OPINION 2004-2

SYNOPSIS

When a lawyer sends a request for medical records to a healthcare provider based on a limited medical authorization, the covering letter must not mislead the healthcare provider as to the scope of the authorization. Although a lawyer has the duty to use legal procedure for the full benefit of a client, a lawyer may not make a frivolous discovery request and shall not knowingly make a false statement of material fact to a third person.

RELEVANT RULES OF PROFESSIONAL CONDUCT

Rule 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, ...

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:
...
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

ISSUE

Is it improper for counsel, when submitting a limited medical authorization signed by the client of opposing counsel and directed to that person's health care providers, to inaccurately characterize the breadth of a medical authorization.

FACTS

This request has been forwarded to this committee by the Vermont Bar Association to address an issue of general interest to members who routinely provide and utilize medical authorization forms in the course of their practice. As always, this opinion is advisory in nature and is not intended and should not be utilized to fault members of the bar for their past conduct. Rather it is intended to advise them how to proceed prospectively.

The issue arises from the following letter and many similar form letters developed by lawyers to "cover the waterfront" so to speak, but that may be overbroad in some cases.

Dear Dr. ____:

Please find enclosed a Medical Records Release Authorization from [Claimant] allowing you to release to me the medical records listed below regarding you and your associates care of [Claimant].

At your earliest convenience, please forward the following materials to me:

1. Copies of any and all office notes, including admission or discharge summaries;

2. Copies of any and all correspondence to anyone or from anyone regarding [Claimant's] care;

3. Copies of any and all diagnostic or other test results;

4. Copies of any and all office consultation, office visits, or notes of telephone calls or interviews or any kind;

5. Copies of any and all prescriptions or prescription notes; and

6. Copies of any and all bills.

Sign off

The problem arises when the cover letter overstates the breadth of the enclosed authorization. Workers Compensation cases provide us with a helpful example.

In Vermont Workers' Compensation proceedings a standardized medical authorization is prescribed which provides for the release of medical records. The release of medical information in the context of Vermont Workers' Compensation proceedings is not subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), *45 CFR 164.512(1).* The Vermont Workers' Compensation medical authorization is known as a Form 7. It advises that HIPAA does not apply to Workers' Compensation matters and otherwise provides, inter alia:

To [medical care provider]:

This, or a photocopy, will authorize you to release to: [Insurance Company/Employer/Lawyer] all medical records you may have relating to the treatment or diagnosis of my injury which occurred on or about _____, 20__, including history, findings, x-rays, bills, statements, diagnosis, lab reports and all other medical or hospital records in your possession including, but not limited to, records of treatment rendered by you or your facility as well as any medical records in your possession upon which you relied in any way in your treatment and/or diagnosis of my condition.

Furthermore in Workers' Compensation proceedings there is an express waiver of claims of privilege in *relevant* medical records. The Workers' Compensation Rules provide:

> **3.0800** The filing of a claim for workers' compensation shall be a waiver of all claims to privilege as between the parties regarding relevant medical records and reports. Therefore, upon request by the employer in the course of its investigation, the claimant shall execute a Workers' Compensation Medical Authorization (Form 7) for the release of all relevant medical records.

Since the medical authorization contemplated by Form 7 is limited in scope to a specific injury on a specific date and does not cover other injuries, treatments or conditions, a request for "any and all" records is overbroad and mischaracterizes the scope of the enclosed authorization. forms similar to the Workers' Compensation Form 7 with respect to the scope of the authorization are often used in personal injury and other cases and the same caveat applies to those situations.

In light of the limited scope of many such medical releases and the broad scope of many cover letters, the Professional Responsibility Committee has been requested by the Vermont Bar Association to review these situations and provide an advisory opinion.

DISCUSSION

This inquiry requires us to balance a lawyer's duty to use legal procedure for the fullest benefit of the client's cause with a lawyer's duty to be truthful when dealing with others on a client's behalf. Compare Comments to Rule 3.1[1] and 4.1.

It should be noted as a preliminary matter that preexisting conditions and prior medical history frequently play a role in Workers' Compensation claims and in litigation where the causation between the defendant's action or inaction and the plaintiff's injury is at issue, as may the existence of subsequent injuries and medical treatment. A request for medical records beyond the scope of a specific date of injury may be appropriate in such cases, and, to some extent, is contemplated in the Workers' Compensation Form 7 which includes the date of injury and "as well as any medical records in your possession upon which you relied in any way in your treatment and/or diagnosis of my condition." Formal discovery is also available in Workers' Compensation proceedings to obtain additional medical records where a preexisting or subsequent condition or event may be relevant. Our focus in this Opinion, however, is not whether the material is relevant but rather whether a lawyer may represent that he or she has authority to obtain such material when that statement is untrue.

Rule 3.1

Rule 3.1 allows the assertion of issues in a proceeding when there is a basis for doing so that is "not frivolous". Moreover, comments to Rule 3.1 point out that "[t]he filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first

[1] This Opinon treats Rule 3.1, *arguendo*, as applying to communications to third parties in discovery in a proceeding.

been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." The Reporter's Note points out that:

> Rule 3.1 merges in "frivolous" the concepts of active bad faith in the sense of harassing or malicious action and lack of good faith as in the advancement of an unsupportable argument. Lawyers should be clear that the standard of Rule 11, and that of the present rule, require that the position advanced be both nonfrivolous and in good faith.

Thus, there may be a 'not frivolous' basis for a broad inquiry into a Worker' Compensation claimant's medical history. Nonetheless, such information may not be obtained from third persons through unethical means such as communications involving misrepresentation. Rule 4.1.

Rule 4.1

The comments to Rule 4.1 offer guidance as to communications with a third person: "A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act."

Comments to Rule 4.1 under the ABA Model Rules of Professional Conduct are somewhat more extensive and provide, inter alia:

> Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

The reference to "partially true but misleading statements or omissions that are the equivalent of affirmative false statements" was added in 2002 to clarify the vague "failure to act" language formerly in the Comment. ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 4.1, Reporter's Explanation of Changes. The revised Comment also includes a cross-reference to Rule 8.4 regarding dishonest conduct that does not amount to a false statement, and misrepresentations made other than in the course of representing a client. See In re Sealed Appellant, 194 F.3d 666 (5th Cir.1999) (backdating endorsement of stock certificate violated both Rule 4.1(a) and Rule 8.4(c)).

We have not previously considered issues under Rule 4.1. However, under the Code of Professional Responsibility, the Committee concluded that a lawyer was obligated to disclose to an opposing insurance company with which he was in direct negotiations that his client had died where that fact had a negative impact on the claim for future pain and suffering. Advisory Ethics Opinion 89-02. DR 1-102(4) prohibited a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and DR 7-102(5) prohibited a lawyer from knowingly making a false statement of law or fact. While the Committee concluded that the disciplinary rules were not to be construed broadly to require disclosure to an opposing party of weaknesses in a client's

case or facts which might reduce settlement value, they did limit an attorney's zealous representation of a client. Different from the facts set forth above, the insurer had no basis to learn of the information (the client's death) other than the attorney.

Most of the litigation under Rule 4.1 as to omissions or misleading statements arises in the context of settlement negotiations.[2]

The analysis also requires determination of whether there is a material statement of fact. The comments to Rule 4.1 further provide:

> This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Clearly the 'statements' in the cover letter are in the nature of directions which imply facts about the disclosure and are not made in a context, such as negotiation, in which advocacy and puffery may be anticipated. The claim in the letter that the Medical Authorization allows the recipient "to release to me the medical records listed below," followed by a list of records exceeding the

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[2] See, e.g., Ausherman v. Bank of Am. Corp., 212 F.Supp.2d 435 (D.Md.2002) (lawyer referred to disciplinary committee for untruths in letter to defendant's counsel proposing settlement terms; case includes thorough discussion of scholarly debate and case law about ethics of misrepresentation during negotiation process); Pendleton v. Cent. New Mexico Corr. Facility, 184 F.R.D. 637 (D.N.M.1999) (lawyer knowingly failed to disclose "non-confidential, material and objective fact" in response to opposing counsel's inquiry in finalizing settlement agreement); Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich.1983) (settlement vacated when plaintiff's lawyer, knowing defendant believed plaintiff would make excellent trial witness, negotiated final settlement agreement without disclosing that client had died); Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578 (Ky. 1997) (lawyer who settled personal injury case without disclosing that her client died violated Rule 4.1; failure to disclose amounted to affirmative misrepresentation of material fact); State ex rel. Nebraska State Bar Ass'n v. Addison, 412 N.W.2d 855 (Neb. 1987) (personal injury plaintiff's lawyer negotiating release of hospital's lien on client's recovery had duty to tell hospital administrator that defendant had additional umbrella policy, of which administrator was evidently unaware); Carpenito's Case, 651 A.2d 1 (N.H. 1994) (lawyer violated Rule 4.1(a) by failing to correct misrepresentation to lawyer for client's partner that certificate of deposit obtained for escrow established with liquidated partnership funds); In re Eadie, 36 P.3d 468 (Or. 2001) (concealing intent to recover costs and failing to correct false impression that settlement agreement would resolve case violated analogue Code provision); ABA Formal Ethics Op. 95-397 (1995) (lawyer whose personal injury client dies before accepting pending settlement offer must so inform court and opposing counsel; failure to disclose is tantamount to making false statement of material fact within meaning of Rule 4.1(a)); Pa.Ethics Op. 97-107 (1997) (lawyer who learns that mutual release negotiated for his client is premised upon client's inability to transfer her interest in real estate must disclose to opposing counsel that premise may not be valid); see also In re Carmick, 48 P.3d 311 (Wash. 2002) (declining to decide whether Rule 4.1 can be violated by omission and deciding case under Rule 4.2 instead). But see Pa. Ethics Op. 2001-26 (2001) (lawyer need not disclose employee's one-year life expectancy when settling workers' compensation claim for equivalent of three years of benefits; Rule 4.1(a) not implicated because no statement made and no question posed regarding matter). The foregoing cases are gathered from annotations to Model Rule 4.1 in the ABA *Annotated Model Rules of Professional Conduct*, Fifth Edition, p. 411

scope of the release is a factual claim. As such, the communication runs afoul of Rule 4.1's prohibition against making false statement of fact to a third person,

It is the opinion of this Committee that the inconsistency between the scope of the Workers' Compensation medical authorization and the covering letter's claim that the authorization allows access to ... the medical records listed below..." constitutes a misrepresentation. Such a misrepresentation is not sufficiently mitigated by the fact that the actual medical authorization is submitted. While doctors and other medical care providers bear some responsibility for training their staff members on issues of confidentiality, the fact that the authorization gives specific notice that HIPAA does not apply to Workers' Compensation proceeding s runs a risk of softening the diligence of the personnel processing this request for records.

The Committee's problem, however, is that as a matter of substantive law, these materials may be relevant and inquiry into them is not prohibited by any rule of Professional Conduct. The issue presented by this question would be mooted by a different procedural sequence. For example simple interrogatories or deposition questions establishing prior medical history would establish the basis for seeking production of a variety of medical records. Likewise, the covering letter could be written to take advantage of the portion of the release referring to *any medical records in your possession upon which you relied in any way* to put the onus on the medical care provider to identify other conditions, knowledge or the existence of which may have played a role in treatment of the work related injury. E.g., 'The enclosed authorization allows you to release to me all records relating to your treatment of Claimant as a result of injuries sustained on January 1, 2005 as well as any other medical records in your possession upon which you relied in any way in determining your treatment for Claimant.'

Rule 8.4(c)

The Committee is unable to address the issue of whether sending an overbroad covering letter to a medical care provider accompanied by a limited Medical Authorization violates the provisions of Rule 8.4(c). It would appear that the level of fraud and misrepresentation required for Rule 8.4 extends beyond the merely inadvertent misrepresentation and applies instead to activities that reflect upon a lawyer's fitness to practice. While it does refer simply to "misrepresentation" in addition to "dishonesty", "fraud" and "deceit", the cases decided under Rule 8.4 involve cases where attorneys acted knowingly[3].

> [S] ubsection (c)'s prohibition ... is a broad one. It encompasses conduct toward clients, tribunals, parties, witnesses, opposing counsel and everyone else, both within and outside the practice of law. It covers the act of failing to disclose, as well as affirmatively

[3] e.g.., *In re Edwards*, 694 N.E.2d 701 (Ind.1998) (lawyer neglected client matter, failed to appear at hearing, falsely told court and opposing counsel that he had not heard from client, withdrew without notifying client and falsely told client that he had not withdrawn); *In re Friesen*, 991 P.2d 400 (Kan. 1999) (lawyer negotiated and accepted settlement without client's authorization after client directed lawyer to dismiss action, presented client with blank release when amount of settlement known, asked client if she would accept $500 when lawyer and opposing counsel had agreed upon $2,400 in settlement, charged fee on recovered expenses, and failed to advise client of right to have fee reviewed by court*): In re Brown*, No. 01-B-2863, 2002 WL 449793 (La. Mar. 22, 2002) (lawyer helped paralegal engage in unauthorized practice of law and deceived clients into believing paralegal was a lawyer working with him). See also additional cases cited ABA Annotated Model Rules of Professional Conduct, *Fifth Edition*, p. 608-614.

> lying. Fraud is defined by Rule 1.0(d) as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive".

ABA *Annotated Model Rules of Professional Conduct. Fifth Edition*, p. 608.

As in all matters involving dishonesty, fraud, deceit or misrepresentation, the fact finder must determine the state of mind of the person accused of such conduct. This Committee is not a fact finder. It is neither our role nor our purpose to examine a specific lawyer's state of mind when such a letter is sent. Indeed, for purposes of this Opinion we rely on a specific set of facts as they are presented to us. Situations involving deceit must be considered on a case by case basis and fall within the purview of Disciplinary Counsel and Vermont Professional Responsibility Board.