

To Disclose or Not to Disclose: Disclosure of Billing Statements to Non-Clients

By the NHBA Ethics Committee

Presented to the Board of Governors July 26, 2001.

THIS PRACTICAL ETHICS article is intended as a follow-up to the recent opinion issued by the Ethics Committee dealing with the release of billing statements to third party auditors in insurance defense cases, NH Op #2000-01/5.¹ For a detailed analysis of the ethical rules and their application to the disclosure of client billing information to any non-client, please refer to the text of that opinion. During discussions regarding that opinion, the Ethics Committee became aware that there were a number of diverse situations in the New Hampshire legal practice in which non-client third parties may have or request access to client billing statements. While perhaps few New Hampshire attorneys face any concerns about disclosing their client's bills to insurance auditors, there are many instances in other practice areas whereby the attorney's fees or detailed client billing information may be disclosed, which indeed raises the same ethical issues involved in the insurance auditor disclosure inquiry (e.g., Rule 1.4, 1.6, 1.7, and 1.8(f)(3)). And client bills disclosed in matters such as criminal defense involve a plethora of additional constitutional, statutory and other issues and concerns.²

The purpose of the following article is to describe what happens and who has access to attorney billing statements under certain types of representation.³ The article does not attempt to answer specific questions about what should be in an attorney billing statement or what actions an attorney need take to protect his client's rights and privileges. Practice areas discussed in this article include state and federal criminal court assigned work, criminal work under the New Hampshire Indigent Defense Contract process, *guardian ad litem* representation, court-assigned abuse and neglect work, contingency fee representation and New Hampshire probate practice. It is not the purpose of this article to review in detail the substantive law in each of these areas pertaining to the content of client bills and/or their submission requirements. Instead this article is intended to alert the practitioner to the ethical concerns and duty to the client that the disclosure of any client billing raises in each of these many different fields of practice. This article should be especially helpful to practitioners who accept state-funded work or who are required to submit bills to the court for approval.

I. The backdrop of New Hampshire's Right to Know Law and access to public records

The public's right to have access to governmental information is recognized in the New Hampshire Constitution under Article 8, titled Accountability of Magistrates and Officers; Public's Right to Know. The constitution provides as follows:

All power resides originally in, and being derived from, the people, all the magistrates and officers of government, their substitutes and agents, are at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

N.H. Const.Art.8. The New Hampshire Supreme Court recognized in reference to court documents that the New Hampshire Constitution requires a presumption that all court records are public and that a burden of proof rests with the party seeking disclosure or non-disclosure, requiring that party to demonstrate some overriding consideration or circumstance establishing a sufficiently compelling interest that outweighs the public's right of access to the records. *Petition of Keene Sentinel*, 136 N.H. 121, (1992); but see *Union Leader Corp. v. Chandler* 119 N.H. 442, (1979). (The Supreme Court held that the New Hampshire House of Representatives did not have to turn over the official tape recording of house proceedings for the purpose of duplicating and using it for a so-called voice-stress analysis.)

The New Hampshire Right to Know Law is a separate statutory right granting the public access to public records and meeting minutes. N.H. RSA Chapter 91-A, "Access to Public Records and Meetings" ("Right to Know Law"). The Right to Know Law notes that openness in the conduct of public business is essential to a democratic society. RSA 91-A :1. Public proceeding is defined as a transaction of any function affecting any or all citizens of the state. RSA 91-A :1-a. The Right to Know Law recognizes certain exemptions, including records from grand and petite juries and parole and pardon boards; personal school records of pupils; records pertaining to, among other things, internal personnel practices, confidential commercial or financial information; and health or safety information on a limited basis to persons whose health or safety may be affected. N.H. RSA 91-A :5.

The combined body of law gives parties wide access to public records and court documents. The risks posed by public disclosure of detailed billing records are perhaps best exemplified by the prospect of a prosecutor in the retrial of a criminal matter gaining access to defense counsel's billing statement from the first trial. The same problem might be posed by the submission of an itemized bill to the court in a contingency fee case if that bill is not sealed. Annulled arrests and convictions for various offenses will also be documented in these public records and if disclosed may place the state in violation of the annulment statute. N.H. RSA 651:5.⁴

II. Criminal matters

There are several situations in which attorneys who practice criminal law may be required to submit itemized bills in order to receive payment from the state. These include indigent defense contract work and court-assigned work. When the New Hampshire Public Defender's Office is unable to represent someone, the state contracts with selected attorneys (or "contract attorneys") to supply representation to indigent defendants. The New Hampshire Judicial Council administers the contract process. If there are no contract attorneys available and the New Hampshire Public Defenders are unable to represent an individual, the court has the authority to assign other counsel to represent an indigent individual.

The federal district court oversees federal indigent defense. Recently the federal court system modified its practices regarding indigent defense billing. These modifications, set forth below, have addressed many of the problems associated with client billing records in government-funded work.

a. Criminal state court assigned representation

When the court specifically assigns an attorney under New Hampshire law, that attorney is required to submit a form titled "Attorney's Statement." The form, Form AOC-400-1245 1/92, indicates in its instructions that "all bills must be itemized as to the time spent on each case and there shall be no separate charges for overhead." In practice, courts require submission of itemized bills with this completed form in order to authorize payment. Payment is at a rate of \$60 per hour with a maximum compensation of \$400 for any one day. After the court receives the bill it is either approved or denied by the sitting judge. Upon approval it is submitted to the New Hampshire Judicial Council, located at 25 Capital Street, Room 424, Concord, New Hampshire 03301-6312. A face sheet is then attached to the itemized bill and form. A separate face sheet is also entered into a computer. The hard copy form is then forwarded to the Bureau of Accounting, also located at 25 Capital Street at the State House Annex. The computer version of the face sheet and the documents forwarded from the Judicial Council are then reviewed and, if all is in order, approved. After payment the bills are sent to the state archives. These records are available to anybody making a request under the Right to Know Law. Courts have ordered certain files sealed under certain circumstances in criminal cases.⁵

b. State court indigent defense contract work by contract attorneys

Generally contract attorneys are not required to submit itemized bills to the New Hampshire Judicial Council to be processed. If, however, they are involved in a case where they feel it necessary to request extraordinary credit outside of the limited flat fee amount allowed for each case, then they are required to submit an itemized bill, along with copies of any pleadings filed in the case, to the Judicial Council. There is also an application form required, which includes a section requesting details as to why the attorney believes that she is entitled to extra funds for the work completed in the case.

Under these circumstances, the application, itemized bill and pleadings enclosed are then forwarded to the New Hampshire Judicial Council. The Council assigns one of its attorney members to review the application, itemized invoice and attached pleadings. The application and attachments are also sent to the New Hampshire Public Defender's Office for review. If both parties determine that the invoice and application are reasonable, the Judicial Council determines how much extra to pay the attorney in question.

Under these circumstances, attorneys must be aware that several individuals will be reviewing their bills. They also must take into consideration that the bills will eventually end up in the state archives and be subject to public review.

c. The Federal Criminal Justice Act, recent modifications as a model

In 1998 the federal government altered the way it dealt with the Criminal Justice Act (CJA).⁶ The billing process was changed after people realized that the original disclosure clauses of the CJA set forth at 18 U.S.C. 3006A(d)(4) might compromise important interests of the defendant. The important interests were set forth in the amended statute as follows:

- (1) to protect any person's right against self-incrimination;
- (2) to protect the defendant's right to effective assistance of counsel;
- (3) the defendant's attorney-client privilege;
- (4) the work product privilege of the defendant's counsel;
- (5) the safety of any person; and
- (6) any other interest that justice may require, except that the amount of the fees shall not be considered a reason justifying any limited disclosure under section 3006A9d)(4) of Title 18, United States Code. 18 U.S.C. 3006A(d)(4)(D).

The present practice gives the public access to the total amounts approved for payment by allowing them to view the "expense vouchers," but limits access to the itemized billing information, which is attached to the expense vouchers by CJA attorneys. The information requested by the Administrative Office of the Courts on the "expense voucher" has been modified so it does not include detailed information. Detailed information is attached by way of itemized work sheets. In order for the public to gain access to the detailed information a request must be filed with the court. The court is then permitted to make a finding that the defendant's interests require a limited disclosure omitting any detailed information. 18 U.S.C. § 3006A(d)(4)(C).

III. Juvenile matters and guardian ad litem representation

a. Guardian *ad litem*, juvenile criminal matters and termination of parental rights

Court-assigned work performed by guardians *ad litem* in domestic and probate matters (such as termination of parental rights and representation of wards in minor or incapacitated adult guardianship) and in juvenile and criminal matters are also paid through the Judicial Council. Practitioners need to be aware that, if a client confidentiality duty is owed, their invoices and Orders of Assignment from the court submitted under the guardian *ad litem* fund, termination cases and juvenile criminal matters are processed by the Judicial Council in the same way adult criminal matters are processed.⁷ Bills are submitted to the Judicial Council along with the Order of Appointment by the court. Upon approval, these invoices, usually accompanied by detailed billing statements, may become available to the public.

b. Abuse and neglect assigned counsel and CHINS petitions

In juvenile matters it is the county, not the state, that is responsible for the attorney bills. The juvenile system offers some increased privacy protection as a result of the case file being sealed. The process for being paid in abuse and neglect or other non-criminal juvenile proceedings does not differ from that utilized by the guardians *ad litem*. They are still paid by the Judicial Council.

Submission of bills for payment, however, does vary for attorneys representing a parent in the abuse and neglect case and Child In Need of Services petitions (CHINS). In these matters, the attorney submits the itemized bill to the court with a payment form. The itemized bills and form are reviewed by the court and, if approved, forwarded to the county Department of Human Resources. The county government, as opposed to the state government, is liable for juvenile matters brought relative to N.H. RSA 169-C, the New Hampshire Child Protection Act. The county government reviews the itemized invoices and makes payment. The itemized sections of the bill are not released to the public, however. These bills are apparently returned to the child's file which, as a juvenile matter, is sealed.

IV. Contingency fee cases

Another practice area involving mandatory fee disclosure is personal injury litigation with contingency fees. This, of course, is mandated under RSA 508:4-e "Contingency Fees." The actual written contingency fee agreement entered into between an attorney and the client is required to be filed with the court at the time of the entry of pleadings by plaintiff's attorney, RSA 508:4-e, III. Then upon settlement or judgment of the action, "all counsel of record shall submit to the court a complete review of all fees received for services for said action; and all costs incurring from said action including, but not limited to, fees paid to expert witnesses. All fees in actions resulting in settlement or judgment of \$200,000 or more shall be subject to approval by the court." RSA 508:4-e, IV. It is interesting to note that although titled "Contingency Fees," the express provisions of RSA 508:4-e, IV are not limited to contingency fee cases.

What the court actually requires be filed with respect to these statutory provisions, however, varies from court to court. For example, one court may only require the filing of contingency fee agreements and not require any additional filings of fees unless some collection activity follows. Other courts may request the plaintiff's counsel to file submissions pursuant to RSA 508:4-e, IV in any litigation whether or not a contingency fee is involved. Cheshire County Superior Court requires full compliance with RSA 508:4-e, IV by both parties (plaintiffs and defendants alike) and in any civil action, whether or not involving a contingency fee.⁸

The litigant attorney must be aware of this provision and the impact that disclosure of attorney's fees (including billing statements supporting such fees) may have upon the client. An approach frequently taken by practitioners in this area is to request by motion to file the contingency fee agreement or fees incurred under seal or similar client-protective orders. The New Hampshire Bar Association has available on its Web site⁹ a collection of various RSA 508:4-e forms for the use of the practitioner. While it is certainly beyond the scope of this article to discuss in depth the substantive requirements of RSA 508:4-e or its constitutionality, practitioners need to be mindful of the issues involved and the need to protect client confidentiality.

Other than mandatory fee and related disclosures in contingency fee cases, there certainly are many other situations that could arise in civil or equity actions that would also involve disclosure of attorneys' fees and client billing information. Such matters, to illustrate but a few, could include the following:

- As an item of damages under a contractual claim (such as collection of a promissory note, lease or employment agreement);
- In support of a motion for attorneys' fees for contempt arising in a legal proceeding;
- Through a motion for attorney's fees arising as a result of frivolous and unreasonable conduct by the opponent (e.g., RSA 507:15);
- As may be otherwise authorized by statute (such as Unfair, Deceptive or Unreasonable Collection Practices, RSA Chapter 358-C). For a comprehensive list of New Hampshire statutes authorizing the award of attorney's fees, see *Wiebush*, *New Hampshire Practice, Civil Practice and Procedure* § 53.02 (1998).

There are obviously numerous situations in civil and equitable proceedings in which the attorney's fees incurred by a client may be an issue and in which client billing statements may, at some point during the litigation, be either requested or voluntarily disclosed. In certain instances the attorney may under Rule 1.6(a) be "impliedly authorized" to "carry out the [client's] representation" by disclosing such billing statements, especially if it is of direct benefit to the client (such as in collection of damages or as a result of frivolous action by the opponent). It is certainly always the better practice, however, for the attorney to obtain in advance the client's consent for disclosure of the billing statements and any other confidential information contained therein.

V. Disclosure of billing statements in probate court proceedings

Apart from those probate matters previously discussed – the compensation of guardians *ad litem* and court-appointed attorneys in guardianships (of a minor or an incapacitated person) and termination proceedings – since 1992 the usual practice in New Hampshire probate courts has been to disclose detailed billings by executors and trustees and their attorneys. Historically, attorneys practicing in probate matters charged fees for their services rendered in estate and trust administration based upon a schedule set forth in "Probate Fee Guidelines for Maximum Fees."¹⁰ The issue of appropriate administrator's and attorney's fees, however, was addressed in the important decision of *In Re: Estate of Rolfe*, 136 NH 294 (1992). That decision established a number of guidelines to be used by the court to establish reasonable fees (adopting those factors outlined under Rule 1.5 (a)). Soon after, probate courts throughout the state required the attorneys to submit, in some form or another, supporting information for all fees incurred upon filing an estate's accountings. This was typically accomplished by the submission of detailed client billing statements. While the *Rolfe* decision technically did not apply to trustee compensation, a similar practice was generally followed by trustees and their attorneys (see also RSA 564:21).

Since attorney's fees are a valid expense item reflected on an estate account (reported in Schedule 5 on the probate court Form 1, "Executors/Administrator's Accounting") and benefit the client (the "estate" or fiduciary on behalf of the estate) once again, the attorney may arguably be "impliedly authorized" under Rule 1.6(a) to disclose such billing information. Attorneys, nevertheless, must be aware that by filing the billing statements with the estate or trust accountings, they are disclosing confidential information pertaining to the client and prior client consent is always the better practice. It is beyond the scope of this article to argue or debate the identity of the client in probate matters (since the estate, a disembodied entity, is obviously administered by a living and breathing client, the fiduciary). Nevertheless, the attorney must be aware of the effect that disclosure of such information may have, and the applicable ethical rules and constraints.

It is noted that, at least in Cheshire County Probate Court, the practice of requiring the filing of detailed client billing statements in support of the attorney's fees expense item has recently been discontinued. Nevertheless, a summary of all attorney bills and costs is required and the court, at its election, or any other party, upon objection, can request detailed billing statements.

VI. Federal civil matters affected by 18 U.S.C. § 1988

Attorneys working in federal court on civil rights litigation brought under Title 42 of the United States Code must also be aware of the issues raised in this article. As those practitioners are aware, under 42 U.S.C. § 1988 it is necessary to submit an itemized bill to the court in order to be awarded attorney's fees.

(b) Attorney's fees: In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, **in its discretion**, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs

42 U.S.C. § 1988 (emphasis added). Approval of the bill is subject to the court's discretion, so it is often in the attorney's interest to provide substantial detail in his or her invoices.

In these cases the invoices also become of issue in settlement discussions. Practitioners in this area can be left in a difficult position.

VII. Conclusion

As the above discussion illustrates, there are many different scenarios in which an attorney's billing statements (containing client confidential information) may be disclosed, either in seeking payment for services by that attorney, in the support of claims made on behalf of the client, or otherwise resulting from the type of legal matter involved. Whatever the circumstances giving cause to the disclosure of client billings, the attorney must be aware of the applicable ethical obligations to the client.

Depending upon the specific case matter and circumstances involving client billing disclosure, the analysis and outcome under the applicable ethical rules, as discussed in this committee's insurance auditor billing disclosure opinion, NH Op #2000-01/5, will certainly vary. What is important, however, is that the attorney be aware of those ethical obligations and take the necessary steps to protect the client's confidential information (or obtain the client's prior consent to disclose).

Realizing that there may be many different ways and multiple types of cases in which a client's bill may ultimately be delivered and disclosed to non-clients, as a precautionary practical matter each attorney should consider adopting one or more of the following internal office procedures:

1. Identify in advance what types of cases may involve the potential of having to disclose client billing information.
2. Inform clients in those types of cases at the outset that billing information may have to be disclosed during or following the attorney's representation in that matter.
3. Limit the specificity of information contained on billings in such cases (recognizing for risk management purposes detailed bills are often advisable, and it may be more appropriate to redact detailed bills prior to submission).
4. If appropriate, develop a process for client review and approval, as periodic billings may be rendered in such cases, that may include:
 - a. Addressing how disclosure will be handled in any fee agreement;
 - b. Establishing a process whereby the client approves billing content upon receipt; or
 - c. Defining a procedure for the client to approve and authorize disclosure upon submission of billing information or statements.
5. Consider other mechanisms to exclude, limit or protect confidential client information prior to submission, such as Motions to Seal or other appropriate protective orders or relief.
6. Advise the client, when applicable and if desired by the client, to forego whatever benefit may result from disclosure of statements (e.g., in seeking an award of attorney's fees in a particular case, or the allowance of a tax deduction for such attorney's fees on a particular tax return).

Overlooking the issues raised in this article could lead to unintended disclosure of confidential information. An attorney should proceed with caution before submitting any client billings or statements to the court, an administrative agency or any other non-client third party.

¹ In that opinion this committee concluded that (1) under Rule 1.6(a) an attorney may not ethically submit detailed billing statements to outside auditors in an insurance defense matter without prior consultation and informed consent of the client, and (2) that under most situations such attorney would be ethically precluded from even requesting that the client consent to such disclosure (e.g. Rule 1.7 and 1.8), since the benefits of disclosure to the client would not outweigh any potential risks to that client.

² For example, in federal criminal matters a client's Fifth Amendment right against self-incrimination; Sixth Amendment right to effective assistance of counsel; attorney-client privilege; work product privilege; and safety concerns for persons referenced in invoices were all recognized as legitimate reasons to limit public access to court-appointed attorney invoices. 18 U.S.C. 3006A(d)(4)(D)

³ We contacted the following parties concerning the billing process in state-funded cases: The New Hampshire Judicial Council, the New Hampshire Bureau of Accounting, the New Hampshire Department of Health and Human Services, the New Hampshire Department of Cost Containment and the Rockingham County Department of Human Services.

⁴ N.H. RSA 651:5 XII. A person is guilty of a misdemeanor if, during the life of another who has had a record of arrest or conviction annulled pursuant to this section, he discloses or communicates the existence of such record except as provided in subparagraph XI (b).

⁵ This information was derived from conversations with the Bureau of Accounting.

⁶ 18 U.S.C. § 2006A

⁷ It should be noted that there is case law that has held that a GAL does not have an attorney/client relationship relative to privilege, but that the relationship may be altered by the Standing Order relative to GALs.

⁸ It is noted that there have been assertions, through various motions filed, that RSA 508:4-e is unconstitutional and unenforceable. See pleadings on file in the matter of *Derman v McGinnis* (case #96-C-0188), and *Bjork, et al v Wires* (case #00-E-0063), both of which are docketed in the Cheshire County Superior Court.

⁹ Access as of Feb. 12, 2001 would be under the "NH Practice Guidelines" section of the New Hampshire Bar Association Web site (www.nhbar.org).

¹⁰ For a discussion of attorney's fees in estate administration, see DeGrandpre, *New Hampshire Practice, Probate Law and Procedure* § 15.1-15.4(g) (2nd Ed, 1996). Also of interest on the area of attorney-fiduciary involvement is an earlier Ethics Opinion, NH Op. 1987-1988 "Considerations in Attorney-Fiduciary Role (dual capacity; conflict of interest; fees)."