BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 99-F- 143(a)

A further inquiry regarding the relationship between lawyers, who are appointed by insurance companies to defend insureds, and insurance companies.

Board of Professional Responsibility Formal Ethics Opinion 99-F-143 (6-14-99) addresses the increasing tendency of insurance companies to audit the bills and files of attorneys retained to represent their insureds. The opinion states that prior to allowing auditors to review attorney's bills and case files, client consent must be given. The opinion also mandates that attorneys are not allowed to enter into any agreement to represent an insured whereby the insurance company has the power to direct the manner of the attorney's representation.

A request for a clarification of this opinion has been presented to the Board. The first issue presented in this request is whether an attorney may comply with the aforesaid opinion simply by "redacting" the confidences and secrets from the clients' files and bills prior to submitting them to the auditors. It should be reiterated that if a client consents, there is no problem submitting any file or bill to an auditor. DR 4-101(a) requires a lawyer to keep not only information protected by the attorney/client privilege confidential, but also any "secret". "Secrets" include "other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure which would be embarrassing or would likely to be detrimental to the client." "A secret" can therefore be almost anything the client does not wish to be disclosed. For instance, in Board of Professional Responsibility Formal Opinion No. 82-F-25 (February 22, 1982), the Board noted that even zip codes, birth dates, race, sources of referral, etc., may be considered "secrets". It is not up to the attorney to determine what the client wishes to keep confidential or secret. Thus an attorney cannot unilaterally make redactions based on his/her personal judgment as to the confidentiality of certain information in his/her file. Client consent remains necessary for any disclosure.

The second issue is whether the attorney complies with the requirements of this ethics opinion by sending the bill not directly to the audit service, but to the insurance company with the knowledge that the insurance company may forward the bill to the auditor. DR 1-102(a) states that a lawyer "shall not circumvent the disciplinary rules through actions of another." Therefore, a lawyer cannot evade the requirements of the aforesaid opinion by participating in a scheme whereby the insurance company forwards the bill to the auditor.

The final issue relates to a proposed insurance company requirement that an attorney, who feels he/she cannot provide competent representation to a client under the insurer's litigation guidelines, must first discuss the situation with the insurance company. Such preliminary discussions are permissible, but confidential communications or information cannot be disclosed without the client's consent. If after the discussion the attorney and the insurance company continue in disagreement as to specific aspects of the attorney's representation, Opinion No. 99-F-143 requires the attorney to disregard the insurance company's directives and to proceed in the direction he/she believes to be in the best interest of his/her client.

This 10th day of September, 1999.

ETHICS COMMITTEE

Johanna J. McGlothlin, Chair

Richard A. Fisher

Tom Hill

John J. Walton

APPROVED AND ADOPTED BY THE BOARD