

**ALASKA BAR ASSOCIATION  
ETHICS OPINION NO. 2006-3**

**Disclosure of Confidential Insurance Defense Attorney Bills to  
Non-Insurer Contractors for  
Electronic Or Computerized “Screening”**

**QUESTIONS**

The Committee has been asked to give an opinion as to whether it is proper for a lawyer to send confidential defense bills, at the request of a client’s insurer, to a computer contractor that is not the insurer for screening through a computerized software program. A secondary question is whether the practice would be allowed without the informed consent of the insured.

**CONCLUSION**

It is the committee’s opinion that Ethics Opinion 99-1 controls this issue. The lawyer may not disclose, through electronic means, or otherwise confidences and secrets of the client to an outside contractor that is not the insurer without the informed consent of the insured client.

**DISCUSSION**

**I. Facts**

The facts presented with this question are helpful in setting the stage for the discussion which follows. In the scenario presented to the Committee, an insurance defense firm is retained by Insurer to represent its insureds in litigation in Alaska. The Insurer agrees to pay defense costs as part of its insurance agreement with the Insured client of the law firm. Insurer requests that the lawyer transmit billings through a third-party computer contractor for initial review and screening. The lawyer’s billings contain detailed and confidential statements discussing the lawyer’s work on the client’s behalf.

In the usual case, the bills are “screened” by a computer software program for comparison to certain guidelines established by Insurer. If the lawyer’s billings pass the software screen, then the billing is automatically forwarded to Insurer for review and payment by Insurer’s claims personnel (a human being). The electronic screen may also raise an electronic red flag which is similarly forwarded automatically to Insurer. In the normal course, the Computer Contractor’s employees do not review the lawyer’s billings. However, in case of computer malfunction, or other glitch, the employees of Computer Contractor are able to review the confidential billings, for the

purpose of correcting possible hardware or software malfunctions. The process is intended to be fully automated.

## **II. Analysis**

In Alaska Bar Association Ethics Opinion 99-1, the Committee addressed a similar question. There, the issue was whether defense counsel appointed by an insurer was permitted to send detailed billings (presumably containing confidences and secrets of the insured client) to a third party auditor hired by the insurer solely to review attorney bills. The Committee concluded the practice was ethically problematic for defense counsel. An attorney is only permitted to send billings which contain client confidences and secrets to an outside auditor with the specific consent of the insured client. *See Ethics Opinion 99-1.*

The principal concern is that disclosure of billing statements may disclose information or materials protected by the attorney-client privilege or attorney work-product doctrine. Typically, because insurer imposed guidelines for defense counsel require detailed billing statements reflecting each and every activity involved in the defense of a case, the billing statements may contain confidences and secrets of the client-insured within the meaning of ARPC 1.6(a). Because of the possibility that disclosure of billing records to an outside auditor might result in a waiver of the privileges, the Committee reasoned that attorneys must act cautiously and choose the option least likely to result in an unintended waiver. *Id.*; *See Also, ARPC 1.6(a).* In Ethics Opinion 99-1, the Committee explained that caution requires the attorney to obtain the informed consent of the client insured before transmitting or disclosing the billing records.

Since the Committee issued Opinion 99-1, several courts, bar associations, and commentators have weighed in on the issue. More than thirty state Bar Associations, and the American Bar Association have now addressed the issue and concluded that insurance defense counsel may not submit billing statements containing confidential information to outside auditors without first obtaining the informed consent of the client-insured. *See ABA Formal Opinion 01-421 (2001)*; *See also In Re The Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P3d 806 (Montana 2000). These additional authorities provide further support for Ethics Opinion 99-1.

Here, the practice of sending billing statements through a computer program is, for all practical purposes, the same as sending billing statements to an outside auditor. The billing statements are transmitted to an outside computer, where they are presumably processed, compared by means of a computer program to a series of pre-determined criteria, and then forwarded

again to Insurer. In the Committee's view, the fact that the bills are reviewed by an "electronic screen" or software program rather than an outside human auditor makes no difference. The billing statements have been transmitted to an "outside party" with confidences and secrets of the client available to third parties to review.

In summary, the practice of sending billing statements containing confidences and secrets of a client-insured through a computer screen that is not the insurer's for comparison to an insurer's defense guidelines raises the same ethical concerns addressed by the Committee in Ethics Opinion 99-1. Lawyers may not send billing statements through such screens without first obtaining the informed consent of the client-insured.

Approved by the Alaska Bar Association Ethics Committee on April 6, 2006.

Adopted by the Board of Governors on April 25, 2006.