Utah Ethics Opinions

1999.

99-03R. USB EAOC Opinion No. 99-03R

UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 99-03R

Approved October 29, 1999

On May 28, 1999, the Utah State Bar Board of Bar Commissioners (the Commission) approved Utah Ethics Advisory Opinion No. 99-03, (fn1) which held that nothing in the Utah Rules of Professional Conduct prohibits a defense lawyer from making an *ex parte* contact with plaintiff's treating physician in a personal-injury or medical-malpractice matter.

The typical fact situation that was addressed by Opinion No. 99-03 involves a plaintiff who files suit against a physician who has performed medical services for her. The attorney for the defendant-physician makes an *ex parte* contact with another physician who had previously treated the plaintiff (the "treating physician"). The factual background for the analysis assumes that the treating physician (a) is not represented by counsel in the matter, (fn2) and (b) has not been retained or designated to testify as an expert by the plaintiff. (fn3)

Several requests for rehearing or reconsideration of Opinion No. 99-03 were filed with the Ethics Advisory Opinion Committee (the Committee) and the Commission. (fn4) These were remanded by the Commission to the Committee for further review. The Committee has considered the submissions of the parties and has heard oral argument from representatives of the requesting parties and from a representative of those who supported the conclusion of Opinion No. 99-03.

After review of all information presented and considerable additional research, we affirm the opinion as originally written.

Analysis: In brief, the requests for reconsideration present a variety of arguments that can be put into three major categories. (fn5)

˜Pressuring the physician not to testify or to violate the physician-patient privilege violates the Utah Rules of Professional Conduct.

We agree that certain conduct will violate the Rules of Professional Conduct, but for that conduct the Rules provide sufficient recourse. (fn6) For example, in *Harlan v. Lewis*, (fn7) a case cited by the requesters, defense counsel violated Rules 3.4(a) and 3.4(f) by pressuring the treating physician not to testify and not to give information to other parties. Absent evidence of such conduct, however, the Utah Rules of Professional Conduct do not categorically prohibit *ex parte* contact.

˜A violation of a specific statute or court rule is automatically a violation of the Rules of Professional Conduct, with citation to Harlan v. Lewis.

In *Harlen v. Lewis*, however, the court ruled that the Arkansas Rules of Evidence and Procedure specifically regulated the types of contact between defense counsel and physicians and noted that the specific language of the Arkansas Rules of Evidence and Procedure was added to preserve physician-patient confidentiality in response to widespread misconduct by defense counsel.

We agree that a violation of a statute or a court rule is a violation of the Rules of Professional Conduct. The Utah Rules of Evidence and Procedure do not, however, contain the specific language on which the Eighth Circuit relied in *Harlan v. Lewis*.

The requesters argue that Utah Rule of Evidence 506(d)(1) does contain language that can be interpreted to prohibit *ex parte* contact between defense counsel and plaintiff's treating physician. That rule provides that no physician-patient privilege exists "as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient *in any proceeding* in which that condition is an element of any claim or defense." (Emphasis added.) They argue that this language should be interpreted to mean that a treating physician can be interviewed only *during* a court or other formal proceeding, at which time presumably plaintiff's counsel would be present and able to preserve the physician-patient privilege on behalf of the client.

The requesters cite to no Utah case law and we can find none that interprets the language of the Utah Rules of Evidence in this way. We think it perhaps more likely this language is meant to provide that the physician-patient privilege is waived whenever the patient has filed a proceeding placing the patient's condition at issue, rather than to limit the waiver to actual in-court proceedings. Whatever the language of Rule 506 of the Utah Rules of Evidence means, however, we are not authorized to interpret it. (fn8) That role is the province of the courts.

The requesters also cite to provisions of an interdisciplinary code approved by the Utah Medical Association and the Board of Bar Commissioners, which implies that attorneys should not initiate *ex parte* contact with physicians. (fn9) We note that this code is advisory only it has not been adopted by the Utah Supreme Court or any other court, nor enacted as a binding requirement by any body with jurisdiction. It, therefore, cannot serve as the basis for discipline of an attorney or the foundation for an opinion of this Committee.

˜Public policy prohibits ex parte contact between the defense counsel and the treating physician. Allowing such contacts could lead the physician to violate the physician-privilege and erode the physician's fiduciary relationship with the patient.

As the requesters note, certain courts have adopted the public-policy position that the protection of the physician-patient privilege can best be served by prohibiting *ex parte* contact between defense counsel and treating physicians. Other courts, however, have weighed the physician-patient privilege against the competing policies of facilitating the uncovering of truth, facilitating settlements, conserving judicial resources and decreasing litigation costs and have ruled in favor of allowing *ex parte* contacts. (fn10)

The Committee does not have authority to decide between the competing public-policy positions at issue here. We can only apply clearly articulated judicial policies and clearly drafted statutes to the Utah Rules of Professional Conduct. Once the Utah courts or the Utah Legislature has spoken definitively, we can follow their lead. Until then, however, we find no clearly applicable Utah judicial decision, statute or Rule of Professional Conduct that prohibits ex parte contact between defense counsel and a treating physician.

Accordingly, we deny the requests for rehearing and reconsideration, and we reaffirm Opinion No. 99-03.

Footnotes

1. Utah Ethics Advisory Op. 99-03, 1999 WL 396999 (Utah St. Bar).

2. Hence, Utah Rules of Professional Conduct 4.2(a) proscription of *ex parte* communications "with a person the lawyer knows to be represented by another lawyer in the matter" is not applicable.

3. *See* Utah R. Civ. Proc. 26(b)(4) for limitations on dealing with experts.

4. In compliance with the Committee's Rules of Procedre, requests for rehearing or reconsideration were filed by G. Eric Nielsen, Bertch & Birch; and Dewsnup, King & Olsen. Letters seeking reversal or modification of the opinion, but not in compliance with the Committee's rules, were filed by the law firms of Gridley Ward & Shaw and Spence, Moriarity & Schuster. Elliott J. Williams, Williams & Hunt, filed a brief in support of Opinion No. 99-03.

5. Petitioners' other arguments have also been considered by the Committee and found to be without merit.

6. *See, e.g.*, Rules 3.4 (fairness to opposing party and counsel); 4.1 (truthfulness in statements to others); Rule 4.3 (dealing with unrepresented person); Rule 4.4 (respect for rights of third persons); 8.4 (misconduct).

7. 982 F.2d. 1255 (8th Cir.), *cert. denied*, 510 U.S. 828 (1993).

8. Ethics Advisory Opinion Committee Rules of Procedure III(b)(3).

9. The *Legal/Medical Interprofessional Code for Utah*, VII.1 (3d ed. 1993, Utah St. Bar, Utah Med. Assoc.).

10. *Doe v. Eli Lilly & Co.*, Inc., 99 F.R.D. 126 (D.C. 1983); *Green v. Bloodsworth*, 501 A.2d 1257 (Del. Super. Ct. 1985); *Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo. Ct. App. 1985); *Trans-World Inv. v. Drobny*, 554 P.2d 1148 (Alaska 1976); *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987); *Stempler v. Speidell*, 495 A.2d 857 (N.J. 1985).

Rule Cited:

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