

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 99-1**

**Ethical Obligation of Attorney When Insurer Requests
Attorney to Send Billings to Outside Auditor
Without Informed Consent of Insured**

The Ethics Committee has been asked to address the ethical issues implicated when an attorney, who has been retained by an insurer to defend its insured, is asked by the insurer to send detailed billing records describing the legal services provided on behalf of the insured to an independent auditor hired by the insurer to review defense counsel billings. For purposes of this opinion, the Committee assumes, first, that the attorney's billing records contain confidences and secrets of the insured, as well as matters covered by the attorney work-product doctrine, and, second, that the auditor is hired by the insurer solely to review attorney bills and is not involved directly in litigation management.

The Committee concludes that the attorney's compliance with the insurer's request to send billings to the auditor is ethically problematic and that the attorney may not provide confidences and secrets in billing records to an outside auditor without specific consent from the insured.

Alaska Rule of Professional Conduct 1.6(a) requires an attorney to preserve the confidences and secrets of the client unless the client consents after consultation. The rule provides an exception for "disclosures that are impliedly authorized in order to carry out the representation." In the context of an attorney retained by an insurer to represent an insured, the exception ordinarily covers disclosures by the attorney to the insurer, because the typical insurance contract between the insurer and the insured states explicitly that the insurer may control the defense. See generally Ethics Opinion 89-3; CHI of Alaska v. Employers Reinsurance, 844 P.2d 1113 (Alaska 1993). However, the exception does not apply to disclosures to any third party, such as a billing auditor, when there is neither express nor implied consent from the insured for the disclosure.

Disclosure of attorney-client privileged or work-product-protected materials to a third party, even one selected by the insurer, is problematic, because such disclosure may result in waiver of the privilege or protection. Whether disclosure of billing records to an auditor at the request of the insurer

will waive the attorney-client privilege or work-product protection is uncertain.¹ The Ethics Committee does not express an opinion on the waiver question; this issue must be resolved by the courts. From an ethical perspective, the attorney's duty is clear. When attorneys act in areas where privilege questions are unresolved, they must act cautiously and choose the option least likely to result in an unintended waiver of the attorney-client privilege. ARPC 1.6(a) states explicitly that "[i]n determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information."

Because it is not certain under current law whether an attorney's disclosure of billing records to an outside auditor at the request of the insurer would waive the attorney-client privilege of the insured, the attorney may not provide confidences or secrets in billing records to an auditor without the express consent of the insured.

Informed consent requires the attorney to provide whatever information the client needs in order to make an informed choice among alternatives. With respect to whether the insured should agree to release confidences and secrets in billing records to an auditor, the attorney may wish to explain to the insured the purpose of providing the information to the auditor, how providing or not providing the information could affect the attorney's representation of the insured, and how the attorney-client privilege and attorney work-product doctrine might be waived by the disclosure.²

Approved by the Alaska Bar Association Ethics Committee on January 7, 1999.

¹ While not directly on point, United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997), is read by some commentators to suggest that disclosure to a third-party engaged as a billing auditor will waive the attorney-client privilege. Other commentators contend that disclosures to an auditor selected by an insurer fit within the protection of evidence rules comparable to Alaska Evidence Rule 503(a)(5) and therefore the privilege is not lost.

² The Committee does not mean to imply that full discussion of all these topics is always required or that discussion of these issues is all that is ever required to obtain informed consent. The scope of information essential to informed consent depends on the particular circumstances.

Adopted by the Board of Governors on January 15, 1999.

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