The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 95-12
Issued October 6, 1995
Withdrawn by Adv. Op. 2023-10

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 5-103(B), eff. Jun. 14, 1999.]

SYLLABUS: It is improper for an attorney to follow a client's instructions to pay all settlement funds to the client when the attorney is aware that the client entered an agreement with the physician to pay medical expenses out of the proceeds of a settlement and the attorney with client consent promised the physician to do so. The attorney should hold the disputed portion of the funds until entitlement is established through mediation, arbitration, or if necessary, through a request to the court.

OPINION: This opinion addresses the ethical duties of an attorney when a client instructs the attorney to pay all settlement funds to the client despite the client's prior agreement with the physician to pay medical expenses out of the proceeds of settlement and the lawyer's promise to the physician to do so.

> Is it proper for a attorney to follow a client's instructions to pay all settlement funds to the client when the attorney is aware that the client entered an agreement with the physician to pay medical expenses out of the proceeds of a settlement and the attorney with client consent promised the physician to do so?

During contemplated or pending personal injury litigation, clients of lawyers sometimes enter agreements with physicians to delay payment of medical expenses to the physician until settlement or judgment at which time the debt will be paid from the proceeds. This is a curious practice since there is always a possibility that there will be no proceeds from settlement or judgment, nevertheless, the practice exists.

To supplement these agreements, some lawyers send "letters of protection" to inform the physician that the lawyer will abide by the client's instructions to pay the physician from the proceeds. Letters of protection raise both legal and ethical issues. The legal issues are beyond the scope of this opinion, but should be considered by attorneys. See, e.g., Solon Family Physicians, Inc. v. Buckles, 96 Ohio App. 3d 460 (Ct. App. Cuyahoga County 1994) (holding that a "letter from attorneys to doctor providing medical services on accident victim's behalf was sufficient to give rise to surety relationship and made attorneys liable for accident victim's medical bill").

From an ethical standpoint, the contents of a letter of protection must comport with the Ohio Code of Professional Responsibility. Disciplinary Rule 5-103 (B) permits only the guarantee of litigation-related expenses of medical examination.

> **DR 5-103 (B)** While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his [her] client, **except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.**

The rule is not interpreted by this Board to be a carte blanche for an attorney to advance or guarantee all medical expenses of a client during contemplated or pending litigation. To remain within the ethical ambits of DR 5-103 (B) an attorney should advance or guarantee only litigation-related expenses of medical examination.

Historic support for this view is found in ABA, Informal Op. 664 (1963) advising that a lawyer may agree to pay the doctor's charges for diagnostic work, under agreement with the client that the lawyer would be reimbursed therefor, but that the lawyer may not agree to pay the physician's fees for treatment of the client since this would not be an expense of litigation. That opinion was based on then ABA Canon 42 which stated "[a] lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement." See also, American Bar Foundation, Annotated Code of Professional Responsibility 202 (1979) (citing ABA Informal Op. 664, May 21, 1963 and ABA Informal Opinion 1005, November 18, 1967 for proposition that “[a]dvances for medical expenses must be limited to costs of diagnostic work connected with the matter under litigation and to costs of treatment related thereto").

Nevertheless, Disciplinary Rule 5-103 (B) does not necessarily prohibit an attorney from issuing a "letter of protection" if the letter merely promises that with client consent the attorney will pay the physician for medical expenses from settlement or judgment proceeds. A letter of protection promising to withhold payment for medical expenses from proceeds of settlement or judgment is different from a guarantee by the attorney that all medical expenses will be

paid. See Ohio State Bar Ass'n, Op. 86-6 (1986) (making the distinction that asking an attorney to guarantee to withhold payment from proceeds is different from asking an attorney to guarantee payment).

For purposes of clarity and conformance to the disciplinary rule, a "letter of protection" should precisely state that the attorney is promising to pay the physician for medical expenses from the proceeds of settlement, if proceeds are obtained, and should set forth that the client is liable for expenses. Also, to remain within the ethical boundaries of the rule, an attorney always should be clear in instructing the client that the client remains ultimately liable for such expenses. A "letter of protection" should reflect these ethical boundaries. Even so, from a legal standpoint, a liability of the attorney may be created. See, Solon Family Physicians, Inc. v. Buckles, 96 Ohio App. 3d 460 (Ct. Appeal Cuyahoga County 1994).

A problem arises when a client instructs an attorney to disregard an agreement by the client with the physician and a promise by the attorney to the physician. The attorney holds funds to which both a client and a physician claim entitlement. The problem must be resolved fairly in a manner consistent with the disciplinary rules.

Disciplinary Rule 9-102 (B) is instructive. Under DR 9-102 (B) (4) a lawyer must relinquish to the client funds to which the client is entitled to receive. The pivotal language within the rule is "entitled to receive." The rule mandates prompt payment of funds to a client only when the client is entitled to receive the funds.

> **DR 9-102 (B)** A lawyer shall:
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> > (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

In applying this rule, several approaches to the problem are considered. One approach would be to follow the client's instructions and disburse the funds to the client despite the client's prior agreement and or the attorney's promise with client consent to pay medical expenses out of the proceeds. The Board rejects this approach. Disciplinary Rule 9-102 (B) (4) does not require an attorney to pay a client funds to which the client is not entitled. A client's entitlement to the funds is

dubious at best, when a client has entered an agreement with a physician to pay medical expenses out of the proceeds of a settlement and a lawyer with client consent has promised a physician to withhold payment for the medical expenses out of the proceeds of a settlement or judgment. This Board is not alone in this view. Ethics committees in several states have advised that a lawyer may refuse to abide by a client's instructions not to pay medical care providers when representations were made that they would be paid. See e.g., South Carolina Bar, Op. 94-20 (1994) and 93-14 (1993); State Bar of South Dakota, Op. 94-4 (1994).

A second approach would be to reject the client's instructions and disburse the funds to the physician in accordance with the client's prior agreement with the physician and or the attorney's promise to pay medical expenses out of the proceeds. This approach has received mixed endorsement in Ohio. The ethics committee of the Cincinnati Bar Association in Opinion 92-93-07 concluded that where an attorney, with a client's permission, wrote a letter of protection to a physician agreeing to pay a medical bill out of the proceeds of settlement funds, the bill could be paid to the physician despite the client's request to receive all of the funds. The committee explained that

> [w]hen a lawyer acts within the scope of his or her authority as agent for the client and obligates the client to pay a physician's bill out of settlement proceeds, the client is entitled to receive only the net proceeds, and not to demand receipt of all the funds. Although legal considerations in the fields of contract law and agency law bear on this issue, the lawyer would therefore be acting in accordance with the Code of Professional Responsibility, and specifically DR 9-102 (B) (4), if he or she paid the bill out of the proceeds and delivered to the client only the net proceeds.

In contrast, the ethics committee of the Ohio State Bar Association concluded that where the client entered the agreement then asked the attorney to disregard it, "regardless of the merits of the claim, and however desirous the lawyer may be to recognize it and pay it, the lawyer may do so only with his client's consent." Ohio State Bar Ass'n, Op. 84-1 (1984). The ethics committee of the Cleveland Bar advised that an attorney is ordinarily bound by a client's instructions to pay to the client funds collected by the attorney for the client, but the attorney is not so bound where it is reasonably clear that the client is not entitled to the funds. See Cleveland Bar Ass'n, Op. 87-3 (1988).

There is a mixed response around the country as well. Several states permit payment under certain circumstances despite a client's instructions not to pay. See e.g., Colorado Bar Ass'n, Op. 94 (1993); Washington State Bar Ass'n, Op. 185 (undated). Several states do not permit payment without client consent. See e.g., Connecticut Bar Ass'n, Informal Op. 81-11(1981); Delaware State Bar Ass'n, Op. 1981-3 (1981); Maryland State Bar Ass'n, Op. 94-19 (1991) and Op. 92-4 (1991); Rhode Island SupCt. Op. 91-32 (1991).

The problem with disbursing the funds to the physician when the client objects is that the lawyer must decide entitlement. The lawyer in essence must rule on whether the physician has legal entitlement to the funds. Although Solon Family Physicians, Inc. v. Buckles, 96 Ohio App. 3d 460 (1994) provides guidance, a lawyer's determination as to entitlement might be different from what a court of law would decide on a case-by-case basis.

A third approach would be for the lawyer to reject the client's instructions and hold the funds until the interests are severed. See e.g., Maryland State Bar Op. 94-19 (1993), Tennessee SupCt, Op. 87-F-109 (1987). Some states suggest seeking resolution through interpleader. See e.g., Alabama State Bar, Op. RO 86-63 (1986); Los Angeles County Bar Ass'n, Op. 478 (1994); Oregon State Bar Op. 1991-52 (1991); Rhode Island SupCt, Op. 94-50 (1994) and Op. 93-16 (1993).

In this Board's view, the third approach is the best approach under our disciplinary rules. In following this approach, a lawyer would not relinquish funds to a client to which the client is not entitled, would not deny the client's prior agreement with the physician, and the lawyer would not dishonor his or her promise to the physician.

In conclusion, this Board advises that it is improper for an attorney to follow a client's instructions to pay all settlement funds to the client when the attorney is aware that the client entered an agreement with the physician to pay medical expenses out of the proceeds of a settlement and the attorney with client consent promised the physician to do so. The attorney should hold the disputed portion of the funds until entitlement is established through mediation, arbitration, or if necessary, through a request to the court.

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 Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.