

LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

Ethics Opinion No. 477

SUMMARY

CONFLICTS OF INTEREST-DUAL PROFESSION

While an attorney/physician may ethically conduct a law practice and be a shareholder in a medical practice to which he refers clients, such conduct may raise problems in individual cases that may make the conduct unethical.

AUTHORITIES CITED

California Rules of Professional Conduct, Rules 3-110, 3-300, 3-310

California Business and Professions Code Section 6068(e)

Los Angeles County Bar Formal Opinions: No. 331 (1/18/73), No. 351 (9/11/75), No. 352 (1/15/76), No. 363 (10/20/82)

Sodikoff v. State Bar, 14 Cal. 3d 422 (1975)

Beery v. State Bar, 43 Cal. 3d 802 ((1987)

Hunnecutt v. State Bar, 44 Cal. 3d 362, 371-72

Charles W. Wolfram, Modern Legal Ethics (St. Paul: West Publishing,1986)

FACTS AND ISSUES

An attorney, who also is a licensed practicing family physician, limits his law practice to personal injury and medical malpractice cases. In addition, the attorney/physician has an ownership or partnership interest in a medical facility for which he also practices medicine on a limited basis. While acting as an attorney and in connection with representing injured clients in litigation, he will refer the clients to his medical facility for treatment. The attorney/physician does not personally treat the referred clients.

The inquirer requests our opinion as to the ethical implications of referring his law practice clients to the medical facility in which he holds an ownership interest.

We conclude that the referral process posed by the inquiry presents issues under California Rules of Professional Conduct, Rule 3-300, because the referral to the medical clinic is a business transaction with the client. We further conclude that the inquiry raises issues under the California Rules of Professional Conduct, Rule 3-310, because the relationship and interest existing between the lawyer and the medical facility is a relevant circumstance having a significant effect on the attorney-client relationship.

DISCUSSION

This committee generally has found no ethical prohibition against a lawyer practicing both law and medicine. A lawyer engaged simultaneously in a second calling must comply scrupulously with all ethical requirements of the Disciplinary Rules. While the inquiring lawyer may practice a dual profession, he must comply with ethical obligations. The first issue is whether the transaction is one contemplated by California Rules of Professional Conduct, Rule 3-300.

It is the opinion of this committee that the referral, as described by this inquiry, is the type of transaction intended by Rule 3-300 and compliance with the provisions of that rule is required. Rule 3-300 regulates attorneys entering into business transactions with clients or where the attorney may be acquiring certain pecuniary interests adverse to the client. Pursuant to Rule 3-300(A), the transaction or interest must be fair and reasonable to the client and the terms fully disclosed and transmitted in writing to the client in a manner which should reasonably be understood by the client. Rule 3-300(B) requires that the attorney inform the client in writing of the client's right to seek the advice of independent counsel regarding the referral after disclosing in writing to the client the nature of the referral and the attorney's interest therein. The client must be given a reasonable opportunity to seek independent advice.

Rule 3-300 is designed to further and protect two aspects of the attorney-client relationship. One of the purposes of the rule is to protect clients from improper dissemination and use of information gained from confidences disclosed. Another purpose of the rule is to protect the trust and confidence that arises out of the representation. Hence, the essence of this rule is the principle that a violation of trust through overreaching in a business transaction with a client "strikes at the heart of the client-lawyer relationship." Rule 3-300 has been read broadly to apply even where the relationship between the legal advice sought and the financial interest obtained are not necessarily related, and where the relationship has in fact terminated. The rule also has been held to apply when the transaction involves an entity in which the lawyer has an ownership interest.

Therefore, application of Rule 3-300 depends first of all on whether the transaction is one which may give rise to a situation that involves the client's trust and confidence in the lawyer. The committee concludes that the referral to a lawyer's medical clinic is such a transaction. Within the attorney-client relationship a lawyer is apt to have great influence over the client with respect to decisions relating to the representation. The client may feel justified in following the lawyer's suggestion as to a medical facility as an exercise of judgment in his or her best interests. However, when the lawyer receives a pecuniary benefit by referring the client to the clinic, the lawyer may not be exercising judgment in the client's best interest. By making the referral for any reason in which the client's interests are not the only objective, the potential for undue influence and overreaching is present.

Under Rule 3-300, the referral must be fair and reasonable to the client. For example, the referring attorney cannot condition continued representation in the personal injury matter on the client's seeking treatment at the facility. The cost of medical services provided at the facility must be fair and reasonable when compared to the cost of similar medical services at a comparable facility and must not adversely affect the lawyer-client relationship. The lawyer, at the time of making the referral, must disclose to the client his relationship with the facility in writing and in a manner the client will understand. For example, the lawyer must disclose to the client that he or she is not required to go to the facility, but is free to go to any physician for treatment. The lawyer must advise the client in writing that the client may discuss the matter with another lawyer. The client must be given a reasonable opportunity to seek such advice if he or she desires.

In addition to the concerns raised under Rule 3-300, there is a serious risk to the attorney-client relationship because the attorney's ownership interest in the medical facility may adversely impact his or her ability to exercise his or her judgment in the best interests of the client. Due to the doctor/lawyer's financial interest in the transaction, he may be motivated to advise the client in a manner that may be more to his or her own interest than in a manner which may be in the best interests of the client. The lawyer in this inquiry will be sharing in the medical fees paid by his client to the facility and this interest is a direct financial benefit to the doctor when he is compensated. Consequently, the lawyer's relationship with the medical facility may have an effect on the lawyer's fiduciary obligations to the client. These concerns raise issues that require written disclosure under California Rules of Professional Conduct, Rule 3-310(B).

Rule 3-310(B) requires disclosure of potential adverse effects on the attorney-client relationship caused by (1) other relationships with parties or witnesses, (2) third parties the lawyer knows or reasonably should know will be affected substantially by a resolution of the matter, and (3) by the interests of the attorney in the subject matter of the representation. The rule is intended to protect the relationship from activities or conduct that could produce divided loyalties by the lawyer, and the impairment of the lawyer's competent and impartial representation of the client.

Accordingly, to the extent that an employee at the medical clinic would be expected to testify as a percipient or expert witness in the client's case, written disclosure to the client is required under Rule 3-310(B)(1). Written disclosure is required under Rule 3-310(B)(3) if the medical clinic or an employee of the clinic would be affected substantially by the resolution of the client's matter. For example, if the clinic expects to be compensated out of a settlement or judgment in the client's case or if the client's ability to pay the clinic will be affected by the outcome of the case, the written disclosure requirements under Rule 3-310(B)(3) would be triggered. If the outcome in the client's matter involves a determination about the medical services that would affect the medical clinic's liability to the client or its right to compensation, that, too, would require written disclosure to the client under Rule 3-310(B)(3). In addition, since the lawyer has a financial interest in the clinic which is rendering services in the representation, the lawyer has a financial interest in the subject matter of the representation that requires written disclosure under Rule 3-310(B)(4).

The written disclosure requirements in Rule 3-310 require the lawyer to disclose both the relevant circumstances and "the actual and reasonably foreseeable adverse consequences to the client." Thus, in those situations in which Rule 3-310(B) applies, the lawyer must not only inform the client in writing of the nature of his relationship with the clinic and any of its employees rendering the services or the nature of his interest in the subject matter of the representation, but he must discuss in writing how his relationship or interest may adversely affect the representation. In particular, the disclosure must address whether the relationship or interest will adversely affect the lawyer's loyalty and exercise of independent judgment on behalf of the client and his ability to represent the client competently.

The relationship between the lawyer and the medical clinic normally presumes that the treating physician will testify as an expert in the client's personal injury case. This raises the possibility that the expert testimony will be impeached and the attorney discredited. Thus, the inquiry potentially raises an issue of competency under Rule 3-110(a).

The practice of dual professions also raises very substantial problems for the attorney in honoring his or her duty of confidentiality to the client under Business and Professions Code Section 6068(e). The client has a right to a level of trust in the attorney-client relationship and that communications with his or her attorney will be held in confidence. Where the lawyer is making the referral to a medical facility in which he or she holds an ownership interest, the client may be confused as to whether the attorney's duty of loyalty and confidentiality extends to communications made to employees at the medical clinic. The attorney must make clear to the client that communications to the medical facility are not subject to the lawyer-client privilege.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the question presented.