Committee Opinion
December 10, 1998

LEGAL ETHICS OPINION 1726

ATTORNEY PREPARING NARRATIVE REPORT OF PHYSICIAN'S MEDICAL OPINION ON PHYSICIAN'S LETTERHEAD FOR PHYSICIAN'S SIGNATURE.

You have presented a hypothetical situation in which the defense counsel in a workers' compensation claim proceeding composed a typed physician's medical report on a hospital's letterhead. The medical report thus composed had been sent by facsimile back and forth between the defense counsel and the hospital emergency room physician. The physician, when contacted, conceded that he had merely signed the medical report, and that the defense counsel, or someone in his office, had prepared it for the physician's signature. The defense counsel filed the report with the Workers' Compensation Commission and sent a copy to the claimant's counsel. Thereafter, the claimant's counsel and the defense counsel reached a settlement that the Workers' Compensation Commission approved.

Based on the facts presented, you have asked the committee to opine whether it was ethically permissible for the defense counsel to prepare the medical report on the hospital's letterhead for the physician to sign and then present it as a part of the evidence for an adjudication of the claimant's claim.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law; and DR:7-102(A)(5) through (8) which provide, respectively, that a lawyer shall not knowingly make a false statement of law or fact; participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; or knowingly engage in other illegal conduct or conduct that is contrary to a Disciplinary Rule; and DR:7-105(C)(5), which provides that a lawyer appearing before a tribunal shall not intentionally violate an established rule of procedure or of evidence where such conduct is disruptive of the proceedings.

The committee notes that Rule 2B2 of the Workers' Compensation Commission Rules permits reports of physicians to be admitted in evidence as testimony by physicians and provides that, upon timely motion, any party shall have the right to cross-examine the source of the medical report. Rule 4:2 requires such medical reports to be filed immediately with the Commission, with a copy to opposing counsel. Rule 2B3 provides that parties shall specifically designate by author the medical reports to be received in evidence.

The facts presented omit any statement of whether the defense counsel, in compliance with Rule 2B3, had made a designation by author of the medical report to be received in evidence. The appearance is that, because of the settlement, the claim had not progressed

to the point of the Rule 2B3 designation with the Commission. The meaning of designate by author under Rule 2B3 is, in any case, an issue of interpretation for the Commission and not the committee. The committee observes, however, that the dictionary definition of "author" is "one that originates or gives existence." Webster's Ninth New Collegiate Dictionary (1986).

On the facts presented, it is significant that the medical report had been sent back and forth between the defense counsel and the physician. It can be inferred that, although the defense counsel was the scrivener, the physician reviewed the medical report for accuracy before he signed it as his medical report. Under those circumstances, the defense counsel did not dictate the physician's testimony in the report. There is no suggestion in the facts presented that the physician took exception to the content of the report as an inaccurate or misleading presentation of his own findings or opinions, nor is there any suggestion that the physician did not adopt and voluntarily sign the report as his own.

Lawyers often, if not routinely, prepare writings that others sign. A familiar illustration consists of affidavits presented on summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Traditionally, those affidavits are not prepared by the affiants. They are prepared by lawyers, in some cases by lawyers for a party and in other cases, by lawyers for the affiants themselves. The practice is ethically permissible as long as the affidavit honestly captures the affiant's testimony as opposed to the lawyer "putting words in the affiant's mouth." Even though the lawyer composes the affidavit, the content embodies the testimony of the affiant who knowingly and willingly executes it. The form of expression may be that of the lawyer, but the substantive content is that of the affiant.

To the extent that the form of expression may accentuate substantive content, examination of the affiant at depositions or at trial has a leveling effect. In the situation presented, it is noted that Va. Code § 65.2-703 permits discovery depositions, and Rule 2B2 permits cross-examination of the source of a medical report.

Lawyers also commonly prepare the answers to an expert witness interrogatory under Supreme Court Rule 4:1(b)(4)(A)(i). In doing so, lawyers use their own form of expression to present information derived from the expert. In turn, the lawyer's client signs the answers under oath but has not composed them.

The committee is aware of your concern that the lawyer-composed medical report was on the hospital's letterhead. There is no suggestion, however, that the emergency room physician's use of the hospital's letterhead was unauthorized, or that the lawyer had reason to believe presenting the medical report on the letterhead was improper. There is also no suggestion that the lawyer misrepresented the medical report as having been written by the physician personally. On the facts presented, the lawyer conceded when asked that his office had composed the medical report.

The fact of the lawyer's composition, which the physician reviewed, adopted and signed, is not alone a misrepresentation or dishonest conduct under DR:1-102(A)(4). The

committee cautions, however, that the lawyer must be circumspect in his presentation of the medical report. It is one thing to write "I enclose the medical report of Dr. X to be filed." It is something else, however, to write "I enclose the medical report that Dr. X prepared to be filed." The latter statement would be a misrepresentation with respect to the fact of preparation.

In sum, the committee is of the opinion that defense counsel's writing of the medical report for submission to and review, adoption and signature by the physician does not violate the Disciplinary Rules. The applicable ethical constraint is that the content of the lawyer-composed medical report must honestly capture the testimony that the physician wishes to present (as opposed to lawyer-created testimony that the lawyer wishes to present irrespective of the physician's own testimony) and must be reviewed, adopted and signed by the physician voluntarily. In addition, the lawyer must be alert to the DR:7-103(B) requirement that, in dealing with an unrepresented person, a lawyer shall not state or imply that he is disinterested and may have to clarify his role in the matter to the physician.