

# The Supreme Court of Ohio

## BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

### OPINION 2009-9

Issued December 4, 2009

**SYLLABUS:** If a plaintiff's personal injury lawyer retains an outside law firm to provide health care lien resolution services in a settled matter, the plaintiff's lawyer may use professional judgment as to whether to charge the client for the service as part of the contingent fee or as an expense of litigation. Either way, the client's consent to the outsourcing and the fee arrangement must be obtained prior to outsourcing the service. Either way, the fees and expenses must be reasonable, not excessive. Either way, the nature and basis of the fee arrangement must be communicated to the client and pursuant to Rule 1.5(c) a contingency fee agreement must be in writing. If the outsourced legal fee is included as part of a contingency fee, there is a division of fee among lawyers not in the same firm and that triggers the requirements of Rule 1.5(e). If the outsourced service is charged to the client as a litigation expense, the contingency fee rate must be appropriately set to not result in a duplicative and excessive legal fee charged to a client for a service that is billed separately as an expense.

**OPINION:** This opinion addresses the proper way for a plaintiff's personal injury lawyer to bill a client when health care lien resolution services in a settled matter are outsourced to another law firm.

If a plaintiff's personal injury lawyer retains an outside law firm to provide health care lien resolution services in a settled matter, is it proper for the plaintiff's lawyer to charge the client for the outsourced services as an expense of litigation?

For years, plaintiff's personal injury lawyers have been resolving Medicare, Medicaid, employee health insurance, and private health insurance liens on settled lawsuits. Customarily, health care lien resolution has been included in the legal services performed by a personal injury attorney and covered by the contingent fee.

Now, some lawyers are limiting their law practices to or concentrating in health care lien resolution services. And, some personal injury attorneys in some personal injury matters may be interested in outsourcing to these lawyers who concentrate in health care lien resolution services.

Reasons for choosing to or not to outsource health care lien resolution services may vary among personal injury lawyers. But, factors may include the time involved in resolving liens, as well as the complexity of Medicare laws, Medicaid laws, Employee Retirement Income Security Act (ERISA), and state insurance laws.

In New York, there is an advisory opinion addressing the issue of whether fees for counsel retained to negotiate a plaintiff's complex Medicare, Medicaid or private health insurance lien may be charged to the settlement as a disbursement. In Op. 739, the Professional Ethics Committee of the New York County Lawyers' Association advised: "It is ethically permissible for a plaintiff's personal injury attorney to retain a specialty firm to handle the resolution of a Medicare, Medicaid or private healthcare lien on a settled lawsuit. Under the following conditions, the fee for said outside service may be charged as a disbursement against the total proceeds of the settlement: (a) at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without an overage or surcharge) and must be reasonable; (c) the transaction results in a net benefit to the client on each lien negotiated; (d) the transition complies with all the principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product."<sup>1</sup>

In Ohio, the exact issue presented has not been addressed, but the issue of outsourcing legal services has been addressed. In Op. 2009-6, the Board advised that "[t]he Ohio Rules of Professional Conduct *do not* prohibit an Ohio lawyer or law firm from outsourcing legal or support services domestically or abroad, either directly to lawyers or nonlawyers or indirectly through an independent service provider, but applicable rules *do* impose significant ethical requirements."<sup>2</sup>

Opinion 2009-6 should be read in its entirety, but a recap of the significant ethical requirements is provided herein. First, "[p]ursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyers or nonlawyers." Second, "[p]ursuant to Prof. Cond. Rules 5.1(c)(1), 5.3(a), and 5.3(c)(1), a lawyer who outsources legal or support services has responsibility for another lawyer's violation of professional obligations if the outsourcing lawyer orders, or with specific knowledge of the conduct, ratifies the conduct involved; has responsibility to make reasonable efforts to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer; and is responsible for a nonlawyer's conduct if the outsourcing lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved." Third, "[p]ursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses."

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<sup>1</sup> New York Lawyers' Assn., Op. 739 (2008).

<sup>2</sup> Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 2009-6 (2009).

The advice offered in Op. 2009-6 helps guide the Board's advice as to whether it is proper for a plaintiff's lawyer to charge a client for outsourced health care lien resolution services as an expense of litigation or as part of the contingency fee. In Op. 2009-6, the Board concluded that "neither the rules nor the comments to the rules direct that billing be one way or the other" and advised that "[t]he decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise of professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged."<sup>3</sup>

Thus, either way, whether charging the cost of outsourced lien resolution services as part of the contingency fee or as an expense of litigation, the fees and expenses must be reasonable, not excessive; the basis and rate must be disclosed to the client; and pursuant to Prof. Cond. Rule 1.5(c) a contingency fee agreement must be in writing. Further, if the outsourced service is charged to the client as part of a lawyer's contingency fee, there is a division of fees with attorneys not in the same firm triggering the requirements of Prof. Cond. Rule 1.5(e). If the outsourced service is charged to the client as a litigation expense, the contingency fee rate must be appropriately set to not result in a duplicative and excessive legal fee charged to a client for a service that is billed separately as an expense.

In conclusion, the Board advises as follows. If a plaintiff's personal injury lawyer retains an outside law firm to provide health care lien resolution services in a settled matter, the plaintiff's lawyer may use professional judgment as to whether to charge the client for the service as part of the contingent fee or as an expense of litigation. Either way, the client's consent to the outsourcing and the fee arrangement must be obtained prior to outsourcing the service. Either way, the fees and expenses must be reasonable, not excessive. Either way, the nature and basis of the fee arrangement must be communicated to the client and pursuant to Rule 1.5(c) a contingency fee agreement must be in writing. If the outsourced legal fee is included as part of a contingency fee, there is a division of fee among lawyers not in the same firm and that triggers the requirements of Rule 1.5(e). If the outsourced service is charged to the client as a litigation expense, the contingency fee rate must be appropriately set to not result in a duplicative and excessive legal fee charged to a client for a service that is billed separately as an expense.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.**

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<sup>3</sup> Id.