to insurance defense practice. Those questions are:

Question # 1: May an attorney whose professional services are paid by a person other than the client, disclose, without client consent, to third parties such as an insurer's outside auditing service, client information in detailed, narrative billing statements which describe the professional services rendered?

Question #2: If the answer to the first question is "no" may the lawyer accept a client consent obtained by the insurer? May a lawyer be required as a condition of the employment to obtain such a waiver from the client?

Question #3: May an attorney whose professional services are paid by a person other than the client ethically comply with detailed, narrative billing guidelines of the person paying the billing?

Answer 1: No.

An attorney cannot disclose to an auditor, without the client's consent, information protected by *Idaho Rule of Professional Conduct* ("IRPC") 1.6, except for disclosures that are impliedly authorized to carry out the representation. The exception for disclosures that are impliedly authorized is to be narrowly construed, and does not allow the attorney's disclosure, without specific client consent, of client information to a third party hired by the insurance company.

Answer 2: No to both questions.

Personal and specific inquiry with the client is required before acting upon a waiver of a client's expectation of confidentiality.

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[1] Portions of the language and reasoning employed in this opinion are borrowed from Washington State Bar Association Opinion #195. The Idaho State Bar wishes to acknowledge the WSBA for its efforts in issuing its opinion.

Answer 3: Yes, providing certain conditions are met.

An attorney whose professional services are paid by a person other than the client can ethically comply with "Billing Guidelines" of the person paying the billing, provided the billing Guidelines do not: (1) require disclosure of information relating to the client, without the client's consent; (2) interfere with the attorney's independent professional judgment or with the attorney-client relationship; or (3) direct or regulate the attorney's independent professional judgment in rendering legal services to the client.

BACKGROUND FACTS

Historically, insurance defense attorneys have sent their bills to the insurance company for payment. These bills are detailed and typically include the name of the client, information about the nature of the legal services performed, information about specific research conducted by the attorney, and information which would tend to disclose strategic decisions made with regard to the case. In some instances legal bills include information which would be embarrassing to the client.

Many insurers have issued "Billing Guidelines" to defense counsel. Recently, some insurers have begun a process of retaining independent auditing firms to review bills submitted by their defense lawyers. Some insurers have requested that lawyers send their bills directly to the outside auditing service, either by hard copy or computer disk.

The outside auditing service reviews and makes recommendations for payment or nonpayment of defense counsel's billings based on compliance or noncompliance with certain "Billing Procedures" and "Billing Guidelines" which have been adopted by the particular insurance company.

Payment for professional services is based on "adequate descriptions" contained in the billing statement. "Adequate descriptions" often require the identity of all participants in and the purpose of, a conference, letter, call or meeting; the specific issue involved; and specific information about the nature of what was discussed, reviewed or decided which may require disclosure of specific tactics and strategic information about the defense of litigation irrespective of whether the information is otherwise privileged, embarrassing to the client, or may involve matters of dispute between the client and the insurer. None of the activities of the auditing service involves the direct investigation or defense of the claim.

"Inadequate description" of communications with the clients (insureds) and their personal attorneys, has been the basis for denial of payment by an auditing service where defense counsel, in "reservation of rights" cases (as well as in cases not involving reservation of rights), did not specifically explain what was discussed in client conversations. Auditing services have "reservation of rights" applied the same "adequate description" standards and requirements in reservation of rights cases.

DISCUSSION

Question #1

In drafting this opinion, much consideration was focused on who is the client. The Washington State Bar Association noted that that while there is something of a "tripartite" relationship between the insurer, the insured and the lawyer, in that state the lawyer's ethical responsibilities are toward the insured. *Tank v. State Farm*, 715 P.2d 1133 (1986). There are no Idaho cases as directly on point. Ultimately, for these purposes, it is not necessary to focus on whether the insurer is the client -- it is sufficient to note that the insured unquestionably is a client, owed undeniable duties under the *Idaho Rules of Professional Conduct.*[2]

IRPC 1.6 is very broad in its prohibition against revealing information about a client's cause. That rule states:

> **Rule 1.6 - Confidentiality of Information**
>
> (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) * * *.

The modern rule of confidentiality, prohibiting revelation of "information" is, in fact, much broader than the old DR 4-101(C), which prohibited revelation of a client's "confidences and secrets" without consent.

Because disclosing information to a third party auditor clearly involves communication of information relating to the representation, it falls within the prohibition of Rule 1.6.

Some commentators have suggested that insureds give implied consent to disclosure to third parties by virtue of having purchased a policy of insurance. We do not agree with this conclusion. The exception for disclosures that are impliedly authorized is to be narrowly construed, and does not allow disclosure of confidential client information to a third party hired by the insurance company without specific client consent. While a better argument can be made that an insured gives implied consent to disclosure of *most* information to the insurance company itself,[3] there is no reason to believe that the average policy-holder is even aware of the issues surrounding auditing of defense bills, much less has given implied consent.

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[2] While discussing the exact nature of the relationship between the insurer and the lawyer is not essential to this opinion, it could be a substantial issue in other contexts. For instance, it has been suggested that unless the insurer is a client, disclosure of the insured's information to an outside auditor might be a waiver of the *evidentiary* attorney-client privilege. Such an interpretation of the *Idaho Rules of Evidence* is beyond the scope of this opinion.

[3] In most cases an insured has a contractual duty to cooperate with the insurer in the defense of the case. This necessitates disclosure of information to the insurer, and most insureds would be presumed to understand this

Because disclosure to third-party auditors does not fall within any defined exception to Rule 1.6, and because implied waiver should be narrowly construed, the first question should be answered negatively.

Question #2

The next question is whether a lawyer may act upon a waiver obtained by the insurer, whether in boilerplate contract language or in a release form signed after the casualty occurs. Additionally, we are asked whether a lawyer may be required to obtain such a waiver as a condition of accepting insurance defense employment.

In both instances, the answer is "no," because the lawyer's independent professional judgment requires a personal determination as to whether such a waiver is in the client's best interest. It is inconceivable that such a judgment can be made without consulting with the client and considering the specific circumstances of each case.

IRPC 1.2(a) makes it clear that a client is to be consulted about important decisions in the representation:

> **Rule 1.2 - Scope of Representation**
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> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The comment to Rule 1.2 states, in part:

> * * * [A] client also has a right to consult with the lawyer about the means to be used in pursuing those objectives [of the representation].

Rule 1.7 requires that a lawyer not allow personal considerations to interfere with independent professional judgment on behalf of a client.

> **Rule 1.7 - Conflict of Interest: General rule**
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

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consideration. In the case of a conflict between the rights of the insured and the insurer, however, it is easy to conceive of a situation where disclosure even to the insurer would be impermissible.

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implication of the common representation and the advantages and risks involved.

If a lawyer is required to commit to obtaining concessions from a client prior to even accepting that case, then the lawyer is permitting the prospect of future employment to interfere with independent professional judgment on behalf of a client.

In the generally rare circumstance where a lawyer can independently conclude that a client could properly give consent to disclosing the information to third parties, conveying the insurers request that the insured consent to billings being reviewed by an outside audit service would not interfere with the attorney's independent professional judgment or with the attorney-client relationship.

Conversely, a *requirement* that defense counsel seek or obtain the informed consent of the insured to disclose client confidences or secrets in billings to be submitted to the insurer or its outside auditing service, would invoke the prohibitions in IRPC 1.7 and place defense counsel in an impossible situation, requiring withdrawal from the representation.

The issue is not whether the waiver would be a major concern for most clients. Rather, the issue is, under what circumstances, if any, would independent counsel for the client recommend that the client consent to disclosure of confidences or secrets to third persons? If there is the slightest risk of embarrassment to the client or waiver of privileged information independent counsel would have an affirmative duty to recommend against disclosure.

Silence in the face of an affirmative duty to recommend against disclosure would be as egregious as a recommendation to consent to disclosure. Defense counsel who was required to seek or to obtain the insured's consent to disclosure would proceed to do so only by advancing counsel's own self-interests over the interests of a third party, the insurer, in contravention of rules 1.7(b) and 1.8(f). Thus, a "requirement" to seek or obtain the client's consent to disclosure would put defense counsel in an ethical dilemma requiring withdrawal from the representation.

Question #3

The third and final question presented is whether a lawyer may comply with "billing guidelines" promulgated by the insurer. The guidelines typically establish time and cost parameters for discrete legal tasks within the representation. Thus, a lawyer may be advised that only "X" number of hours of billings will be paid for particular aspect of the representation, e.g., a motion to compel discovery, or a non-party deposition.

Billing guidelines directly between a lawyer and a client are a matter of contract between those two parties and are generally appropriate. The billing guidelines at issue here are not coming from the client, but rather from a third party paying the bill for the client. Again, the issue is not whether the insurer is *also* a client of the lawyer, but that decisions about handling the case are being made by someone else. The fact that the insurer may or may not also be a client does not change the fact that the insurer, as an outside entity, is directing the lawyer's independent professional judgment *vis a vis* the interests of the insured.

IRPC 1.8(f) states:

> **Rule 1.8 - Conflict of Interest: Prohibited Transactions**
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> * * *
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> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1) 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
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> (3) information relating to representation of a client is protected as required by Rule 1.6.

As already noted, IRPC 1.7(b) prohibits a lawyer from representing a client if the representation of that client may be limited by the lawyer's responsibilities to a third person or by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected, and the client consents in writing after consultation and full disclosure.

IRPC 5.4(c) requires that a lawyer shall not permit a person who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

A billing guideline of a person other than the client that compels or requires disclosure of client confidences or secrets in detailed, narrative descriptions of legal services rendered, absent client consent, requires conduct in violation of IRPC 1.6, 1.7, 1.8(f) and 5.4.

A billing guideline that limits or restricts time spent by counsel performing services which counsel considers necessary to adequate representation, such as periodic review of pleadings, conducting depositions, or in preparing or defending against a summary judgment motion, endeavors to direct or regulate the lawyer's professional judgment in violation of IRPC 5.4(c). These limitations are, by necessity, general provisions that have not taken into account the vagaries of a particular case.

Absent client consent an attorney may not ethically comply with the billing guidelines of a person other than the client who pays the lawyer's bill.

A lawyer being paid pursuant to billing guidelines of a person other than the client must initially consult with the client at the outset of the representation, and consult with the client periodically thereafter as circumstances may require, and obtain the client's informed consent to any limitations imposed on the lawyer's representation.

Where a lawyer reasonably believes that representation of the client will be materially affected by any limitations in billing guidelines of the person paying the billings, the lawyer must withdraw, subject to the requirements of IRPC 1.15, and notify the client of the basis for the withdrawal.

Conclusion

Based on the foregoing, the Board of Commissioners of the Idaho State Bar hereby issues the foregoing Formal Ethics Opinion #136 this 1st day of October, 1999.[4]

President

Commissioner

Commissioner

Commissioner

Commissioner

[4] The Commission also considered the opinions of the following jurisdictions. Alabama (Op. 98-02); Kentucky (Op. E-404); Louisiana ; Maryland (Op. 99-7); Massachusetts (1977-T53); Nebraska (Letter Op. 1/8/98); Oregon; South Carolina (Op. 97-22); Utah (Op. 98-03); and Vermont (Op. 98-7).