

What to Do When a Third Party Pays Your Fees

by Keith A. Call

My dad used to say, “Paying legal fees is like paying for a dead horse.” Of course, one of the best ways to get out of paying for a dead horse is to get someone else to pay for it.

Chances are you have had a client whose fees are being paid by someone else, such as a parent or other family member, a friend, a co-client, the other party to a transaction, or an insurance company. When someone other than a client pays your fees, there are several things you must do to keep your nose clean.

INFORMED CONSENT

You must obtain your client’s consent before accepting fees from a third-party payer. Utah Rule of Professional Conduct 1.8(f) spells this out: “A lawyer shall not accept compensation for representing a client from one other than the client unless...the client gives informed consent.” Utah R. Prof’l Conduct R.1.8(f). Provided there is no particular conflict of interest (keep reading if there is), it may be sufficient for the lawyer to simply disclose the fact that a third party is paying and the identity of the third party payer. *See* Utah R. Prof’l Conduct 1.8 cmt. 12; *In re Reneer*, 2014 UT 18, ¶ 12, 325 P.3d 104. The informed consent can be oral and still comply with the rules. *In re Reneer*, ¶ 14.

Following certain “best practices” will help avoid misunderstandings and help keep you out of ethical and liability pickles. You would be wise to make full disclosure yourself (do not delegate this to a paralegal or to the person paying the bill), fully disclose any conditions of payment, explain all associated risks, and have the client confirm his or her consent in writing.

DEALING WITH CONFLICTS

Third party payer situations can be fraught with conflicts of interest. Indeed, one of the primary reasons for the consent requirement is because “third-party payers frequently have

interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing.” Utah R. Prof’l Conduct R. 1.8 cmt. 11.

All of the standard conflict of interest rules apply. Regardless of whether the client consents, the lawyer cannot proceed with the representation if the arrangement would preclude him or her from providing competent and diligent representation. In all other cases, informed client consent – in writing – must be obtained. *Id.* R. 1.7(a)–(b).

Do not gloss over the “informed” part of “informed consent.” Informed consent requires the lawyer to communicate adequate information about the risks of having a third party pay the bill, as well as the availability and risks of other alternatives. *Id.* R. 1.0(f). It is a good idea to look in Pandora’s box, try to think of the worst possible outcomes, and explain those fully to your client.

CLIENT IDENTITY

A third party payer might have a false sense of authority or entitlement to direct the case. They may even start to feel like a client. Be very wary of this. The lawyer’s duty is to the actual client, not to a third party payer. For example, it is the client (not a third party payer) who is entitled to make decisions about the objectives of the representation, the means by which they are to be pursued, and whether to settle. *Id.* R. 1.2(a). Do not allow yourself to get confused about who you represent. Don’t let the payer get confused either. You can reduce the risk

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of future claims by letting the payer know in writing that you are not his attorney.

CLIENT CONFIDENCES

There are many situations where sharing confidential information with a third party payer may seem natural and appropriate. For example, a caring parent or friend may want to participate in attorney-client conferences, both for emotional support and for strategic reasons. An insurer may demand information about the representation. In all such situations, a lawyer must take care to preserve client confidences. This includes preserving the attorney-client privilege under applicable rules of evidences, as well as the much broader obligation to preserve “information relating to the representation of a client” under Utah Rule of Professional Conduct 1.6.

In order to preserve client confidences, you may have to exclude third party payers from your client meetings and other communications. It would be wise to educate your client on the importance of helping you preserve such confidences.

Insurance company representation presents special problems, since insurers typically demand information about the case, require invoices for payment, and sometimes send invoices to be scrutinized by outside auditors. You should avoid sharing sensitive client confidences with the insurer, especially any information that might undermine coverage. Avoid putting sensitive information in your bills. And it is always a good idea to let your insured client review written reports before they are delivered.

The Utah Ethics Advisory Opinion Committee has opined that a lawyer must have the client’s informed consent before submitting billing statements to an insurer’s outside audit service. Even if the client’s consent is included as part of the insurance contract, the lawyer should consult with the client to make sure the client understands and renews his consent. Utah State Bar Ethics Advisory Opinion Committee, Op. 98-03 (Apr. 17, 1998).

INDEPENDENT PROFESSIONAL JUDGMENT

Finally, represent your client zealously and loyally, notwithstanding any loyalty or pull you may feel from a third party payer. Rule 5.4(c) of the Utah Rules of Professional Conduct addresses this specifically: “A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in

rendering such legal services.” Utah R. Prof’l Conduct 5.4(c).

How you represent your client must be governed by your client’s legal objectives and the best means of accomplishing those objectives. If you sense yourself pulling any punches to please or assuage the payer, quickly step backward and recalibrate your compass to do what is best for your client.

CONCLUSION

Third party payer situations can present ethical problems that are not always obvious. What might seem natural in such situations might actually be unethical. It is important to use the logical, critical thinking skills they taught you in law school and apply them to the numerous ethical rules that come into play. By doing this, you stand a better chance of not having to ask your friend or your insurer to pay your legal fees.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.