

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 42

Issued on June 24, 2009

QUESTION

May an attorney obtain his client's medical payment coverage monies paid pursuant to an automobile liability insurance policy, hold the money in trust until the end of the case, and then attempt to negotiate a reduction in the medical care provider's fee?

ANSWER

Yes. The Nevada Rules of Professional Conduct do not prohibit an attorney from obtaining medical payment coverage monies on behalf of the attorney's client, holding the money in trust until the end of the case, and then attempting to negotiate the medical care provider's fee before paying the medical care provider. In fact, if the scope of the attorney's representation includes obtaining medical payment monies on behalf of a client, the lawyer likely has an obligation to hold those monies and attempt to reduce the fee charged by the medical care provider.

AUTHORITIES

Atty. Grievance Comm'n v. Kemp, 496 A.2d 672 (Md. Ct. App. 1985).

In re Discipline of Laub, Order of Suspension, Case No. 36322 (Nev. Jan. 9, 2002).

Lawyer Disciplinary Bd. v. Morton, 569 S.E.2d 412 (W.Va. Ct. App. 2002).

Nev. Rule of Professional Conduct 1.1.

Nev. Rule of Professional Conduct 1.5.

Nev. Rule of Professional Conduct 1.15.

S.C.R. 123.

See Cooper, John, “Med-Pay – The Forgotten Insurance Coverage,” *Norfolk-Portsmouth Personal Injury Lawyer* (Sept. 5, 2006), <http://norfolk.injuryboard.com/motor-vehicle-accidents/med-pay-the-forgotten-insurance-coverage.php>.

Griffin, Drew, “Insurance companies fight paying billions in claims,” CNN.com – Anderson Cooper 360° Blog (Feb. 7, 2007), <http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2007/02/insurance-companies-fight-paying.html>.

DISCUSSION

As more individuals injured in automobile accidents seek the advice of counsel, it is becoming more common for the scope of the attorney’s representation to include obtaining medical payment monies on behalf of the client. In some such cases, the patient/client’s medical care provider directly bills the patient/client’s insurer for the medical care costs incurred by the patient/client as a result of the automobile accident. When the patient/client visits the medical care provider, the patient/client executes an assignment of his/her insurance benefits to the provider.

However, once the attorney becomes involved, the attorney requests that the medical payment coverage monies be paid to the attorney, who then holds the money in trust until the conclusion of the representation of the client.¹ At that time, the attorney attempts to negotiate the medical care provider’s fees. The motivation for requesting the medical payment coverage monies from the medical care provider is for the protection of the client. First, at the time the client—many of whom are unsophisticated—went to the medical provider he or she may not

¹ The Committee does not opine on the commercial aspects of the relationship between the medical care provider and the attorney, but limits the opinion to whether the attorney’s conduct violates the Nevada Rules of Professional Conduct. Assuming the client properly assigned his or her insurance benefits to the medical provider, the provider can refuse the attorneys’ request.

have been aware that they had medical payment coverage available.² Second, when the client suffers an injury, they may have many medical expenses. Allowing the first medical provider to deplete all of the medical payment coverage monies places the client at risk of not recovering enough money to cover the client's expenses as a result of the accident and places the client even more at the mercy of the opposing party's insurance company.³ However, an opposing party's insurance company is motivated to pay the plaintiff as little money as possible.⁴ Thus, being able to use the client's medical payment coverage monies—and not having to rely solely upon the fairness of the opposing party's insurance company—to satisfy all of the client's expenses as a result of the accident places the client in a better position to obtain sufficient compensation for his or her injuries.⁵ The Nevada Rules of Professional Conduct do not prohibit this practice and may, in fact, obligate the attorney to attempt to negotiate a reduction the medical care provider's fee for the benefit of the client.

The Nevada Rules of Professional Conduct require an attorney to provide competent representation.⁶ In *In re: Discipline of Joe M. Laub*, the Nevada Supreme Court concluded that failing to attempt to negotiate a reduction in the medical care provider's fee on behalf of a client

² See Cooper, John, "Med-Pay – The Forgotten Insurance Coverage," *Norfolk-Portsmouth Personal Injury Lawyer* (Sept. 5, 2006), <http://norfolk.injuryboard.com/motor-vehicle-accidents/med-pay-the-forgotten-insurance-coverage.php>.

³ See *id.*

⁴ Griffin, Drew, "Insurance companies fight paying billions in claims," CNN.com – Anderson Cooper 360° Blog (Feb. 7, 2007), <http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2007/02/insurance-companies-fight-paying.html>.

⁵ See Cooper, John, *supra* n.2.

⁶ See Nevada Rule of Professional Conduct 1.1, which provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

is an ethical violation because it demonstrates a lack of competence. *See In re Discipline of Laub*, Order of Suspension, Case No. 36322 (Nev. Jan. 9, 2002).⁷ In *Laub*, an attorney representing a client in a personal injury matter made representations that he would make efforts to negotiate and reduce the amount of the client’s medical bills. However, the disciplinary panel concluded that neither the attorney, nor any member of the attorney’s staff made any such efforts. The Nevada Supreme Court disciplined Laub for, among other things, violating his obligation to competently represent his client. *Id.* at 21. The Nevada Supreme Court noted “that an attorney has a duty to negotiate for the client to the best of his or her ability, whether those negotiations be with the opposing side, the opposing side’s insurer, or the client’s own medical providers.” *Id.* at 13. Accordingly, the Court concluded that Laub did not act competently when he failed “to attempt to reduce [his client’s] medical bills,” thereby violating S.C.R. 151.⁸ *Id.* at 21.

Thus, the Nevada Rules of Professional Conduct do not prohibit an attorney from obtaining the client’s medical payment monies, holding them in trust, and then negotiating the fee of the medical care provider. In fact, it is strongly arguable that if the scope of the attorney’s representation of a client includes obtaining medical payment monies on behalf of the client, the attorney likely has an obligation to secure those funds, hold them in trust, and make an attempt to negotiate a reduction in the medical provider’s fee.⁹

⁷ It should be noted that the Court’s opinion in *Laub* is an unpublished case. *See* S.C.R. 123.

⁸ S.C.R. 151 is the predecessor to Nevada Rule of Professional Conduct 1.1.

⁹ A related issue is whether the attorney can charge a contingency fee for obtaining the medical payment coverage. Under Nevada Rule of Professional Conduct 1.5(a), an attorney cannot collect an “unreasonable” fee. With respect to obtaining a contingency fee for the recovery of medical payment monies, at least one court has adopted what amounts to almost a *per se* rule prohibiting such a fee. *See Atty. Grievance Comm’n v. Kemp*, 496 A.2d 672, 677–79 (Md. Ct. App. 1985) (concluding that an attorney cannot charge a contingency fee for the recovery of medical payment coverage except in a “rare case” and recommending that the attorney obtain the medical payment coverage “as an accommodation to the client or subject to a minimal charge”). However, the

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committee believes that the better-reasoned view is that adopted by the court in *Lawyer Disciplinary Bd. v. Morton*, 569 S.E.2d 412 (W.Va. Ct. App. 2002).

In *Morton*, the attorney charged a client a 30% contingency fee, by which the attorney was paid \$1,500 of the \$5,000 medical payment monies recovered for the client. An ethics panel concluded that the attorney's fee was excessive and recommended a public reprimand. The court, however, dismissed the charge. The court refused to adopt a *per se* rule prohibiting the recovery of a contingent fee for medical payment coverage. *See id.* at 417. Instead, the court concluded that, like any fee, the fee must be reasonable. *See id.* (relying upon Rule 1.5(a), which is similar to Nevada Rule of Professional Conduct 1.5(a)). In *Morton*, the court concluded that the fee was reasonable.

The Committee does not express an opinion whether any particular contingent fee for the recovery of medical payment monies is reasonable, as this involves a detailed factual analysis of the reasonableness of each fee. *See Nev. Rule of Professional Conduct 1.5(a)(1)–(8)*.