

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 53

BACKGROUND

The Committee has received requests from several Nevada attorneys for an opinion on the ethical implications of entering into a business relationship with other personal injury attorneys and/or firms to purchase medical liens.

QUESTION PRESENTED

Is it ethical for an attorney who represents clients in personal injury cases to be involved in the business of buying and selling medical liens for other attorneys' personal injury clients?

ANSWER

No.

DISCUSSION

a. The Business of Medical Liens.

During the pendency of a personal injury case, clients often must obtain medical treatment related to the injuries caused by the alleged tortfeasor. However, not all clients have sufficient funds or personal insurance coverage to cover the costs of that treatment throughout the litigation process. One way for those clients to obtain the necessary treatment is through the use of a medical lien. Medical liens are contracts between the client, physician or other care provider, and the attorney that promise payment from any recovery, regardless of source, to the care provider before any recovery payment is made to the client. As a result, the care provider agrees to refrain from any collection activities until the case is concluded, with the understanding that there is a risk that no payment will ever be received. This risk comes at a cost to the client – the fees for the services provided to a client pursuant to a medical lien generally are significantly higher than if billed to insurance or for cash payment. Because the additional expense often is necessary for clients to obtain the treatment they need, medical liens are used regularly in personal injury cases.

Many care providers, before agreeing to provide a medical service with the risk of not getting paid, seek details about the case to evaluate the risk. They may ask for various information, such as: accident reports; adverse insurance policy limits; the client's insurance information, if any; details regarding the client's injuries and any preexisting issues. Further, once a case settles, the practice of a competent attorney is to attempt to negotiate a discount of the lien.¹ This generally

¹ State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 42, June 24, 2009; *In re Discipline of Laub*, Order of Suspension, Case No. 36322 (Nev. June 9, 2002) (unpublished opinion).

requires an explanation to the lienholder of the circumstances of the resolution, settlement amount, payments for attorneys' fees, costs and the claims of other lienholders/interested third parties. In fact, Rule 1.15(d) of the Nevada Rules of Professional Conduct requires that lienholders be provided with a full accounting at their request.

The existence of clients desperate for medical care under these circumstances led to the creation of many lucrative medical lien companies. Based on the premise of relieving care providers from the financial risk and burden of waiting for the conclusion of litigation to receive payment on their liens, medical lien companies began purchasing the liens at a discounted rate and collecting directly from the patients' attorneys. Many of these companies were owned and operated by the very care providers who held the liens. However, seeing the inherent danger of this practice, in 2013 the Nevada Legislature in NRS 629.078 not only prohibited these business ventures by care providers, but also made it a felony for care providers to purchase or acquire medical liens related to the same claim in which the health care provider or health facility provided services to the client.

During the meetings of the Senate Committee considering the issue, supporters for the Bill argued that medical lien companies and care providers must remain at arm's length to ensure a separate and independent medical process.² The premise was that these business practices created a "financial incentive for prolonged and unnecessary treatment, and [] can jeopardize the integrity of the . . . legal case."³

It is the position of this Committee that the same scrutiny should be placed on attorney owners of medical lien companies.

b. Proposed Business Model.

The business proposed by some attorneys involves the attorney's purchase of non-client medical liens from care providers for the personal injury clients of other attorneys. The intent is that the purchase of liens would be anonymously and randomly assigned by the care providers.

c. Ethical Considerations.

The attorney/client relationship is a fiduciary one. Attorneys are prohibited from entering into business with a client or *knowingly acquiring an ownership interest adverse to a client*.⁴ As a result, all business transactions growing out of the relationship are subject to intense scrutiny by the courts and are presumed to be improper, which may be overcome only by clear and satisfactory evidence of fundamental fairness, no professional overreaching, and full disclosure to the client.⁵ At the same time, regardless of the business model of the proposed medical lien purchasing company, whether it be a partnership, general partnership, corporation or limited liability company,

² Senate Committee on Commerce, Labor and Energy, Mar. 27, 2013, p. 28.

³ *Id.* at pp. 27-28.

⁴ NRPC 1.8(a).

⁵ *Id.* See also *In re Discipline of Singer*, 109 Nev. 1117, 1120 (1993).

the partners, owners, board members or members will owe fiduciary duties to each other as well. This leads to a quandary.

An attorney who represents an injured party in a personal injury case owes a duty of loyalty to that client.⁶ However, once the case is settled and/or resolved, if there are lienholders or interested third parties, under the Nevada Rules of Professional Conduct, the attorney's duty is then split between the client and the interested third parties.⁷ In situations where the client does not want the attorney to pay the lienholders, this split duty can get precarious rather quickly. If the attorney's loyalty is split between their client and the business in which they have a personal interest, that puts the client in a disadvantageous position.

Nevada Rule of Professional Conduct 1.7 addresses conflicts with current clients. It prohibits an attorney from representing a client with whom there is a concurrent conflict. A concurrent conflict as defined by the Rule includes one where the representation of a client "will be materially limited by the . . . personal interests of the lawyer."⁸ It also provides limited situations where the conflict may be waived by the client with informed consent that is confirmed in writing.

Comment 10 to Model Rule of Professional Conduct 1.7 cautions:

The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. . . . In addition, a lawyer may not allow related business interest to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.

Personal injury attorneys who also are in the business of buying and selling medical liens run the risk of encroaching on these principles. Given the nature of the conflict, this Committee does not believe this situation falls under one of the enumerated exceptions. Rule 1.7 does not permit this type of conflict.

Nevada Rule of Professional Conduct 1.8 also prohibits an attorney from acquiring a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client.⁹ Here, the attorney would benefit not only from the settlement of the case based on his/her fee agreement, but also from the highest amount in payment of the lien possible. This runs contrary to the Rule and the lawyer's fiduciary duty owed to the client.

⁶ See *Williams v. Waldman*, 108 Nev. 466, 471 (1992).

⁷ NRPC 1.15(d) and (e); see also State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 31, Mar. 25, 2005.

⁸ NRPC 1.7.

⁹ NRPC 1.8(i).

The proposed business scenario is fraught with the potential for ethical problems and runs the specific risk of breaching attorney/client confidentiality.¹⁰ Illustrative is a case from California, *Dodd v. Cruz*.¹¹ Like our hypothetical situation, *Dodd* involved a personal injury action in which the plaintiff's attorney was also the president of the company that purchased his client's medical lien. The defendant served the lien company with a deposition subpoena for production of business records.¹² The business moved to quash the subpoena. The defense argued that the evidence was relevant to show "collusion" between the care provider, the attorney and the lien purchasing business.¹³ Allowance of this type of scenario would place the best interests of the clients at risk for defenses such as collusion or sham medical treatment.¹⁴ It will not take the defense bar long to realize the identities of the attorney-owners and will subject every client to this increased scrutiny.¹⁵ These types of defense inquires will increase litigation costs, which also is contrary to the client's best interest. Like in *Dodd*, the purchase and sale of liens by attorneys in Nevada likely would result in the types of arguments considered in *Dodd*. Clients and their attorneys would be subject to discovery requests that risk breach of the duty of confidentiality. Ultimately, this discovery could result in prejudice to the client's case.

This scenario raises additional concerns. Because the business will be owned and operated by attorneys, the discussions as to the basis for discounting a medical lien upon settlement of a claim will likely go beyond the mere facts of the case. This Committee is concerned that the attorney-owners would be tempted to inject their own legal theories of the case – theories that undercut the client's position, encroaching on the fiduciary nature of attorney/client relationship. This would create the potential for a conflict between the best interests of the client and the attorney's personal business interests. An attorney may try to persuade the client not to settle, or even be persuaded themselves to disregard the client's instruction to settle in the first instance to protect his/her business interest with the medical lien company.¹⁶

Additionally, what if a lien client fires his/her attorney and unknowingly hires the attorney-owner who purchased the "anonymous" lien? Where will the attorney's loyalty lie, with the new client or his or her company? How will the new attorney know he/she is the holder of the lien if they are purchased "anonymously"?

¹⁰ NRPC 1.6 sets forth an attorney's ethical obligation of confidentiality. To the extent the attorney is discussing a client's case with a third-party lien purchaser, there is a risk of breaching the duty of confidentiality.

¹¹ 223 Cal. App. 4th 933, 167 Cal. Rptr. 3d 601 (Feb. 5, 2014), ordered not to be officially published (June 11, 2014). The Committee is referencing *Dodd* as a secondary source for persuasive authority in the context of this opinion.

¹² 167 Cal. Rptr. 3d. at 604.

¹³ *Id.* at 609.

¹⁴ State Bar of Arizona, Ethics Op. 96-05, Feb. 1996.

¹⁵ *Khoury v. Seastrand*, 123 Nev. Adv. Op. 52 (2016) (holding that medical liens may be admissible at trial to show bias).

¹⁶ NRPC 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter.").

Finally, personal injury attorneys inevitably will experience a client who, upon settlement and/or resolution of a claim, instructs the attorney *not* to pay the lienholders. While this situation is addressed by Rule 1.15 and Nevada Formal Ethics Opinion No. 31, the proper manner of resolution is to interplead the funds. Under these circumstances, the attorney would be required to name their own company, one to which he/she owes a fiduciary duty and has an ownership interest, as a defendant. Pursuant to *Michel v. Eighth Judicial District Court*, when interpleading settlement funds, attorneys' liens take priority, leaving the other lienholders to resolve their claims with the remaining funds.¹⁷ This action by the attorney, while the correct and ethical one for the personal injury client, would be seen as a breach of the attorney's fiduciary duty to the medical lien company.

Alternatively, there is concern as to how involved attorneys will handle the very common scenario where there are insufficient funds available for the injured client or the lienholders. Like the analysis above, the attorney, if unable to negotiate the liens or mediate a consensual settlement, might have to interplead the funds. However, an attorney with a personal interest in the outcome of the negotiations may not wish to sue the medical lien company in interpleader, requiring it to incur fees and costs thereby further reducing its potential recovery, along with involving the Court in the resolution process. This scenario would provide great temptation for the attorney to pay the lien company in full, denying the client of the opportunity to benefit from any discount.¹⁸

As evidenced above, while not exhaustive, the scenario at issue is fraught with potential conflicts and substantial violations of the Rules of Professional Conduct. In Arizona, an attorney sought a formal opinion on the ethical propriety of owning an interest in a medical/chiropractic office to which his office regularly referred clients. The Arizona State Bar concluded that, similar to the instant scenario:

[The] examples of the significant potential for conflicts inherent in the referral system have persuaded this Committee that the inquiring lawyer cannot reasonably believe that the representation with the referral will not adversely affect the relationship with the client or be fair and reasonable to the client.¹⁹

CONCLUSION

It is unethical for an attorney who represents clients in personal injury cases to be involved in the business of buying and selling medical liens of other attorneys' personal injury clients.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

¹⁷ 117 Nev. 145 (2001).

¹⁸ "There is a great temptation for an attorney to temper his or her own loyalty to a client where the attorney's own financial interests are involved." *In re Discipline of Singer*, 109 Nev. 1117, 1120 (1993).

¹⁹ State Bar of Arizona, Ethics Op. 96-05, Feb. 1996.

AUTHORITIES

NRS 629.078

NRPC 1.2

NRPC 1.6

NRPC 1.7

NRPC 1.8

NRPC 1.15

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