

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 03-02

Issued April 23, 2003

¶1 **Issue:** What are the ethical responsibilities of a plaintiff's lawyer who reasonably believes a health-care provider that he deals with on a recurring basis may be charging his clients and prospective clients for services not actually rendered?

¶2 **Facts:** An attorney ("Attorney") represents tort plaintiffs. A health-care provider ("Provider") regularly treats patients with injuries arising from motor vehicle accidents, including some of Attorney's clients. Attorney expects to encounter Provider repeatedly as she maintains her practice in this area.

¶3 A client ("Client") engages Attorney to represent him in connection with injuries suffered in an auto accident. In the course of the representation, Client complains about Provider's bills, adamant that they were for services never rendered. Attorney reasonably believes Client's claims.

¶4 In reviewing Client's case with Provider in preparation for trial or settlement discussions, Attorney questions the bills. Provider readily admits that the bills include amounts for work not actually performed. Attorney tells Provider that its illegal to submit such bills, that his records need to be legitimate, and that he should return the funds so obtained. A few days later, Provider calls Attorney, thanks her for the advice, and asks her advice about how to return the money.

¶5 Attorney tells Provider that she will act only in conformity with the law and will not participate in dealings involving false records. She also tells Provider that she cannot advise Provider how to fix his problems. Later, Attorney sends a letter to Provider confirming that she is not representing Provider. A few days later, Provider sends Attorney a letter outlining the return of money to the health insurance carrier on Client's case.

¶6 Attorney is not sure if the overbillings admitted to by Provider were the result of billing patients for missed visits, of input errors in the billing or patient codes, or of some

deliberately fraudulent scheme. The discussions with Provider could be interpreted in several different ways. Attorney does not want to ask more questions of Provider about this issue, but her level of suspicion about Provider's ongoing conduct is very high.

¶7 Attorney has other clients who are the ongoing patients of Provider for injuries for which Attorney is pursuing legal compensation. Attorney has bought a medical code book to interpret all billing codes and uses a form letter to all her clients (not just Provider's patients) advising them to review their medical bills carefully for errors before they are submitted to insurance carriers or in legal proceedings.

¶8 Inquiry:

a. Did Attorney form an attorney-client relationship with Provider by informing Provider that his conduct was illegal? Is Attorney obliged to keep Provider's "confessions" confidential?

b. Can Attorney warn existing patients of Provider and Attorney's future clients who are also Provider's patients that they should review their bills carefully and tell them why? If so, would this violate Utah Rule of Professional Conduct 1.6 concerning confidential client information?

c. In representing her clients, Attorney must submit settlement packages containing Provider's billings to insurance carriers. Given what she has learned about Provider's past actions, although she does not actually know that any future bills will be fraudulent, may she ethically submit such packages?

d. Must Attorney report this information to the insurance carriers or to law enforcement? *May* she do so?

SUMMARY

¶9 Because Attorney owes a duty of confidentiality to Client, she may not reveal information disclosed to her by Client in the course of the representation without Client's consent. (fn1) On the other hand, Attorney may seek Client's consent to give the information about Provider to others and may do so as broadly as Client's consent permits. (fn2) Whether or not Client consents to revealing the information, Attorney is not prevented from working with the Provider in the future, so long as she takes reasonable and prudent steps to assess the accuracy of Provider's billing statements. This experience neither prevents Attorney from representing other clients who are patients of Provider, nor from advising them generally to be cautious about all bills from their health-care providers. Further, Attorney has no ethical duty to report her concerns to law

enforcement, and she may not do so under these circumstances without the Client's consent.

ANALYSIS

¶10 We can best address Attorney's inquiries by first reviewing the fundamental areas.

¶11 *The Relationship Between Attorney and Provider.* Whether an attorney-client relationship has been established between parties is a legal question driven by the facts and applicable case law, (fn3) and it is not within our authority to render legal opinions. (fn4) However, it appears on the facts given that no attorney-client relationship has been established between Attorney and Provider by Provider's voluntary "confessions" to Attorney. For purposes of this opinion, we therefore *assume* that no attorney-client relationship was formed between Attorney and Provider. (fn5)

¶12 *Keeping Client Confidences.* Rule1.6 of the Utah Rules of Professional Conduct provides for the confidentiality of information an attorney receives in the course of representing a client. Specifically subparagraph (a) provides: "A lawyer shall not reveal information relating to representation of a client except as stated in subparagraph (b), unless the client consents after consultation." Subparagraph (b) specifies the exceptions that permit an attorney to reveal confidential information relating to the representation of a client: (1) to prevent the client from committing a future crime; (2) to rectify the consequences of the client's using the lawyer as an unwitting accomplice in a past crime or fraud; (3) to establish a claim or defense in a legal controversy between the lawyer and the client, or to establish a defense to a criminal charge against the lawyer based upon conduct in which the client was involved; or (4) to otherwise comply with the Rules of Professional Conduct.

¶13 As a separate matter, evidentiary rules and statutory law provide various individuals with protection from the disclosure of certain information. These protections are generally applicable to adjudicative proceedings and cover a much more restricted range of attorney-client communications than those subject to the protections of Rule1.6. Attorneys should not confuse the obligation of confidentiality owing to clients under Rule1.6 with the more limited legal privileges afforded to their clients in adjudicatory matters.

¶14 The obligation of confidentiality owing to a client under Rule1.6 is much broader than evidentiary privileges and doctrines, which are creations of the law and not within the Committee's authority to interpret. On the other hand, the confidentiality requirement of Rule1.6 is an ethical constraint that applies to *any* information relating to *any*

representation of a client (with the exceptions noted in Rule1.6(b)), not just adjudicative representations. Thus, Rule1.6 confidentiality includes not only statements and information obtained directly from a client, but also other information obtained by a lawyer in the course of investigating a client's case.

¶15 In the case here, the statements made by Provider to Attorney are confidential information as to Client and are protected by Rule1.6. Absent Client's consent, these communications may not be revealed. Because the information obtained does not pertain to *Client's* future commission of a criminal or fraudulent act, to *Client's* engaging in past criminal conduct in which Attorney was complicit, or to Attorney's establishing a claim or defense in a controversy with *Client*, there is no basis under Rule1.6 for Attorney to breach the confidentiality of Client, absent Client's informed consent. (fn6)

¶16 The fact that the information obtained by Attorney may reveal past criminal conduct by a third party, or even possibly of an ongoing criminal fraud scheme in which the client is not participating, is immaterial. The lawyer is bound to the obligation of confidentiality under Rule1.6 and may not reveal the information she has received in the course of representing Client to anyone, including insurance carriers or law enforcement authorities, without Client's consent. (fn7)

¶17 Of course, Client may choose to authorize Attorney, after consultation, to reveal what she had learned in the course of the representation. In that case, Attorney could reveal the information to third parties to the extent Client's waiver would allow. Client can control the breadth of the waiver, limiting it to time, persons or incident, for example. Further, nothing prohibits Attorney from asking Client for permission to disclose Provider's conduct to authorities, so long as there is proper consultation about the ramifications of the disclosure.

¶18 The foregoing analysis does not prohibit an attorney who has gained experience about human behavior or human nature in the course of her practice from using the general knowledge and information for the benefit of other clients at a later time. Thus, although Attorney could not specifically advise future clients about the exact information she has learned about this particular Provider, the lawyer may warn all clients who are patients of health-care providers to review their bills carefully and to be vigilant in assuring that their health-care providers submit proper bills.

¶19 *Duty of Candor and Duty of Fairness.* All of these circumstances raise an additional question about future dealings with Provider. Under Rule 3.3 of the Utah Rules of Professional Conduct, a lawyer owes a duty of candor

toward any tribunal in which she is practicing. This obligation includes the requirement that "[a] lawyer shall not knowingly. . . [m]ake a false statement of material fact or law to a tribunal or offer evidence that the lawyer knows to be false." To be in compliance with Rule 3.3, Attorney may need to exercise extra vigilance if she is to continue associating with Provider as an expert in her cases.

¶20 Further, under Rule 3.4 of the Rules of Professional Conduct, the lawyer owes a duty of fairness to opposing parties and to opposing counsel. Rule 3.4(b) prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely. This would prohibit a lawyer from knowingly submitting false billing information to an opposing counsel or insurance adjuster in furtherance of a client's claim for settlement or from knowingly submitting false medical bills as trial exhibits.

¶21 In this case, Attorney may be wise to review Provider's bills with care before submitting them to insurance carriers, adjusters, opposing counsel or a court in furtherance of her clients' claims. If, however, the lawyer has no actual knowledge the bills are inaccurate, then the lawyer will commit no ethical violation for submitting Provider's billings to anyone in the future. (fn8)

CONCLUSION

¶22 We summarize the responses to Attorney's specific questions:

a. Did Attorney form an attorney-client relationship with Provider by telling him that his conduct was illegal? We do not answer this legal question for reasons set forth above. For purposes of addressing the remaining questions, we assume on these facts⁸;without deciding⁸;that there is no attorney-client relationship with Provider.

b. Can Attorney warn future clients who are patients of Provider that they should review their bills carefully and tell them specifically why? Would this violate Rule 1.6 regarding confidential information obtained from Client? Attorney can generally warn any of her clients that they should be careful in analyzing their health-care provider bills for accuracy. Absent consent from Client, Attorney may not advise existing clients or future clients that they should specifically be aware of this Provider or state the reasons they should be aware of this particular Provider, because such information has been obtained in Attorney's representation of Client, to whom Attorney owes a duty of confidentiality.

c. Given what she knows, can Attorney ethically submit settlement packages to insurance carriers containing Provider's billings? Yes, if she does not have actual knowledge that the billing statements are inaccurate.

d. Must or may she report anything to the insurance carriers or law enforcement? A lawyer is not required to report these crimes. Further, only with the informed consent of Client may Attorney report any information obtained without causing a breach of her obligations of confidentiality under Rule 1.6.

Footnotes

1. Utah Rules of Professional Conduct 1.6(a). We assume that none of the exceptions in Rule 1.6(b) that allow discretionary disclosures are present here, such as rectifying the consequences of a *client's* criminal act. We also note that the lawyer is, of course, authorized to make disclosures of confidential information as necessary to carry out the representation.

2. We also note that Rule 1.6(a) does not require the consent to be in writing, although in some cases a lawyer would be well advised to obtain written consent.

3. *See, e.g., Roderick v. Ricks*, 2002 UT 84, 54 P.3d 1119.

4. *See, e.g., R. Proc. Ethics Adv. Op. Comm. § I(b)(2)(iii)*.

5. If an attorney-client relationship were found to exist between Attorney and Provider, a different analysis would be necessary.

6. From another perspective, Attorney's disclosure without the informed consent of Client could be to Client's disadvantage. Utah Rules of Professional Conduct 1.8(b). For example, if Client were to continue to need treatment by Provider, Provider might refuse to supply such treatment were he to know that disclosure of his indiscretions to Attorney could lead to civil, criminal or administrative discipline.

7. The obligation to treat information obtained in the representation of Client as confidential does not end with the termination of the representation. Utah Rules of Professional Conduct 1.9(b).

8. Under the Utah Rules of Professional Conduct, Terminology, "knowingly" and related terms imply actual knowledge, although a person's knowledge may be inferred from circumstances.

Rule Cited:

1.63.33.4