

When someone else pays your bill



I love our ethics hotline.¹ Not only are we helping lawyers every day to navigate their ethical responsibilities, but oftentimes the questions present themes that make perfect subjects for this column. Lately I've answered several calls that involve issues arising because

someone else was paying the lawyer's bill. This can arise in lots of different practice areas: family, criminal, immigration, estate planning, employment, and insurance defense, to name a few. Much has been written on this subject in matters of insurance defense,² so I would like to set that specific practice area aside and focus more on when friends or relatives are footing the bill.³ Let's begin, as always, with the rules.

A lawyer's independence

One of the most important hallmarks of an attorney-client relationship is the lawyer's loyalty to the client. Preservation of this duty is furthered by compliance with the rules involving confidentiality, conflicts of interest, and professional independence. Two rules in particular are implicated when someone else pays the bill for legal services: Rule 1.8(f) and Rule 5.4(c), Minnesota Rules of Professional Conduct.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

Specifically, Rule 1.8(f) says:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to the representation of a client is protected as required by Rule 1.6.

The related Rule 5.4(c) says:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Informed consent

The first stop in a third-party payor relationship is informed consent of the client. Of course, there is sometimes a caveat: In a limited subset of cases this is not the first stop, such as for public defenders, other court-appointed counsel, or legal aid, where payment of the lawyer's fee by another is inherent in the nature of the representation. In all other cases, however, informed consent is your first stop. Why is this?

This is the first stop because the issue is fundamentally one of conflicts. You need to determine if there are or could be differing interests between your client and the third-party payor, and whether your responsibilities to your client may be materially limited by your responsibility to a third party, or your own interest in having your bill paid. Too often lawyers forget this important step because on initial consultation, everyone seems aligned, and you are just glad someone with money can pay you. You really do not know if the parties are aligned, however, unless you have a conversation on the topic. This is particularly true if the third-party payor is also a client.

Things to consider include but may not be limited to these questions:

- What are the objectives of each relating to the representation?
- Are there limits to what and how much the third party is willing to pay?
- If so, how will that impact the representation?
- What happens if the third party stops paying the bill?
- What amount of information will be shared with the third-party payor?
- How will that impact the attorney-client privilege? (hint: likely waiver)
- Who is entitled to a refund if one is due?
- Does the third party understand they are not the client?

If you discuss these matters with the parties, you will be better able to ascertain if there is a risk from someone else paying the fee and how material the risk may be. Explaining the risks and alternatives to your client enables them to give informed consent as required by Rule 1.8(f)(1). This consent does not need to be confirmed in writing, unless the third-party payor is already a client (then you have a Rule 1.7 concurrent conflict you need to analyze as well), but your client must give informed consent. If you don't have a conversation on the topic at all, it is hard to say (or to prove, if a complaint is raised) that the client gave informed consent.

The best practice is to discuss these issues with your client and reflect the results of the conversation in your engagement letter. I also recommend you have a separate written agreement with the third-party payor. This helps to reiterate that the third-party is not the client, which can be confusing to some if the payor is signing the engagement letter too.

No interference

Lack of interference by the third-party payor is so important that it is mentioned twice in the ethics rules, in Rule 1.8(f)(2), and Rule 5.4(c), MRPC. It is human nature for individuals who are paying the bill to want to have a say in how their money is spent. While those individuals can certainly share their opinion, that opinion cannot interfere with the independent exercise of your professional judgment. A good way to prevent this from occurring is to make sure the client and payor understand this important fact as part of the informed consent process, and to reiterate the requirement in the engagement letter and third-party payor agreement you use.

Confidentiality

Only in limited circumstances may an attorney reveal client confidences to a third party. In fact, everything relating to the representation is confidential (remember, this is broader than the attorney-client privilege) and should not be shared except under specified circumstances.⁴ You should discuss with your client the level of information it is permissible to share with the third party, and the risk of doing so. Most importantly, you should discuss with your client the impact of sharing information on the attorney-client privilege, particularly if waiver of the privilege may prejudice your client. Rule 1.8(f)(3) expects you to protect client confidences no matter who is paying, and the client must give informed consent to any disclosures.

A final caution: One recent hotline call I received concerned a lawyer who had fallen into the bad habit of

talking primarily to, and taking direction from, the concerned family member paying the bill because the family member was more attentive and accessible than the client. Please do not do fall into this habit. Even if the client has consented to the disclosure of information and the waiver of privilege has been addressed, your ethical duty is to abide by your client's decisions regarding the representation, and to consult with your client regarding the means to accomplish those objectives.⁵ Do not abrogate that responsibility because of the ease of working with the person who is paying your bill.

Hiring a lawyer can be expensive. Some are fortunate to have a friend or relative who agrees to assist in that situation. For this to work, however, you need to have a good discussion with your client, preferably documented in writing, which will enable your client to give informed consent to the risks and advantages of this often conflict-ridden course of action. ▲

¹ Also known as our Advisory Opinion service; senior staff attorneys can be reached daily at 651-296-3952, or via email at www.lprb.mncourts.gov.

² See William J. Wernz, *Minnesota Legal Ethics, A Treatise*, at 509-526 (8th Ed. 2018).

³ See also Kenneth L. Jorgensen, "When a Friend or Relative Pays the Client's Legal Fee," *Bench & Bar* (February 2005).

⁴ See Rule 1.6, MRPC. Rule 1.6(a) broadly defines the information that should be kept confidential as all "information relating to the representation." Rule 1.6(b) describes the specific circumstances in which a lawyer may reveal information relating to the representation. <https://media.gettyimages.com/photos/three-invoices-all-with-paid-stamp-picture-id900553128>