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ETHICAL ISSUES WHEN A LAWYER IS FACED WITH QUESTIONS ABOUT THE AMOUNT A CLIENT MAY OWE A THIRD PERSON FOR MEDICAL EXPENSES AT THE CONCLUSION OF A PERSONAL INJURY CASE

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Introduction and Scope

This opinion addresses a lawyer's obligations under the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) in connection with the disbursement of funds at the conclusion of a personal injury case when the lawyer is faced with questions over the amount the client may owe to a third person for medical treatment. The issue arises when the client is obligated to reimburse a third person or company, such as a medical care provider, health insurer, Medicare, or Medicaid (collectively referred to as Creditor), from the proceeds of a claim against a tortfeasor. The Creditor may have a right of reimbursement pursuant to contract, statute, or regulation. After receipt of payment from a settlement or judgment, the lawyer deposits the proceeds into his or her trust account. The lawyer must then allocate the funds as appropriate to the Creditors, the lawyer's firm for attorney fees and costs, and the client. *See* CBA Formal Op. 94, "Ethical Duties Relating to a Client's Property Held By a Lawyer in Which a Third Party Has an Interest" (1993, Rev. 2006) (Opinion 94).

Often there are no questions as to how to distribute the funds. Sometimes questions arise as to the amount requested by a Creditor. Sometimes a Creditor's final request for

reimbursement appears to omit charges of which the plaintiff's lawyer is aware from other documents, such as medical bills or explanations of benefits—that is, the final amount sought by the Creditor is *less* than the total of the separate charges. This opinion addresses whether there are circumstances in which the lawyer is ethically required to notify the Creditor about this discrepancy.

The issue is how much the client owes to a Creditor. In some situations, the client may owe a medical provider the amount "billed" for the treatment; in other situations, the client may owe a health insurance company the amount "paid" to the provider. Whether the client owes a Creditor the "billed" or the "paid" amount is a legal issue not addressed in this Opinion. *See Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, 276 P.3d 562 (Colo. 2012).

Syllabus

The Colorado Bar Association Ethics Committee (Committee) expects that in most circumstances, the ethical issue should be resolved simply by identifying probable outcomes from bringing or not bringing the discrepancy to the Creditor's attention, communicating with the client about the perceived discrepancy, weighing the advantages and disadvantages of bringing it to the Creditor's attention, and following the client's instruction. Pursuant to Colo. RPC 1.4(a), a lawyer is ethically obligated to "keep the client reasonably informed about the status of the matter" and "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Colo. RPC 1.6 obligates a lawyer to treat any "information relating to the representation" as confidential. This would include information about the perceived discrepancy about what amount must be paid to the Creditor. Rule 1.6 allows disclosure of such information if the client provides informed consent, the lawyer has implied authorization, or an exception identified in Colo. RPC 1.6(b) applies. The

Rules also sometimes mandate a lawyer disclose such information. *E.g.,* Colo. RPC 3.3(c). Because disclosure of the discrepancy to the Creditor may be disadvantageous to the client, disclosure is likely not impliedly authorized. Colo. RPC 1.6.

This Opinion attempts to identify those limited instances where there may exist an ethical obligation to notify the Creditor.

To determine whether such a limited instance exists, the first step is to determine whether *the client's* failure to notify the Creditor of the discrepancy would be fraudulent concealment or nondisclosure under substantive law. If so, the lawyer ethically must not assist the client in committing fraud. A lawyer generally has no duty to inform the opposing party of relevant facts, but must avoid making false statements. Omissions or partially true but misleading statements can be the equivalent of affirmative false statements, so a lawyer has the duty to avoid making material omissions or partially true but misleading statements.

The next step is to determine whether *the lawyer* would commit dishonesty, fraud, deceit, or misrepresentation by not alerting the Creditor of the discrepancy. If so, the lawyer ethically must notify the Creditor. If the answer to both of those legal questions is no, the lawyer does not have an ethical duty to notify the creditor of the discrepancy, but should consult with the client about the risks from not doing so.

This Opinion addresses whether the Creditor must be notified about questions over the amount of its claim. It does not address ethical issues that arise if such notice is given and results in a dispute with the Creditor. If a dispute occurs between the client and the Creditor, the lawyer should consult Opinion 94. This Opinion does not alter or amend Opinion 94.

The Creditor's claim could create a concurrent conflict of interest if there is a significant risk that the lawyer's representation of the client would be materially limited by the lawyer's

duties to a third person or the lawyer's personal interest. Colo. RPC 1.7(a)(1). For example, a Creditor might attempt to assert claims against the lawyer if the client does not fully pay the Creditor's claim.

In some situations, it may be advisable after consulting with the client to retain sufficient funds in the trust account to protect the client (and perhaps the lawyer) pending resolution of the question(s) with the Creditor. On the other hand, undisputed funds should be disbursed promptly. Colo. RPC 1.15A(c).

Analysis

The Committee has not previously addressed these specific issues. Opinion 94 addressed issues relating to third-party claims against client funds (both disputed and undisputed), but in the scenario this Opinion considers a dispute has not yet arisen. Instead, in this scenario, there is a discrepancy that may or may not lead to a dispute. This Opinion complements Opinion 94 and does not alter or amend it.

In Opinion 80, the Committee addressed ethical issues arising from the adverse party's error in preparing real estate closing documents. CBA Formal Op. 80, "Lawyer's Duty to Disclose Mistakes in Commercial Closing" (1989, Rev. 1995 & 2019) (Opinion 80). With one exception noted below, unlike Opinion 80, the typical scenario involving a discrepancy addressed in this Opinion does not involve an "undeniable mistake … regarding a basic assumption or element upon which the contract between the parties is based." Syllabus, Opinion 80.

The prior opinions offer guidance, but do not resolve these issues, in which there is no question that the client owes *some* amount of reimbursement, but there is a question regarding the amount.

In this situation, the lawyer has both a duty of loyalty to the client and a duty of honesty to the third-party Creditor and the Creditor's lawyer. This Opinion provides ethical guidance on how the lawyer should reconcile these duties.

I. Ethical Duties Regarding Disbursements from Trust Account.

Colo. RPC 1.15A(b) and (c) govern the ethical duties when a lawyer comes into possession of property in which third persons may claim an interest:

> (b) Upon receiving funds or other property of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.
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> (c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is a resolution of the claims and, when necessary, a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

As noted in Opinion 94, although the interest of a third party in trust account funds "can arise in many contexts, it typically arises where a lawyer recovers funds as a result of a client's personal injury and a medical provider claims some right to those funds. Often the third party has had some contact with the lawyer which may place additional responsibilities on the lawyer." Opinion 94, Introduction and Scope.

Colo. RPC 1.15A does not address how the lawyer should determine the amount the "third person is entitled to receive." In the scenario addressed in this Opinion, the medical bills show one amount, but the Creditor's payment request is for a different amount. If the Creditor's request is for *more* than the total of the bills, the lawyer's ethical obligations (including competence under Colo. RPC 1.1 and diligence under Colo. RPC 1.3) may require the lawyer to

determine if there is an error in the amount, and that may include contacting the Creditor. That investigation would be consistent with the client's objective to maximize recovery, and the lawyer's contact with the Creditor may be impliedly authorized to carry out the representation under Colo. RPC 1.6(a). Raising this issue with the Creditor would not prejudice the client because reducing the Creditor's claim would increase the client's recovery.

On the other hand, if the Creditor's payment request is for *less* than the total shown by other documents that the lawyers knows about, this might reflect an error by the Creditor. It might also reflect the Creditor's decision to request less than the lawyer anticipates. Because the lower amount would be to the client's advantage, a request for less than the total of the bills raises ethical issues not involved when the request is for more than the total of the bills. When the request, for unknown reasons, is lower than the total of bills, the lawyer probably is not impliedly authorized to communicate with the Creditor to investigate the reasons, and the lawyer should not contact the Creditor, if at all, without first obtaining the client's consent. *See* Colo. RPC 1.6.

II. Client Consultation Is Fundamental to Determining the Ethical Issues Relating to Creditor Claims.

The lawyer should consult with the client about claims by third parties to proceeds of the case. Colo. RPC 1.4(a)(2) requires the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Under Colo. RPC 1.2(a), the client sets the goals of the case, and the lawyer determines the means to reach those goals: "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Colo. RPC 1.4, shall consult with the client as to the means by which they are to be pursued." Since the client's objective is typically to maximize legal recovery, the means by which Creditor claims are to be resolved is an appropriate topic for client consultation.

The lawyer should consult with the client about the discrepancy, including the risks of not informing the Creditor. Colo. RPC 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(a) requires the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."

One of the risks of not informing the Creditor is that the transaction with the Creditor may be voidable under the contract doctrine of mistake, in which case the Creditor may attempt to recover the funds paid under the mistake. *See, e.g., Sumerel v. Goodyear Tire & Rubber Co*., 232 P.3d 128 (Colo. App. 2009).

The extent of the client consultation, and the topics to be discussed, depend on the circumstances. "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved…. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Colo. RPC 1.4, cmt. [5].

Factors that may affect the appropriate extent and content of the client consultation include the sophistication of the client, the size of the discrepancy, and the risk of additional claims by the Creditor after the case proceeds have been fully disbursed from the trust account. It may be prudent to advise the client to agree to keep some of the case proceeds in the trust account until the statute of limitations on the Creditor claim expires. *See* Opinion 94, *Discussion*, ¶ 3, at pp. 4-258 to 4-259.

The conferral with the client should include whether the client disputes the amount or basis for the Creditor's claim.

If a dispute with the Creditor arises, Opinion 94 provides ethical guidance.

III. Would the Client's Failure to Notify the Creditor of the Discrepancy Constitute Fraudulent Concealment or Nondisclosure?

When the Creditor requests less than the total of the bills, the lawyer should determine whether the client's failure to notify the Creditor of the discrepancy would be fraudulent concealment or nondisclosure. If so, the lawyer ethically must not assist the client in committing fraud.

Colo. RPC 1.2(d) states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Colo. RPC 4.1 prohibits a lawyer from assisting the client in a fraudulent act. The Rule states:

> In the course of representing a client a lawyer shall not *knowingly* [see definition of "knowingly" discussed below]:
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Id. (emphasis added). Rule 4.1 Comment [1] explains the intent of the Rule:

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A false statement can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Omissions or partially true but misleading statements can be the equivalent of affirmative false statements. For dishonest conduct generally see Rule 8.4.

Colo. RPC 4.1, cmt. [1].

The term "knows" in Colo. RPC 1.2 and "knowingly" in Colo. RPC 4.1 are defined in Colo. RPC 1.0(f), which states: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

A reckless state of mind is sufficient to establish fraud as a matter of law, but is not sufficient to establish a violation of Colo. RPC 4.1(a) as a matter of ethics. Colo. RPC 1.0, cmt. [7A] explains the difference between the meaning of "know" for the purpose of determining whether conduct was fraudulent and for the purpose of determining if a Rule of Professional Conduct was violated:

> [7A] In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme Court has stated, "with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). *See also People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo. 1998). For purposes of applying the ABA Standards for Imposing Lawyer Sanctions, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a Rule of Professional Conduct specifically requires the mental state of "knowledge," recklessness will not be sufficient to establish a violation of that Rule and to that extent, the *Egbune* line of cases will not be followed.

Further, "fraudulent" is defined in Colo. RPC 1.0(d): "'Fraud' or 'fraudulent' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Colorado substantive law on fraud is addressed below. Comment [5] explains the meaning of "fraud" in the Rules:

> When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does *not* include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Colo. RPC 1.0, cmt. [5] (emphasis added).

Colo. RPC 4.1, cmt. [3] clarifies the lawyer's duty to avoid assisting a fraudulent act by the client:

> [3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer *knows* is criminal or fraudulent. *Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation*. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Id. (emphasis added).

To constitute fraudulent conduct under Colo. RPC 1.2 and 4.1, there are two requirements. Colo. RPC 1.0(d). First, the conduct must be "fraudulent under the substantive or procedural law of the applicable jurisdiction." *Id.* Second, the conduct must have "a purpose to deceive." *Id.*

It is a legal question, not an ethical issue, whether the client's failure to notify the Creditor of the discrepancy would constitute fraudulent concealment or nondisclosure. Under Colorado law, fraud may consist of false statements or nondisclosure when there is a duty to disclose (also called concealment). *See* CJI:Civ. 19:1-19:3 & 19:5. To state a claim for nondisclosure or concealment, the person who concealed or failed to disclose must have been under a duty to disclose. *See* CJI:Civ. 19:2. This duty can arise in several circumstances. *See* CJI:Civ. 19:5. The duty can arise (1) where the defendant was in a fiduciary or confidential relationship with the plaintiff; (2) where the defendant stated some facts, but not all material

facts, knowing that they would create a false impression in the mind of the plaintiff; (3) where the defendant knew that by his or her unclear or deceptive words or conduct, he or she created a false impression of the actual facts in the mind of the plaintiff; (4) the defendant knew that the plaintiff was not in a position to discover the facts for him or herself; (5) where the defendant communicated material facts that were true at the time, but later learned that the facts were no longer true and knew that the plaintiff was acting under the impression that the facts were true; or (6) the defendant promised to perform or communicated an intent to perform, knowing that undisclosed facts made his or her performance unlikely. *Id.*

Ordinarily, in this circumstance, a personal injury plaintiff will not have such a duty to disclose to his or her medical provider, insurer, or the like. First, a personal injury plaintiff ordinarily will not owe a fiduciary duty to his or her medical providers, insurers, or the like. Examples of such relationships include joint venturers and agents. *See* CJI:Civ. 19:5, Sources and Authority, ¶¶ 1 & 4. Second, if the personal injury plaintiff has not communicated with the provider, insurer, or the like about the requested reimbursement, then the bases for a duty under (2), (3), and (5) would not be present. Third, providers, insurers, and the like are always in a position to discover the facts for themselves because they are in the business themselves. Finally, this situation involving a discrepancy does not implicate false promises to perform in the future under (6).

In contrast, the personal injury client might owe a duty to disclose if he or she were also an officer or director in the company that made the claim, either providing medical services or insurance for the incident, and/or communicated directly with the Creditor about the claim.

To avoid assisting the client with fraud, a lawyer should consider whether there is an ethical duty to notify the Creditor of the discrepancy even if the client directs the lawyer not to

disclose the discrepancy. *Cf.* Opinion 94, *Discussion*, ¶ 5, at p. 4-260. The client's instruction to the lawyer not to disclose the discrepancy, however, may create a conflict of interest, which this Opinion discusses below.

In some circumstances, the Rules allow a lawyer to disclose information about the representation to third parties in order to prevent fraud. Colo. RPC 1.6 states in part:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services….

These obligations continue even if the client discharges the lawyer.

IV. Would the Lawyer's Failure to Notify the Creditor of the Discrepancy Constitute Dishonesty, Fraud or Deceit?

The next step is to determine the legal question of whether the lawyer would commit dishonesty, fraud, deceit, or misrepresentation by not alerting the Creditor of the discrepancy. If so, the lawyer ethically must notify the Creditor. *See* Colo. RPC 8.4(c) ("It is professional misconduct for a lawyer to… engage in conduct involving dishonesty, fraud, deceit or misrepresentation…."). If the lawyer is required to notify the Creditor of the discrepancy, the lawyer must do so after discussing that requirement with the client. Failure to notify the Creditor could violate Colo. RPC 8.4(c). In contrast with Rule 4.1, a reckless state of mind is sufficient to prove a violation of Colo. RPC 8.4(c) because Rule 8.4(c) does not have a knowledge requirement. *See* Colo. RPC 1.0, cmt. [7A]. The lawyer should be aware that in dealing with third parties, the lawyer's conduct may have created a duty to alert the Creditor to a discrepancy.

For example, if the lawyer has induced reliance by the Creditor, there may be an obligation to call the discrepancy to the Creditor's attention. *See*, *e.g.*, Opinion 94, *Discussion*, ¶ 4, at p. 4-259 (describing scenario where lawyer has led third party to rely on the manner in funds will be distributed).

Moreover, if a plaintiff's lawyer has also negotiated a settlement of the claim with the Creditor or its lawyer and the Creditor presents a final claim that has an "unmistakable error," then the plaintiff's lawyer has a duty to disclose the discrepancy to the creditor. *Cf.* Opinion 80, p. 1. This would be the case if the creditor had a claim for $150,000, the plaintiff's lawyer negotiated a settlement with the creditor for payment of $100,000, but the creditor mistakenly presented a final claim for $10,000. This is the same problem addressed in Opinion 80, although in a different context (closing of a commercial transaction).

The syllabus of Opinion 80 states:

> In representing a client in the closing of a commercial transaction, a lawyer has both a duty of loyalty to the client and a duty of honesty to the other party and the other party's lawyer. If, in preparation for or at the time of the closing, one party or its lawyer has made an undeniable mistake in the closing settlement statement regarding a basic assumption or element upon which the contract between the parties is based, and silence by the other party would amount to a knowing misrepresentation under the facts and circumstances, a lawyer must advise his client to disclose the mistake rather than remain silent about the mistake and accept its benefits.

Id.

V. Lawyer's Duties If Colo. RPC 4.1 and 8.4(c) Do Not Apply.

If Colo. RPC 4.1 and 8.4(c) do not apply, the lawyer does not have an ethical duty to notify the Creditor of the discrepancy or to advise the client to notify the Creditor of the discrepancy. Colo. RPC 1.15A does not itself require such notice. If Colo. RPC 4.1 and 8.4(c) do not apply, notice to the Creditor may be prudent, but is not an ethical requirement. The

lawyer should not notify the Creditor if the client directs otherwise. See Opinion 94, *Discussion*, ¶ 5, at p. 4-260.

VI. Lawyer's Conflicts of Interest.

The Creditor's claim may create a concurrent conflict of interest. Colo. RPC 1.7(a) states in part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if… (2) there is a significant risk that the representation of one or more clients will be materially limited … by a personal interest of the lawyer.

The Creditor's claim may affect the lawyer's personal interest in several ways. For example, there could be a conflict if the lawyer concludes that Colo. RPC 4.1 or 8.4(c) requires the lawyer to notify the Creditor, but the client directs the lawyer not to notify the Creditor. A Creditor also might assert or threaten to assert a claim against the lawyer. Under Colorado law, however, possession of property in which a third party claims an interest gives rise to ethical obligations under Rule 1.15, but a lawyer does not owe a fiduciary duty to the third person with respect to trust account funds. *See Accident & Injury Medical Specialists, P.C. v, Mintz*, 2012 CO 50, ¶ 33

The lawyer should consider whether such personal exposure creates a "significant risk" that the lawyer's representation of the client will be "materially limited." Ordinarily, a disagreement between the lawyer and the client regarding the attorney's disbursement obligations will not create a "significant risk" of representation being "materially limited" so long as the disagreement can be resolved through communication. However, in the event the disagreement cannot be resolved despite communication between the attorney and the client, the lawyer can continue to represent the client only by complying with requirements of Colo. RPC 1.7(b) which include the client's informed consent confirmed in writing.

The lawyer should also consider the potential for having to disgorge to the client a portion of the contingent fee if the contingent fee is based on the Net Recovery and if it turns out the Creditor is entitled to additional sums.