

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 99-03

Approved May 28, 1999

Issue: May a defense lawyer make *ex parte* contact with plaintiff's treating physician?

Opinion: No ethical rule prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue.

Analysis: It is neither uncommon nor improper, under the Utah Rules of Professional Conduct, for an attorney to make *ex parte* contacts with witnesses involved in a controversy, including witnesses for the adversary. When that witness is a medical doctor, especially one who has treated the plaintiff in a litigation, concerns may be raised about the physician's and both lawyers' ethical responsibilities to maintain confidences and to abide by other professional responsibilities.

In cases where the witness-physician is not separately represented by another lawyer in the matter, there is no provision of the Rules of Professional Conduct that prohibits a defense attorney from making an *ex parte* contact with the plaintiff's treating physician.

Although there may be a potential for ethical misconduct arising out of such a contact, such misconduct can be separately addressed and remedied in accordance with the appropriate rules. In an opinion issued in 1993, the American Bar Association held that no provision of the Model Rules of Professional Conduct directly prohibits *ex parte* contacts with the other side's witnesses in civil matters. The ABA opinion discusses the ethical rules in light of expert witnesses as well as fact witnesses:

There are nonetheless some ethical limitations that apply to contacts with any witness, and some additional limitations that may have different application to expert witnesses. Among the former, the principal limitations are the obligations of candor imposed by Rule 4.3 on dealing with unrepresented persons. When a lawyer contacts any witness, lay or expert, actual or potential, a lawyer must not knowingly leave the witness in ignorance of the lawyer's

relationship to the case that gives occasion to the contact. Further, the lawyer may not, consistent with Rule 4.1(a), convey the message, directly or indirectly, that the witness *must* speak to the lawyer. As with any other witness not under subpoena, an expert witness may choose not to discuss the case with the lawyer. In fact, the opposing party or its lawyer may properly have asked the expert *not* to discuss the case with the inquiring lawyer. See Model Rule 3.4(f).

The ABA opinion also warns about attempts to induce an opposing witness to reveal confidences:

[B]oth fact witnesses and experts may be in possession of confidences of the opposing party, or work product of that party's lawyer, about which it would be improper to inquire. *See American Protection Insurance Co. v. MGM Grand Hotel*, 748 F.2d 1293, 1301 (9th Cir. 1984), holding that "A corollary of the attorney's duty not to reveal confidences of a client is the duty not to seek to cause another to do so." (fn1)

Using an *ex parte* contact to attempt to obtain information protected by the physician-patient privilege would violate Utah Rules of Professional Conduct 3.4(c), 4.4, and 8.4(d). Other considerations arise when the physician's role is to appear as an expert witness; the Committee notes that an expert witness may be privy to opposing counsel's legal theories and thought processes and there may be little information from that physician-expert that would not be protected by the appropriate confidential privileges.

In addition to the concerns raised in ABA Opinion 93-378, it would also be improper for the attorney to attempt to persuade the witness not to testify; (fn2) to disobey or to circumvent the appropriate court rules concerning discovery and evidence; (fn3) to ask a person other than a client to refrain from voluntarily giving relevant information to another party; (fn4) or use the *ex parte* contact in a way that may tend to embarrass, delay or burden the doctor. (fn5) Overreaching by counsel in the ways discussed above is prohibited by the ethics rules, as is similar improper influence on the part of plaintiff's counsel.

The mere possibility of misconduct by an attorney during an *ex parte* contact with a physician does not justify a blanket prohibition on such *ex parte* contacts. Thus, it would not be appropriate to assume that an *ex parte* interview conducted by either plaintiff or defendant would be outside the bounds of proper discovery. (fn6) An attorney must conform to the rules of the court and particular rules of evidence and discovery in each case. The court may limit or condition *ex parte* contacts, but as a matter of professional ethics and the existing rules, there is

no bar to such *ex parte* contacts. Many states have come to the same opinion that attorneys for a defendant in a personal injury case have the right to interview plaintiff's treating physician *ex parte*. (fn7)

The attorneys involved in an *ex parte* contact of an opposing witness may appropriately be concerned about the extent of a physician-patient privilege. The nature and extent of that privilege is carefully defined in statute, rule and court decision and is, therefore, a matter for legal interpretation. It is not the function of this Committee to offer legal advice regarding the extent of the privilege; in situations where the question is a close one, the matter should be addressed by the parties in concert with the court, applying applicable rules of discovery and evidence.

Footnotes

1. ABA Comm. On Ethics & Prof. Responsibility, Formal Op. 93-378. The opinion also reminds attorneys that Rule 3.4(b) prohibits attorneys from "counsel[ing] or assisting[ing] a witness to testify falsely."

2."A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." Utah Rules of Professional Conduct 3.4(a).

3. "A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." *Id.* 3.4(c)

4. "A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) The person is a relative or other agent of a client; and (2) The lawyer reasonably believes that the person's interests will not be adversely affected from giving such information." *Id.* 3.4(f).

5."In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." *Id.* 4.4.

6. *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo. App. 1985).

7. *See, e.g.*, Mich. Ethics Op. 60 (Dec. 1980); Mich. Ethics Op. 177 (July 1958); Wash. State Bar Ethics Op. 108 (April 1962); Wash. State Bar Ethics.

Rule Cited: