NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

OPINION

It is the opinion of this committee that it would not be ethically proper for an attorney to assume personal responsibility for physician's fees in the circumstances above set forth. It would violate Canons 10 and 42 and would be champertous, (Matter of Gilman, 251 N.Y. 265, 269).

A physician may attempt to assure payment of his fees out of a recovery in a negligence action by obtaining a valid assignment of their value from his patient. Of course, a lawyer with notice of an assignment executed by his client to a doctor is personally liable if he fails to honor the assignment out of any recovery, (Brinkman v. Moskowitz, 38 Misc. 2d, 950).

The instances propounded by the question are specifically covered in the "Standards of Practice for Doctors and Lawyers" adopted by the New York State Bar Association and the Medical Society of the State of New York, under the chapter entitled "Compensation", paragraph "G".

> "The payment of a physician's fees for examinations, reports, conferences, and testimony in connection with litigation is always the obligation of the patient or the party to a court action. It is contrary to the Canons of Ethics of the legal profession for a lawyer to agree to be personally responsible for the costs of maintaining a lawsuit. It is often advantageous to request the patient, either directly or through his lawyer, to permit the lawyer to pay the physician's fee directly out of any recovery which may be had in a particular lawsuit. The lawyer, where he requests reports, conferences, or testimony, may advance the payment for these charges as necessary, reimbursable expenses. If the lawyer does not advance the payment, he should use his good offices to see that the charges are paid by his client."

These standards of practice are guidelines for both professions and are the result of years of study and consideration in order to reach mutual understanding and respect between the two professions in carrying out their respective responsibilities to their patients and clients.

Opinion #37(a) - 3/1/68 (31-67) Topic: Champerty.
Assumption of Responsibility for Litigation Expenses.

Modified by #37

Digest: Lawyer's assumption of personal responsibility for client's expenses for experts in the preparation of litigation is not improper provided client is to reimburse lawyer.

Canon: Former Canons 10, 28, 42

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QUESTION

This Committee issued Opinion No. 37 - 11/30/66, which states that it would be ethically improper for a lawyer to respond to a demand by his client's physician that the lawyer assume personal responsibility for the payment of the physician's fees for examinations, reports, conferences and testimony in connection with personal injury litigation. Our Committee is now asked whether Opinion No. 37 was intended to forbid a lawyer from assuming personal responsibility for the payment of experts, including medical experts, employed by the lawyer to assist him in the preparation of a lawsuit.

OPINION

It is the opinion of this Committee that there is no ethical impropriety in a lawyer assuming personal responsibility for the payment of experts, including medical experts, employed by him to assist in the preparation of a lawsuit, provided that he does so subject to reimbursement by his client. Such an assumption of personal responsibility by a lawyer is not forbidden by Canon 42, if made in good faith and as a matter of convenience:

Canon 42 provides:

> "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."

The basic purpose of Canon 42, like Canons 10 and 28, is to implement the policies against champerty, maintenance and barratry. What are condemned by Canon 42 are arrangements between a lawyer and his client that the former shall bear the expenses of litigation. A lawyer may appropriately employ experts, including medical experts, and assume personal responsibility for payment of such experts, subject to reimbursement by his client, without violating the policies of Canons 10 and 42. He cannot, however, become a joint venturer in a lawsuit. See Opinion No. 474 (January 4, 1939) of the Committee on Professional Ethics of The Association of the Bar of the City of New York. Also cf. ABA Informal Opinions No's. 398, 664 and 911.

A lawyer's assumption of personal responsibility for fees for medical treatment, even when subject to ultimate reimbursement by his client, would be unjustified and professionally improper. Just as a lawyer may not advance living costs to an injured client while suit is pending, ABA Formal Opinion 288 (October 11, 1954), he may similarly neither advance nor assume responsibility for obligations of his client for medical treatment or other personal obligations.

A distinction must be made between a physician's services in diagnosing or treating the plaintiff's injuries and a physician's assistance in connection with prosecution of a pending claim or lawsuit. The physician is, of course, entitled to be compensated for all his services, but the lawyer can assume responsibility only for those related to the litigation.

Whether or not in any particular case a lawyer may properly advance the payment for these charges as "necessary reimbursable expenses" depends on whether he can do so in good faith, as required by Canon 42, and without violating accepted policies against champerty and maintenance. It is, however, implicit in the "Standards of Practice for Doctors and Lawyers," approved jointly by our Association and the Medical Society of the State of New York, 33 N.Y.S.B.J. 364 (1961), that it would be professionally inappropriate for a patient's attending physician to condition consultations, reports or attendance at trial on receiving advance payment or commitment from his patient's lawyer for services not directly applicable to the prosecution of the claim or suit.

In other words, the services of a physician, whether the attending physician or one separately retained for the purpose, in helping the lawyer prepare for and conduct a lawsuit, fall in the same category as the services of an investigator, expert engineer, or any other individual who renders some special service needed as an incident of trial preparation. There are all contractual obligations which may be appropriately assumed by the lawyer, though subject to ultimate reimbursement by his client.

To the extent inconsistent herewith, Opinion No. 37 is overruled.

Opinion #38 - 12/6/66 (6-66)

Topic: Conflict of Interest. Representation of Adverse Parties

Digest: Lawyer may not represent both buyer and seller of real estate where there is a clear instance of conflicting interests.

Canon: Former Canon 6

QUESTION

Is it ethically proper for a lawyer who represents a party to a real estate transaction to undertake also the representation of an adverse party, assuming such representation would ordinarily involve merely computing the adjustments and preparing the deed, or where title insurance is not used, the preparation also of a title abstract? Would the answer be different if a subdivision were involved in which an access road is required to be built but there is no agreement as to who is to build the road?