

LEGAL ETHICS OPINION 1640

CONFLICT OF INTERESTS;
REPRESENTING CLIENT IN MEDICAL
MALPRACTICE CASE ARISING FROM
INJURIES RESULTING IN WC CLAIM
AFTER REPRESENTING SAME CLIENT
IN THAT WORKMEN'S
COMPENSATION CLAIM WHERE
ATTY'S FEE WAS DEDUCTED FROM
DOCTOR'S BILL AND PAID BY
WORKMEN'S COMPENSATION
CARRIER.

You have presented a hypothetical situation in which an attorney represents a claimant in a contested Workers' Compensation matter. As a result of the attorney's successful representation, he is entitled to a pro rata contribution to his attorney fee from each treating physician whose medical bills will now be paid by the Worker's Compensation carrier pursuant to applicable Virginia law. The attorney submits all medical bills along with a fee request, as required by the Workers' Compensation Commission, and notifies all treating physicians of his intent to collect a portion of his attorney fees from the sums due them for treating his client. One physician contacts the attorney to negotiate the percentage of the attorney's fee to be paid out of his medical bills directly with the attorney. An amount is agreed upon for both the medical and legal fees and paid by the Workers' Compensation carrier in full. Subsequently, the client advises the attorney that he believes the physician with whom attorney fees were directly negotiated may have negligently treated his injuries and instructs the attorney to proceed with a malpractice action.

The issue of the physician's alleged malpractice was never raised during the fee negotiation.

You have asked the committee to opine on whether the attorney's submitting and receiving payment of a percentage of his fees from a physician's share of medical expenses after direct negotiation with that physician on this matter creates a conflict of interest that prohibits the attorney from later pursuing a medical malpractice action as requested by his client.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:5-105(D) which requires that a lawyer who has represented a client in a matter shall not represent another person in the same or substantially related matter if the interests of the new person are adverse in any material respect to the interests of the former client, unless the former client consents after full disclosure.

The committee is of the opinion that no conflict exists which would prohibit the attorney from pursuing the client's malpractice claim under the circumstances presented, since no attorney-client relationship was established with the treating physician (See LE

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Op. 1384, LE Op. 1536, and LE Op. 1457) or in derogation of existing law [See Va. Code § 65.2-714(B)]. An attorney-client relationship must be created by mutual consent and not involuntarily thrust upon either party.

The conversation between the attorney and the client's treating physician merely complied with the statutory law's directive to resolve the issue of a pro-rata contribution by all medical providers to the attorney's fee award. Assuming that the issue of alleged malpractice was not discussed with the physician, the attorney never allowed his representation of his client's interest to waiver.

The mere process of fee negotiation did not give rise to the expectation that the discussion would be held in confidence. Moreover, the fee negotiation did not subject the attorney to any impermissible influence of the physician which might effect the attorney's representation of his client in the future malpractice action. The committee further assumes that the client consented to the payment of some portion of his legal fees by the workers' compensation carrier as negotiated out of fees owed to his physician in accordance with § 65.2-714 of the Code of Virginia of 1950, as amended, which is self explanatory and states:

If a contested claim is held to be compensable under this title and, after a hearing on the claim on its merits or after abandonment of a defense by the employer or insurance carrier, benefits for medical services are awarded and inure to the benefit of a third party insurance carrier or health care provider, the Commission shall award to the employee's attorney a reasonable fee and other reasonable pro rata costs as are appropriate from the sum which benefits the third party insurance carrier.

Thus the committee believes that, under the facts presented, the attorney did not receive any compensation or payment of his legal fees from the physician. The attorney simply negotiated a reduction of the physician's medical bill, which the client would otherwise be obligated to pay.

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