

ADVISORY ETHICS OPINION 96-05

SYNOPSIS:

It is impermissible for a Lawyer representing personal injury claimants to execute a proposed "Medical Lien" form from client's health care provider agreeing to protect the interests of the health care provider, if to do so may place Lawyer in conflict with client's interests.

FACTS:

Lawyer representing personal injury claimants has been contacted by the client's medical providers and asked to sign a "Medical Lien" form¹

The undersigned being attorney of record for the above patient does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect [health care provider].

Dated: _____ Attorney's Signature: _____" pledging to withhold money from any settlement, judgment or verdict procured on behalf of client, and further directed to forward those monies directly to the medical providers in payment of their claims for services. In the past, Lawyer has refused to sign such "Medical Lien" forms, believing that to do so may create a conflict of interest if the client subsequently directs the Lawyer not to pay the health care provider in full, although Lawyer has agreed to pay the bill by signing the form. Because of Lawyer's refusal to sign the "Medical Lien" forms, Lawyer has not been able to secure some medical records required for the client's claim.

QUESTION:

Does the signing the proposed "Medical Lien" form by Lawyer create an impermissible ethical conflict?

DISCUSSION:

As we have recently stated, a lawyer does not violate the Code of Professional Responsibility by failing to forward funds obtained in settlement of personal injury claims to the client's health care providers, so long as there is no enforceable lien, properly perfected, or an agreement consented to by the client.² Stated differently, a lawyer may be obligated to pay a client's health care provider from settlement proceeds if, by agreement with the client, the client so directs the lawyer to do so.³

¹ The form reads as follows:

MEDICAL LIEN

For:
To:
Re: MEDICAL LIEN

I hereby authorize and direct you, my attorney, to pay directly to [health care provider] such sums as may be due and owing for medical service rendered () me () my child by reason of this accident and by reason of any other bills that are due their office and to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect [health care provider]. I hereby further give a lien on my case to [health care provider] against any and all proceeds of any settlement, judgment, or verdict which may be paid to you, my attorney, or myself as a result of the injuries for which I have been treated or injuries in connection therewith.

I fully understand that I am directly and fully responsible to [health care provider] for all medical bills submitted by them for service health care provider rendered () me () my child, and that this agreement is made solely for [health care provider's] additional protection and in consideration of their awaiting payment. I further understand that such payment is not contingent on any settlement, judgment, or verdict by which I may eventually recover said fee.

Dated: _____ Patient's Signature: _____

Dated: _____ Witness' Signature: _____

² See Opinion 95-1.

³ The issue of a lawyer's duty with respect to a client's third party creditors as to funds of the client's that are in the lawyer's custody has not been addressed directly by the Model Code of Professional Responsibility or the Model Rules of Professional Conduct. See ABA/BNA Lawyers' Manual on Professional Conduct, §71.902.

In the present case, the client (patient) in executing the "Medical Lien" form is expressly authorizing and directing the Lawyer to pay the health care provider. However, the "Medical Lien" form as presented here reads as follows:

The undersigned being attorney of record for the above patient does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect [health care provider].

The form as written, therefore, requires Lawyer to accept two undertakings: First, Lawyer agrees to observe all of the terms of the authorization by the client. Further, Lawyer agrees to withhold such sums as may be necessary to adequately protect the health care provider. This second undertaking by the lawyer creates the ethical dilemma. "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties." EC 5-1 (emphasis added). Hence, Lawyer may be placed in an untenable position if the client subsequently directs Lawyer not to pay the health care provider in full.⁴

The ABA Standing Committee on Ethics and Professional Responsibility has ruled that it is not improper for a lawyer requesting a physician's services for the client to permit the client to sign an agreement with the physician directing the lawyer to withhold from any future recovery of funds all sums necessary to pay the accrued bills of the physician.⁵ Nevertheless, the proposed "Medical Lien" form at issue herein goes further and seeks a representation from the Lawyer that the health care provider will be protected. This, the Lawyer may not do without violating the Code of Professional Responsibility.

CONCLUSION:

The signing of the proposed "Medical Lien" form by Lawyer creates an impermissible ethical conflict whereby the interests of the client may be in conflict with Lawyer's agreement that the interests of the health care provider will be protected. Of course, a modification of the form may alleviate the Committee's concerns in this regard.⁶

⁴ See Alaska Bar Association Opinion, 80-1 (1980) (lawyer may forward funds received to client unless lawyer represented to third party that lawyer would do otherwise).

⁵ See ABA Informal Opinion 1295 (8/18/74).

⁶ Lawyer had also requested the Committee to address what devices are available to Lawyer to insist on the production of the treating physicians' medical records absent signing the proposed "Medical Lien" form. While it is beyond the authority of this Committee to answer questions of substantive law related to the legal methods available to the Lawyer, see Rules of the Committee on Professional Responsibility, Rule 7, the devices would likely include employing the usual methods of civil discovery. See, e.g., V.R.C.P. 27 and 45.