

## Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-11

Approved October 30, 1998

**Issue:** In a lawsuit against a Utah county, brought by the heirs of a decedent whose medical bills were paid (in part) by the State of Utah's Medicaid program after the decedent had been in the county's jail facility, what are the ethical considerations that govern a medical cost-recovery retainer agreement among the heirs, their attorney and the State's Office of Recovery Services (ORS)?

**Opinion:** The attorney representing ORS may request the heirs and their attorney to execute a retainer agreement that precludes the heirs' attorney from acting adversely to ORS and provides that ORS will be paid first from any recovery from third parties as a condition for ORS's contributing to the heirs' attorneys' fees and costs. Whether the heirs' attorney may execute such a retainer agreement depends on whether the attorney can satisfy the conflict-of-interest requirements of Rule 1.7(b).

**Facts:** Lawyer represents the surviving widow and daughter of the decedent, who was seriously injured while incarcerated in a county jail and died several months later after incurring significant medical bills. Through the Medicaid program, the State of Utah, Department of Health (the "Department"), paid a portion of these medical bills. Lawyer has commenced a lawsuit on behalf of the surviving widow and daughter (the "Heirs") against the county. (fn1)

The Department has claimed a lien in the action for the medical assistance provided to the decedent (the "Medicaid lien"). Lawyer contacted ORS to negotiate a reduction in the Medicaid lien in an effort to reach a negotiated settlement of the lawsuit. The Heirs have claimed that the damages being sought in the lawsuit are not for "medical assistance" and that the Medicaid lien is inapplicable or invalid as to any recovery in the action.

ORS responded by refusing to negotiate the Medicaid lien and by requesting that Lawyer enter into a retainer agreement to be executed by Lawyer, the Heirs, and ORS under which Lawyer would agree to represent the interests of ORS in the recovery of the medical assistance provided

by the State of Utah. The retainer agreement provided that Lawyer would agree not to represent the Heirs in a manner adverse to the interests of ORS with respect to the matter, and that ORS would be paid first out of any recovery from the defendant county the full amount of the Medicaid lien, without discount or reduction.

ORS made execution of the retainer agreement by Lawyer and Heirs a condition to ORS's agreeing to pay any portion of the attorneys' fees or costs incurred by Lawyer in the prosecution of the lawsuit. The retainer agreement contained an acknowledgment of the potential conflict of interest between ORS, Lawyer and the Heirs. It stated that this potential conflict of interest had been fully discussed with the Heirs and stated that the Heirs consented to Lawyer's undertaking the dual representation. Paragraph 11 of the retainer agreement further provided: "This Retainer Agreement may be terminated only upon a showing of good cause, written notice being given to all other parties. Upon termination, the attorney agrees that he/she shall not continue representation of either ORS or Recipient in the Cause of Action." The retainer agreement also provided: "A copy of any separate fee agreement between the Attorney and the Recipient shall be provided to ORS."

**Issue No. 1:** As a condition of ORS's contributing any attorneys' fees or costs incurred by the attorney in seeking recovery from the responsible third parties, is it unethical for the attorney for ORS to require an attorney representing the Heirs of the decedent in a claim against third parties allegedly responsible for the decedent's injuries necessitating the medical assistance, to enter into a retainer agreement described above for execution by the attorney, the Heirs and ORS?

**Opinion:** If the retainer agreement does not otherwise violate the Rules of Professional Conduct, it is not unethical for the Utah Attorney General's Office to prepare a retainer agreement with these terms for execution by ORS, the Heirs and the attorney representing the Heirs as a condition to ORS's agreement to contribute to the payment of any attorneys' fees or costs incurred by the attorney in seeking a recovery from the responsible third parties. It is the attorney's ethical obligation to determine if the retainer agreement imposes obligations on the attorney or the Heirs that would create an unwaivable conflict of interest under Utah Rules of Professional Conduct 1.7(b). (fn2)

**Analysis:** By statute, the Department is provided a lien against any proceeds payable to or on behalf of a recipient of medical assistance by a third party responsible for the injuries. (fn3) The Department is allowed to make a direct claim against the responsible third party. (fn4) This does not bar a recipient or a dependent of a recipient from

bringing a claim against the responsible third party for damages not included in the Department's action. (fn5) A recipient may not, however, "file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance, without the department's written consent." (fn6) The State of Utah's written consent, if given, is required to "state under what terms the interests of the department may be represented in an action commenced by the recipient." (fn7)

Section 26-19-7(4) addresses the issue of the Department's obligation to pay attorneys' fees and costs: "The department may not pay more than 33% of its total recovery for attorney's fees, but shall pay a proportionate share of the costs in an action that is commenced with the department's written consent."

If a legal action is commenced by a recipient without the Department's written consent, the Department has no obligation to pay any attorneys' fees or costs incurred by the recipient's attorneys in that legal action. (fn8) The Legislature has therefore determined that a legal action may not be commenced by a recipient for the recovery of medical costs paid by the State without the consent of the Department, and that the Department has no obligation to pay any attorneys' fees or costs incurred in such an action unless the Department has consented to the legal action.

It is not unethical for the Department to condition the consent to such a legal action by a recipient and to condition any obligation to pay attorneys' fees or costs upon the agreement of the recipient and the recipient's attorney that the recipient's attorney will represent the interests of ORS. The Legislature left to the discretion of the Department the terms under which it would consent to a legal action by a recipient for the recovery of medical expenses paid by ORS.

If these conditions are unacceptable to the recipient or to the recipient's attorney, they may simply decline to bring a legal action for the recovery of medical costs paid by the State of Utah. We recognize that the State may seek to enforce its Medicaid lien even as to any recovery by the recipient for damages other than the medical expenses paid by the State of Utah. (fn9) If the State does so, it avoids any obligation to pay a portion of the attorneys' fees and costs incurred to recover such amounts. The Legislature has inherently already addressed these issues and has resolved them in favor of the protection of the public treasury.

This is not to suggest that attorneys representing Utah, including attorneys in the Attorney General's Office, may draft retainer agreements that violate the Utah Rules of

Professional Conduct. However, because we do not find a per se unwaivable conflict of interest present in these circumstances, we do not believe the consent to the conflict of interest arising from the joint representation contained in the retainer agreement necessarily violates Rule 1.7(b). (fn10)

However, two provisions of the retainer agreement warrant additional discussion. As quoted above, paragraph 11 of the retainer agreement requires a showing of good cause to terminate the agreement. The comment to Utah Rules of Professional Conduct 1.2 provides: "An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree . . . to surrender the right to terminate the lawyer's services . . ." The restriction in the retainer agreement limiting the clients' rights of termination of the agreement to "for cause" terminations is inconsistent with this comment to Rule 1.2. Accordingly, it would be unethical for lawyer to enter into a retainer agreement containing this limitation. Further, if an Assistant Attorney General prepared the retainer agreement and knew that the termination clause would cause the attorney executing it to violate the Rules of Professional Conduct, then that attorney would violate Rule 8.4(a). (fn11)

Finally, the retainer agreement provides that: "A copy of any separate fee agreement between the Attorney and the Recipient shall be provided to ORS." The fee agreement between the recipient and Lawyer is confidential information under Rules 1.6 of the Utah Rules of Professional Conduct. (fn12) This paragraph does not, however, violate the Rule 1.6, as it constitutes a written consent to the disclosure of this confidential information by the recipient.

**Issue No. 2:** Is it unethical for the Heirs' attorney to enter into the retainer agreement to represent both ORS and the Heirs in claims against third parties, when the retainer agreement precludes the attorney from contesting the validity or the amount of ORS's lien and contains an agreement by the attorney and the Heirs that any recovery will be paid first to ORS for payment in full of all medical expenses paid by the State of Utah, without discount or reduction.

**Opinion:** Whether it is ethical for the attorney in such circumstances to represent both the Heirs and ORS, or to represent the Heirs given the limitations of the retainer agreement, depends upon whether the attorney can satisfy the requirements of Utah Rules of Professional Conduct 1.7(b). If the attorney's representation of the Heirs may be materially limited by the attorney's agreement in the retainer agreement to represent the interests of ORS, or by the attorney's obligations to ORS under the retainer agreement, including the attorney's duty not to undertake

representation adverse to the interests of ORS, then the attorney may undertake the representation only if the attorney reasonably believes the representation of the Heirs will not be adversely affected by the execution of the retainer agreement. If this condition is satisfied, then, if an attorney-client relationship is created with ORS, ORS and the Heirs must consent to the multiple representation after consultation, including an explanation to each client of the implications of the common representation and the advantages and risks involved. If an attorney-client relationship is not created with ORS by the retainer agreement, then only the Heirs must consent to the representation after a disclosure of the limitations on the representation.

**Analysis:** Whether an attorney representing a recipient may ethically enter into a retainer agreement to represent both the recipient and ORS is dependent on the facts of each case. The Utah Supreme Court has recently cast doubt on whether the retainer agreement, notwithstanding its language, creates an attorney-client relationship between an attorney and ORS. (fn13)

Yet, whether or not an attorney has an attorney-client relationship with ORS under the retainer agreement does not alter the analysis of a potential conflict of interest under Rule 1.7(b). The attorney's representation of the Heirs may be materially limited by the responsibilities to ORS under the retainer agreement, whether ORS is a client or a non-client third party. Rule 1.7(b) provides that such representation may be undertaken only if: (1) the attorney reasonably believes the representation will not be adversely affected; and (2) each client consents after consultation, which consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved. (fn14)

Under the facts of the request to the Committee, it is doubtful that Lawyer can satisfy the first requirement of Rule 1.7(b). If a bona fide legal dispute exists between the Heirs and ORS as to the applicability or validity of the Medicaid lien to any recovery in the lawsuit, Lawyer could not reasonably believe that the representation of the Heirs would not be adversely affected by the retainer agreement and Lawyer's obligations to ORS. The retainer agreement contains an agreement by Lawyer and the Heirs that ORS will be paid first out of any recovery from the third party the total medical expenses paid by the State, without discount or reduction. It further provides that Lawyer may not undertake any representation adverse to the interests of ORS. Lawyer could therefore not represent the Heirs in negotiating a reduction in the Medicaid lien. The retainer agreement terms will obviously adversely affect the representation of the Heirs, unless the Heirs knowingly and voluntarily waive and release their defenses to the Medicaid

lien.

In other circumstances where a bona fide dispute does not exist between the Heirs and ORS as to the applicability or validity of the Medicaid lien to any recovery, but the recipient desires to negotiate with ORS an equitable reduction in the Medicaid lien, an attorney may be able to satisfy the conditions of Rule 1.7(b) and execute the retainer agreement. The attorney would be required to disclose fully and completely to the recipient the limitations upon the attorney's representation of the Heirs caused by the retainer agreement, including the following: the recipient and the attorney would agree contractually to ORS's entitlement to the full lien amount, and would rely on the equitable discretion of ORS to reduce the lien amount; and the attorney could not advise the recipient with respect to negotiating a reduction in the lien amount and could not represent the recipient in negotiating a reduction in the lien amount. If the attorney satisfies both requirements of Rule 1.7(b), it would not be unethical for the attorney to execute a retainer agreement, assuming it otherwise complies with the Utah Rules of Professional Conduct.

#### Footnotes

1. In the facts of the request to the Committee, Lawyer's clients are the heirs of the decedent, who was the recipient of the medical services paid by the State of Utah. Utah Code Ann. § 26-19-2(6) defines "recipient" to include the estate and heirs of a person receiving medical assistance from the State of Utah. This Opinion addresses the decedent's heirs as "recipients," but the analysis is equally applicable to situations where the attorney represents the actual recipient of the medical assistance.

2.(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved.

Utah Rules of Professional Conduct 1.7(b).

3. Utah Code Ann. § 26-19-5(1)(b) (1998).

4. *Id.* § 26-19-5(3).

5. *Id.* § 26-19-5(5).

6. *Id.* § 26-19-7(1)(a).

7. *Id.* § 26-19-7(3).

8. *Camp v. Office of Recovery Services*, 779 P.2d 242, 247-48 (Utah App. 1989).

9. *See* Utah Code Ann. § 26-19-5(1)(b); *In re: Estate of Higley*, 810 P.2d 436, 439 (Utah App. 1991).

10. The application of Rule 1.7(b) in those circumstances is discussed in greater detail in the Analysis of Issue No. 2.

11. "It is professional misconduct for a lawyer to . . . [v]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Utah Rules of Professional Conduct 8.4(a).

12. *See* generally Utah Ethics Advisory Op. No. 98-03, 1998 WL 199533 (Utah State Bar).

13. *Houghton v. Department of Health*, 962 P.2d 58 (Utah 1998) (suggesting an attorney under the ORS retainer agreement acts as a collections agent for ORS, not as an attorney for ORS).

14. To the extent that the retainer agreement does not create an attorney-client relationship with ORS, ORS's consent is not required and an explanation need not be made of the advantages and disadvantages of common representation

Rule Cited:

1.7