DELAWARE STATE BAR ASSOCIATION
PROFESSIONAL ETHICS COMMITTEE

OPINION 1981-2

RESPONSIBILITY FOR PAYMENT OF PHYSICIANS' SERVICES RELATED TO LEGAL MATTERS

The solution to practical problems of responsibility for medical fees in connection with services in legal matters is not completely clear. However, the principles stated by a number of medical-legal and legal ethics committees give a basis for determining the duty of the attorney. In the "Interprofessional Code of Conduct and Practice" adopted by the DBA and the MSD in March, 1957, in Section VI, it is stated:

> "When financial circumstances justify, the physician is entitled to reasonable compensation for professional services rendered in connection with litigation. 'Reasonable compensation' may include consideration for time spent by the physician in conferences, preparation of required or requested reports, travel costs and court or other appearances. The attorney should explain this to his client.
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> "When a doctor is called to testify as a witness for his patient, the charge to be made to the patient may be the equivalent of what the charge would have been to such patient for the same amount of time for professional services."
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> (The Code comments on the non-attending physician are irrelevant for these purposes.)

Section VII of the same Code provides:

> "The attorney and payment of medical fees.
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> "The attorney should, as a matter of fairness and interprofessional courtesy, do everything possible to assure payment for services rendered by a physician in any matter in which the attorney is involved."

The statement in the "National Interprofessional Code for Physicians and Attorneys" adopted by the AMA and ABA in 1958 is less explicit. It states:

> "The physician is entitled to reasonable compensation for time spent in conferences, preparation of medical reports, and for court or other appearances. These are proper and necessary items of expense in litigation involving medical questions. The amount of the physician's fee should never be contingent upon the outcome of the case or the amount of damages awarded."
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> The same code also provides:
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> "Payment of medical fees.
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> "The attorney should do everything possible to assure payment for services rendered by the physician for himself or his client. When the physician has not been fully paid the attorney should request permission of the patient to pay the physician from any recovery which the attorney may receive in behalf of the patient."

An inference might be drawn from the provision of Section VII of the Delaware Code and the provision of the National Interprofessional Code that the attorney's obligation is limited to urging the client to pay for his physician's services in legal matters. It does not seem that the majority of ethics ruling would support that proposition. In any event neither Code consideres the situation in which the lawyer is unsuccessful in persuading the client to make such payment directly. It is necessary to look elsewhere to resolve the problem.

Delaware's Code of Professional Responsibility (DCPR) DR 5-103(B) states that:

> "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that the lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

The DCPR was adopted by the Delaware Supreme Court in 1971, superseding the prior 47 Canons of Professional Ethics. However it is customary to look to the prior canons and their interpretation since adoption in 1908 for guidance.

Canon 42 of the former Canons of Professional Ethics provides as follows:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

None of the propositions quoted above resolve the issue in this memorandum but they do set the legal limitations within which the problem must be resolved. The question is: Who must see to the payment of a physician's charges for services rendered in legal matters? The phrase "see to" as opposed to "is responsible for" is used since there is no question but tha the client is responsible for payment. This latter proposition does not resolve the problem of how the physician can be assured of payment. This is a legitimate basis of inquiry by physicians.

The Delaware Interprofessional Code affirms that the fees are the obligation of the patient. However, the Code also establishes that the physician is entitled to fees for such services (setting aside the phrase "when financial circumstances justify") and that "the attorney should explain this to his client". Implicit in this Code provision is the proposition that the attorney be reasonably satisfied that the client understands that such fees, regardless of the outcome of the legal matter at issue. The same proposition is implied in the DCPR. The problem is the case in which the client assures the attorney of intent to pay the physician, the attorney secured the physician's services, but the client does not pay, or the attorney fails to secure specific assurance of payment prior to informal employment of the treating physician's services, or to using his power as an officer of the court to secure a subpoena to compel attendance of the physician at a proceeding.

A review of some of the published opinions on legal ethics* suggests what seems to be the appropriate practical solution to the problem.

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*The authorities may be found in ABA Opinions on Professional Ethics (1967); the Informal Ethics Opinions of the Committee on Ethics and Professional Responsibility; and the Supplement to the Digest of Bar Association Ethics Opinions (1975).

ABA Informal Opinion No. 398 on former Canon 42 states that an attorney may agree to pay a fee to obtain a written medical reports by a physician "subject to reimbursement" from his client.

Informal Opinions Nos. 664 and 911 on the same canon are to the same end. They provide that a proper diagnosis of a client's physical condition, a conference between the attorney and the doctor, the deposition of the doctor and his testimony in court are all examples of circumstances in which the attorney may in good faith advance the doctor's fees, but only as a matter of convenience and subject to a clear understanding that he is to be reimbursed by his client. In Informal Opinion No. 911 the committee said:

> "It is recognized that an attorney may not properly advance or become obligated for items other than expenses of litigation and that these must be subject at all times to reimbursement from his client."

Informal Opinion No. 1084 states that it is proper for a lawyer to make a personal commitment to advance expenses of litigation, including the charges of a physician, and that this is not unethical if the arrangement with the client provides for reimbursement to the attorney for such costs.

Opinions by State Bars since the adoption of the new Code follow these precedents:

> 8169 A lawyer may advance or guarantee fees of medical witnesses so long as he has a clear understanding with the client that the ultimate responsibility for the fees must be borne by the client. 1972 Fla.Opinions 47 (Opinion 72-27, July 30, 1972)

> 9048 It is proper for a lawyer to advance or guarantee the payment of a fee charged by a physician for services to a patient-client only when such services constitute the physician's assistance in connection with the prosecution of a pending claim or matter to be litigated--i.e., reports, and consultations, etc.--and only when the patient-client remains ultimately liable for such expenses. . . .
> 45 N.Y.S.B.J. 350 (1973)(Opinion 288, April 27, 1973)

> 8681 An attorney who ordered or requested services from doctors, engineers, accountants, or other persons may deny responsibility for the payment of their compensation only if by express written statement at the time of the order or request he informed the provider of the service that he would not be responsible for payment.
> 31 Bench and Bar Minn. 13 (July 1974) (Opinion 7, June 26, 1974)

> 9665 An attorney who fails to explain to a physician that his client is responsible for the payment of his fee for a deposition is responsible for such payment.
> N.D. (Informal Opinion 001, July 30, 1973)

In Wise's "Legal Ethics" published by Bender, 1975 Edition, it is stated at page .253:

> "A lawyer cannot finance his client's litigation or matters and can advance disbursements only against a reasonable probability of reimbursement pursuant to agreement with the client. . . ."

To return to the problem: How does the physician secure payment for services he is required to render when the client does not pay a legal expense he has agreed with the attorney that he would pay or the attorney has failed to fulfill his responsibility to make clear to his client that the client has the primary responsibility to pay the

expenses of the litigation including the costs of the fees of his treating physician for services in connection with a legal matter?

The problem is an acute one not easily resolved. The attorney representing the patient has no choice but to go to the patient's physician for information and testimony. As agreed in the MSD-DBA Code, the treating physician has no choice but to cooperate to the best of his ability with the patient's attorney no matter how distasteful to him legal matters may be. Under subpoena, he has no choice but to testify or disclose relevant records at the request of any interested attorney.

Except in situations in which the attorney has made clear to the physician that only the patient-client will be responsible for fees concerning legal matters, the physician can reasonably maintain that he is justified in believing that he is rendering services to the attorney, although on behalf of his patient, to assist the attorney in his legal work and that he is entitled to look to the attorney for payment or assurance of payment, of reasonable fees. This includes the cost of reports, fees for office conferences, depositions, appearance at hearings, late cancellation fees and office preparation of photocopies. This is the case even when a reasonable fee is charged for no actual services, as when court calendars require last moment continuance of a trial.

The ethics opinions seem to make clear that it is the responsibility of the attorney to see that suitable arrangements are made for the payment of medical-legal fees. He is required to do this by making prior arrangements with his client. However, this is a matter between the attorney and his client, not the client-patient and the physician.

CONCLUSION

When an attorney requests medical-legal services of a physician, the rules of legal ethics warrant the physician's reliance on the proposition that:

> (1) The attorney will guarantee the payment of reasonable fees;
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> or
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> (2) The attorney will make clear to the physician in writing prior to using the physician's services that only the client-patient will be responsible for the fees.

This opinion was prepared by the Medical-Legal and Dental-Legal Relations Committee and approved by the Professional Ethics Committee.

Dated: April 21, 1981