Committee Opinion
February 20, 2004

LEGAL ETHICS OPINION 1789

CLIENT FILE – WHETHER AN ATTORNEY CAN REFUSE TO RELEASE INFORMATION AND MEDICAL REPORTS TO CLIENT AT HIS REQUEST.

Your request presented a hypothetical situation involving a lawyer representing a client before the Social Security Administration. The client is seeking disability benefits under Title II of the Social Security Act. The client has disabling mental impairments affecting both personality and judgment. In the course of this representation, the attorney secured a copy of a report developed by the client's treating psychologist. The psychologist had prepared the report specifically at the direction of the client's long-term disability insurance carrier to determine the client's eligibility for those benefits. The carrier paid for the report.

The attorney's standard practice is to have the client secure the report directly from the evaluator so that the evaluator can discuss with the patient the implications of any findings or opinions expressed in the medical records. However, in the present instance, the carrier directed the psychologist not to release a copy of the report to the client. The psychologist refuses to authorize release of the report to the client; the attorney cannot ascertain whether this is for medical reasons or due to the carrier's instructions. The attorney is mindful of the client's right to obtain the record from his own Social Security file were he to so request.

Under the facts you have presented, you have asked this Committee to opine as to the following questions:

1. Is a medical record obtained in the course of litigation and submitted to the tribunal in support of the client's case part of the "client's file" requiring disclosure to the client pursuant to Rule 1.16(e)?

2. Can the insurance carrier and/or the psychologist prohibit the lawyer from providing this report to the client?

When a lawyer's client requests the contents of the file, the appropriate response for the lawyer hinges on whether the representation has terminated. The ethical duty of response to such a request varies depending on whether the requester is a current or a former client. During the course of the representation, an attorney's duty to provide information to his client is governed by Rule 1.4(a), regarding communication. However, upon termination of the representation, the lawyer must follow the directives of Rule 1.16(e) regarding the disposition of the client's file.

Throughout representation of a client, Rule 1.4 requires the attorney to ensure proper attorney/client communication, outlined as follows:

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Generally, the rule does not direct the means by which an attorney may "keep a client reasonably informed." Depending on the circumstances, information may reasonably be provided, for example, at a meeting, in a telephone call, in a letter or other document, or via e-mail correspondence. Nevertheless, the rule requires more than just this general duty to keep the client reasonably informed; the lawyer is also required to "promptly comply with reasonable requests for information." A client's request for a copy of a particular document or documents in the file must be considered in light of that duty. While a lawyer may not be required to provide all file contents whenever requested, the lawyer must be sure to comply with 1.4(b) in responding to any reasonable client request for documents during the course of the representation. Additionally, the Committee notes that the attorney also has a duty to the client under Rule 1.15(c) to return client property received by the attorney to the client upon request.

The lawyer's obligations regarding file contents change upon termination of the representation. Rule 1.16 governs the termination of an attorney/client relationship. Paragraph (e) of that rule specifically addresses a lawyer's obligations regarding provision of file contents to a client upon request at the end of the representation. That paragraph states as follows:

RULE 1.16 Declining Or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal

> instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

The thrust of this rule is to require an attorney to provide the file at the termination of the representation, upon request of the client, one time. Paragraph (e) specifically addresses how to handle the client's file, with language breaking file contents into three categories.

The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property; the attorney must unconditionally return them to the client upon request. While the attorney may make a copy of such documents for his own use, he may not charge that copying expense to the client.

The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client, research materials, and copies of prior bills. For this second category, a lawyer may charge the client for the expense of the lawyer's making a copy of the items for his own retention. However, the attorney may not condition the release of the documents upon the client's prepayment of copying expenses.

A third category presented in Rule 1.16(e) includes copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising with the attorney/client relationship. A lawyer is not required to provide those items to the client.

In applying paragraph (e)'s categories to the medical report at issue, the key category is the second one. That category in paragraph (e) includes "documents prepared by or collected for the client in the course of the representation." That language clarifies that the directive of the provision applies not only to material developed by the attorney himself but also to those documents obtained from others for the representation. A medical report from the client's

treating psychologist is just such a document. Thus, the Committee opines that this medical report is part of the client file for purposes of Rule 1.16(e).

This request questions further whether either the carrier or the doctor can prohibit the attorney from providing the client with a copy of this report. In considering that question, this Committee references its previous opinion regarding carrier directives to insureds' attorneys. *See*, LEO 1723. In that opinion, which dealt with a carrier's directives to an insured's attorney to work with certain limitations on the scope of representation, the Committee noted that the attorney must remain mindful that he represents the insured, not the carrier. Accordingly, in rejecting the attorney's acceptance of the restrictions, the Committee noted:

> [I]t is ethically impermissible for an attorney to agree to an insurance carrier's restrictions on the right of the insured absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions.

Similarly, the present attorney must be mindful of the fact that he represents the patient, and not the carrier or the psychologist. This attorney should not follow the instruction of these nonclients to breach the attorney's ethical duties owed to his client, such as provision of file contents pursuant to Rule 1.16(e).

The Committee notes that while question two does not make express mention of mental health concerns as the reason for the psychologist's directive in this matter, the facts in the hypothetical do raise that possibility. Were the attorney to determine that the psychologist wants to preclude client access to the report out of concern for the effect on the client of such disclosure, the attorney may wish to consider whether Rule 1.14 is implicated in his situation.

Rule 1.14 provides guidance to an attorney with a client with impairment. In particular, the rule allows an attorney to take protective action with regard to his client under certain circumstances when the client cannot act in his own interest. The limited facts presented do not allow for analysis of whether Rule 1.14 is triggered in this particular situation. However, the Committee does note that while an attorney may never withhold a medical report from a client merely at the request of some other party, in rare instances, an attorney may appropriately consider whether the client is able to act in his own interest with respect to requesting the information.

The Committee further notes that the conclusions drawn in this opinion are only those within the purview of this Committee to interpret the Rules of Professional Conduct. Comment 11 to Rule 1.16 states that "the requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law." Interpretations of authority other than the Rules of Professional conduct would be beyond this Committee's purview. Accordingly, this opinion does not address legal questions of permissibility of disclosure of medical records under legal authority such as Virginia Code §§8.01-413 and 32.1-127.1:03 or the

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Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 42 U.S.C. 1301 *et. seq*.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.