THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2017-2: Obligation to Report Fraudulent Billing

TOPIC:
Obligation to report fraudulent billing by another lawyer, subject to duty of client confidentiality.

DIGEST:
A lawyer who learns that another lawyer has fraudulently billed a client has a duty to report the other lawyer to the appropriate disciplinary authority under Rule 8.3 of the New York Rules of Professional Conduct (the "Rules"), but this reporting duty is limited by the lawyer's duty not to reveal client confidences without the client's informed consent.

RULES: 1.0(j), 1.4(a)(1)(iii), 1.4(b), 1.6, 1.9, 3.3, 5.1, 5.3, 8.3

QUESTION:
When a lawyer knows that a colleague has fraudulently billed a client, may or must the lawyer report the colleague's misconduct under Rule 8.3, even though reporting would disclose or risk disclosure of the client's confidential information and the client has not consented to disclosure?

OPINION:

This Opinion addresses a lawyer's reporting obligations upon discovering that another lawyer in the law firm has engaged in fraudulent billing. Specifically, the question is whether the lawyer is obligated in all cases to report the colleague's misconduct to the appropriate disciplinary authority under Rule 8.3 or whether the reporting obligation may be overridden by a duty of confidentiality to the firm's client.

Rule 8.3(a) provides:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such misconduct to a tribunal or other authority empowered to investigate or act upon such violation.

Rule 8.3(c)(1), however, limits this duty. It provides that the reporting rule "does not require disclosure of information otherwise protected by Rule 1.6" – i.e., "confidential information" as defined by Rule 1.6. Under Rule 1.6(a), a lawyer may not reveal confidential information without the client's informed consent unless there is an applicable

exception to the confidentiality duty. Therefore, absent an applicable exception to the confidentiality duty or the client's informed consent, the lawyer may not and, indeed, must not, disclose confidential information to the disciplinary authority.

Rule 1.6(a) provides that "confidential information"

> consists of 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. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

The lawyer in a law firm who discovers the fraudulent billing has the same duty of confidentiality to the firm's client as any other lawyer in the firm, regardless of whether the lawyer personally worked on the client's matter. *See* Rule 1.6(c) & cmt. [16]; *see also* Rules 5.1, 5.3.

The law firm, upon discovery of the fraudulent billing, must inform the client that the fraudulent billing occurred. *See* Rule 1.4(a)(1)(iii). Then the firm must consider whether to inform the appropriate disciplinary authority.[1] Lawyers generally have an affirmative obligation to report serious misconduct under Rule 8.3(a). Another lawyer's fraudulent billing (as distinguished from innocently erroneous billing) "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." Therefore, knowledge of the fraudulent billing would trigger the reporting obligation under Rule 8.3(a). However, under Rule 8.3(c)(1), a lawyer is not required to disclose confidential information protected by Rule 1.6(a) and, in fact, is prohibited from doing so absent informed client consent.

The central question is whether reporting the fraudulent billing would entail disclosure of "confidential information" protected by Rule 1.6(a). The fact that a colleague sent fraudulent bills to a client of the firm is "information gained during or relating to the representation of a client." Consequently, this information is confidential under the definition in Rule 1.6(a) if it is protected by the attorney-client privilege, if disclosure would be embarrassing or detrimental to the client, or if the client requests that the information be kept confidential.

Absent client consent, no exception to the duty of confidentiality applies to this information. Under Rule 1.6(a)(2), a lawyer may disclose confidential information without client consent if "the disclosure is impliedly authorized to advance the best interests of the

[1] Rule 8.3(a) provides that misconduct be reported "to a tribunal or other authority empowered to investigate or act upon such violation." In the case of billing fraud, the report ordinarily would be made to the disciplinary authority in the jurisdiction in which the lawyer who committed the fraud is licensed to practice.

client." However, there is no apparent benefit to the client from reporting the fraudulent billing. Indeed, as discussed below, there may be reasons why reporting would be embarrassing or detrimental to the client. Therefore, disclosure of this information is not impliedly authorized under Rule 1.6(a)(2). Under Rule 1.6(b)(6), a lawyer may disclose confidential information without client consent "to the extent that the lawyer reasonably believes necessary … when *permitted* or *required* under the Rules or to comply with other law or court order" (emphasis added). Because Rule 8.3(c)(1) provides that that "[t]his Rule does not require disclosure of … information otherwise protected by Rule 1.6," disclosure is not "required" for purposes of Rule 1.6(b)(6). Nor is there anything in Rule 8.3 that "permit[s]" disclosure for purposes of Rule 1.6(b)(6).[2]

Having told the client about the fraudulent billing, the lawyer should explain that she is ethically obliged to report it unless doing so would breach her duty of confidentiality to the client. She should further explain that reporting the fact of the fraudulent billing to a disciplinary authority could result in further disclosure of confidential information contrary to the client's wishes. Even if the lawyer reported the fraudulent billing to the disciplinary authority without identifying the client, client confidentiality would be at risk because the disciplinary authority could respond by seeking further information.[3] For example, the disciplinary authority might subpoena the firm for additional information about the client and underlying matter. Only if the information was protected by attorney-client privilege could the firm resist production.[4] Once the disciplinary authority had the information, it could unilaterally decide to take steps leading to its disclosure, e.g., in bringing formal charges against the perpetrator of the fraudulent billing. An explanation of these possibilities is necessary to enable the client to give "informed consent" to the disclosure or to make an informed decision to direct the lawyer not to report. *See* Rules 1.0(j), 1.4(b) & 1.6(a). However, the lawyer should take care to give a realistic assessment and not to overstate the risks.

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[2] In certain circumstances, rules other than Rule 8.3 may require disclosure of confidential information relating to fraudulent billing absent client consent. For example, a lawyer who submits billing information to a court believing it to be correct and later learns the billing was fraudulent must correct the false submission as required by Rule 3.3(a)(1). Under Rule 3.3(b), the correction required by Rule 3.3(a)(1) must be made "even if compliance requires disclosure of information otherwise protected by Rule 1.6."

[3] Prior opinions have recognized in other contexts that redacted or otherwise unidentified disclosure without client consent may breach client confidentiality, if it would be possible for the client's identity to later be discerned. *See* NYSBA Formal Op. 743 (2001) (union's lawyer may not disclose redacted arbitration decision if relevant employee can "conceivably be identified from unredacted portions of decision"); NYSBA Formal Op. 718 (1999) (anonymized information about juvenile clients extracted from mental health examinations may not be provided to bar association committee for statistical analysis if recipient "can conceivably link the information … to a particular client, with the result that the client may be embarrassed or harmed"); NYSBA Formal Op. 1026 (2014) (lawyer who also acts as divorce mediator may publish fiction drawing on his work only if client information is so altered and disguised that no one can trace particular information to a particular client).

[4] Legal bills may include information that is privileged, but they are not invariably privileged *per se*. *See, e.g., Baker v. Dorfman*, No. 99 Civ. 9385(DLC), 2001 WL 55437, at *2 (S.D.N.Y. Jan. 23, 2001).

Finally, although the lawyer should make clear to the client that she will not report the fraudulent billing if the client objects or declines to give informed consent to the disclosure of confidential information, she "should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Rule 8.3 cmt. [2]; *see also* ABA Formal Op. 04-433 ("[W]e believe it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules. In essence, this would allow the lawyer to circumvent them."). The lawyer should explain that reporting serious misconduct to the disciplinary authorities is necessary to protect future clients from wrongdoing. Encouraging disclosure unless the client's interests would be substantially prejudiced furthers the lawyer's obligation to promote the integrity of the legal profession.

In most fraudulent billing cases, the client will either direct the lawyer not to disclose the information or give informed consent to the disclosure. In the unusual case where the client does neither because the client is unavailable or non-communicative—for example, where the client is deceased, or where the client is otherwise unreachable[5]— the lawyer must determine whether the information is confidential because it is "likely to be embarrassing or detrimental to the client if disclosed" or because it is information that the client previously "requested be kept confidential."

Whether the disclosure of information is "likely to be embarrassing or detrimental to the client" must be determined on a case-by-case basis. In many or most cases, disclosing that the client was the victim of billing fraud will not adversely affect the client. On occasion, however, a client would be embarrassed or harmed if others knew that the client was fraudulently billed by the client's law firm, even though the client is the victim of the fraud and even though the law firm might suffer the greater embarrassment. For instance, a particular client may be embarrassed if it becomes known that he or she hired an attorney who was untrustworthy or was taken advantage of and failed to engage in adequate oversight. In some cases, the very fact that the client secured a particular lawyer's services may be a source of embarrassment, as when a client secretly consults with a divorce lawyer or a criminal defense lawyer.

The question is not whether the client would be embarrassed or harmed if the information were disclosed to the disciplinary authority specifically, but whether the client would be embarrassed or harmed if the information were disclosed to anyone. Subsection (b) of the definition of confidential information – "likely to be embarrassing or detrimental to the client if disclosed" – does not refer to a particular proposed disclosure. Even if the disciplinary authority undertook not to disclose the confidential information or employ it in a way that was embarrassing or detrimental to the client, the information would not lose its potentially prejudicial character. And as a practical matter, once the information has been disclosed to the disciplinary authority, there can be no certainty as to its future use. Thus,

[5] The duty of confidentiality applies to former as well as current clients. *See* Rule 1.9(c).

an attorney may not disclose client information to a particular recipient on the basis that the information is unlikely to embarrass or harm the client in the hands of that recipient, if disclosure to others would likely be embarrassing or harmful.

Presumably, the unavailable client will not have previously made a specific request that the firm maintain the confidentiality of information concerning fraudulent billing because the client would not anticipate such billing to occur. However, in the engagement letter between the client and the firm, or in the course of the representation, the client may have explicitly or implicitly requested that particular information or categories of information concerning the matter be kept confidential, whether or not the information is privileged or its disclosure would be embarrassing or harmful, absent a particular need for disclosure to further the client's objectives. If so, a lawyer facing the decision whether to report fraudulent billing involving an unavailable client should consider whether this is among the information that the client requested the firm to keep confidential, even if disclosure would not be embarrassing or detrimental.

The present Opinion is consistent with a previous opinion in which this Committee interpreted DR 1-103(A), the predecessor to Rule 8.3.[6] In that opinion, the Committee concluded that a lawyer's obligation to report a former partner's neglect of matters or mismanagement or conversion of client or firm funds was limited by the duty not to reveal client confidences or secrets without client consent:

> It is true that the otherwise broad definitions of "confidences and secrets" do not encompass P's behavior in the law office or conversations with other lawyers in the law firm not regarding client matters. To the extent that specific cases involving the firm's former clients are involved, however, the inquirer must be mindful that some, if not all, of the information about the cases may fall within the definition of a secret set forth in DR 4-101(A). This consideration does not change because the confidence or secret involves a former client.
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> Specifically, if the inquirer reports the misconduct, he may be required to give the disciplinary authorities as part of their investigation (pursuant to their subpoena power or otherwise) his former clients' names, and either he or the clients could be compelled to provide details of the cases. As a result, if the inquirer determines that the "secrets" doctrine applies to the disclosure, he should contact his former clients to obtain consent to disclose the information to a disciplinary committee. This is obviously a delicate matter because the firm's former clients are present clients of P. However, the inquirer is not prohibited from talking to the former clients for this purpose.

NYCBA Formal Op. 1995-5 (1995) (internal citations omitted). The Committee's earlier reasoning under the Code of Professional Responsibility remains applicable under the

[6] There is no material difference between DR 1-103(A) and Rule 8.3.

current Rules because a lawyer's duty to report misconduct under Rule 8.3 remains subject to client confidentiality. *See also* Mich. Op. RI-314 (Oct. 19, 1999) (Michigan Rule 8.3 does not require reporting of another lawyer if the information at issue is protected by confidentiality); Phila. Eth. Op. 93-28, 1994 WL 32641 (reporting obligation superseded where client refused consent); In re Ethics Advisory Panel Opinion No. 92–1, No. 93–41–MP (June 25, 1993 Supreme Court R.I.) (Rule 1.6 prevents disclosure of predecessor counsel's embezzlement under Rule 8.3 absent client consent).

CONCLUSION:

A lawyer's duty to report a colleague's billing fraud to the appropriate disciplinary authority is limited by the lawyer's obligation to maintain client confidences. If the lawyer discovers that a colleague in the law firm has engaged in fraudulent billing, the lawyer may not report the misconduct to the disciplinary authorities if disclosure would violate the lawyer's duty of confidentiality under the Rules.