

BAR ASSOCIATION OF ERIE COUNTY

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 2010- 05

Topic: Lawyer's Duties to Health Insurer

Digest: When a client's health insurer claims a contractual right to be reimbursed for its expenses out of the proceeds of any personal injury award or settlement, and demands that the lawyer agree to comply, the lawyer should consult with the client and follow the client's lawful directions.

Rules: 1.1, 1.2, 1.4, 1.7

QUESTION

May an attorney who is representing a plaintiff in a personal injury case, sign an agreement with the client's health insurer to abide by the health insurance policy provisions requiring that any recovery under the policy be paid first to the health insurer to reimburse it for its expenses for the client's health care?

OPINION

An attorney represents a plaintiff in a personal injury action. The client has health insurance which requires, as a condition of paying for her treatment, that she and her attorney agree that the health insurer will receive full payment of the amounts it has paid for her healthcare out of the proceeds of her claim before any distribution to the attorney for fees or to the client. The attorney asks if it is ethical for him to sign the agreement.

The attorney has posed the question as if he would be representing the insurance company if he takes on this responsibility. We do not believe that is the proper portrayal of the arrangement. Personal injury attorneys are familiar with dealing with Medicaid liens in their practice, but that does not put them in the position of representing Medicaid. Similarly, attorneys who are on notice of an I.R.S. lien also have a responsibility to the lienor, but do not represent the lienor. NYCLA Eth. Op 732, (2004). Therefore, this does not present a conflict of interest situation under Rule 1.7(a)(1), as the lawyer would not be representing "differing interests."

Neither does this situation appear to present a conflict between the client's interest and the lawyer's own interests within Rule 1.7(a)(2). The inquiring lawyer has advised that he believes that the provision requiring payment first to the insurance company may not be valid. The lawyer owes the client competent representation (Rule 1.1) and should assist the client in making informed decisions relating to the representation (Rule 1.4). In considering whether to sign the document prepared by the insurance company, or to attempt to modify it through negotiation, or to refuse and challenge the provision of the health insurance contract, the lawyer should consult with his client. In

such consultation, the lawyer should review the advantages and disadvantages of the alternative courses of action that are available, to enable the client to make an informed decision. The lawyer should respect and endeavor to abide by the client's lawful directions (Rule 1.2).<sup>1</sup>

## CONCLUSION

When a client's health insurer claims a contractual right to be reimbursed for its expenses out of the proceeds of any personal injury award or settlement, and demands that the lawyer agree to comply, the lawyer should consult with his client concerning the alternative courses of action that are available in response to the health insurer's position, and follow the lawful directions of the client in accordance with Rules 1.1(c), 1.2(a), and 1.4(b).

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<sup>1</sup> As in other situations, if the interests of the client appear to conflict with the lawyer's own interests within the meaning of Rule 1.7(a)(2), the lawyer should disclose the conflict to the client and should not proceed without the client's informed consent, confirmed in writing, pursuant to Rule 1.7(b).