



**New York State Bar Association
Committee on Professional Ethics**

Opinion 987 (10/25/13)

Topic: Insurance company review of staff counsel's files.

Digest: Absent informed consent from the insured (staff counsel's client), staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company which employs the staff counsel.

Rules: 1.0(h); 1.6(a); 1.8(f)

FACTS

1. An insurance company that employs staff counsel to represent the company's insureds conducts peer reviews of the staff counsels' files to both evaluate the attorneys' handling of files and to develop best practices to be followed by staff counsel attorneys of the insurance company. The panel conducting these reviews has until now been comprised solely of staff attorneys of the insurance company but the insurance company now proposes adding non-attorney members of the insurance company's claims department to the panel.

QUESTION

2. Is it permissible to allow non-attorney members of the reviewing panel access to the insured's confidential information contained in the staff counsel's files?

OPINION

3. Rule 1.6(a) provides that a lawyer "shall not knowingly reveal confidential information...or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent...;

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b) [none of the provisions of which paragraph (b) are applicable to the facts of this opinion]."

4. Confidential Information is defined in Rule 1.6(a) as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”

5. Rule 1.0(h) defines “law firm” to include “the legal department of a corporation or other organization”. The office of staff counsel therefore constitutes a law firm but the non-attorney members of the insurance company’s claims department are not members or employees of the “law firm” of staff counsel and are not subject to supervision and control by the staff counsel. Therefore, the attorney does not have the ability or authority to exercise reasonable care in their supervision to prevent their disclosure or use of confidential information in accordance with Rule 1.6(c).

6. Accordingly, any confidential information in the staff counsel’s file cannot, without the client’s informed consent, be revealed to the non-attorney members of the review panel. Informed consent is defined in Rule 1.4(j) as, "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Unless such consent is contained in the language of the applicable insurance policy, it is incumbent upon the staff counsel to obtain the client’s informed consent to the disclosure of the information to the non-attorney members of the reviewing panel. Absent such consent, the confidential information must be redacted from the file before the file may be reviewed by the non-attorney members of the reviewing panel. See N.Y. State 716 (1999) (counsel assigned by insurance company to represent the insured cannot provide bills, which are deemed to contain confidential information, to independent auditors retained by the insurance company, without the insured’s informed consent) and N.Y. State 721 (1999) (defense counsel may follow direction of insurance carrier to utilize a specified legal research service subject to certain conditions, but may not in doing so reveal client confidential information without the informed consent of the client).

7. Because the fees of the staff counsel are paid by the insurance company, the provisions of Rule 1.8(f) are also applicable. These provisions require that if the fees are to be paid by someone other than the client, the client must give informed consent (this is usually in the language of the policy), there be no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship and the client’s confidential information is protected as required by Rule 1.6.

CONCLUSION

8. Absent informed consent from the insured (staff counsel’s client), staff counsel may not permit review of the confidential information in the client’s file by non-attorney employees of the insurance company which employs the staff counsel.