



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1063 (6/29/15)

Topic: Conflicts; fees paid by third-party payors

Digest: When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where the lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give father reason to believe he was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

Rules 1.7(a) & (b), 1.8(f)

FACTS

1. The inquirer agreed to represent an 18-year old client ("Son") in a criminal defense matter. When the inquirer initially met the Son at the Town Court, the Son's divorced parents ("Mother" and "Father") were present. Although only Son signed a retainer agreement, each of the client's parents paid one-half of the retainer. The inquirer continues to represent Son.

2. Recently, inquirer agreed to represent Mother in two matters against Father. One is a custody dispute against Father (not involving Son). The other is a support matter against Father in which Son is among the subjects of the support sought. Opposing counsel has protested that, having taken money from Father, it is a conflict of interest for inquirer to represent Mother adverse to Father.

QUESTION

3. When a lawyer has accepted payment of a legal fee from a client's relative, may the lawyer later accept a representation adverse to the interests of the payor?

OPINION

4. Many lawyers occasionally accept payment of their clients' legal fees from third-party payors. *See* New York Rules of Professional Conduct (the "Rules"), Rule 1.8(f), Cmt. [11] ("Lawyers are frequently asked to represents clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an

indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees”).

5. It is well-established that when a lawyer accepts payment from a third party to represent a client, the third-party payor is not a client merely by virtue of paying the lawyer’s fee. See N.Y. State 716 (1999) (when an insurance company retains a lawyer to represent a policyholder, the client is the policyholder, not the insurance company). *See generally* American Law Institute, Restatement Third, *The Law Governing Lawyers*, §14, cmt. c (2000) (paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else).

6. If a third-party payor is present at an intake interview, the lawyer may sometimes give the impression that the third party is also a client. Many factors might contribute to such an impression by the third party. A lawyer who accepts payment from third parties may therefore wish to inform such persons that the lawyer does not represent them and has no duties to them. The lawyer should also avoid giving legal advice to the third-party payor, and should make clear that the lawyer will not share confidential information with the third-party payor absent informed consent from the client. *See* Rule 1.8(f)(3) (lawyer shall not accept fees from third party unless “the client’s confidential information is protected as required by Rule 1.6”).

7. The remainder of this opinion assumes that the lawyer has not given Father grounds to believe he is a client.

8. Rule 1.8(f) recognizes that, when the lawyer accepts payment of his or her fee from a third party, the interest in being paid might affect the lawyer’s independent professional judgment on behalf of the client. Consequently, it prohibits the lawyer from accepting such compensation unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship; and

(3) the client’s confidential information is protected as required by Rule 1.6.

9. If these three conditions are fulfilled, the Rules permit the third party payment. *See* N.Y. State 1000 (2014), in which compliance with Rule 1.8(f) operates to permit payment even by one whose interests are adverse or potentially adverse to those of the client. (Indeed, Opinion 1000 points out that, where legal fees are paid by an indemnitor such as an insurance company, the interests of the indemnitor are often contrary to those of the client.)

10. Unless the inquirer has given the Father reason to believe that he represents the parents as well as the Son, the Father is not a client of the lawyer, by virtue of paying part of the lawyer’s

fee. Assuming that the lawyer has not indicated to the Father that he is a co-client, and has not otherwise given the Father the impression that he is a client, then the Father is not a client.

11. Conflicts of interest with current clients are governed by Rule 1.7. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that (i) the representation will involve the lawyer in representing differing interests, or (ii) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests. If there is a conflict of interest under Rule 1.7(a), the client may consent to the conflict if the requirements of Rule 1.7(b) are met.

12. Since we assume the Father is not a client, accepting a retainer from the Mother adverse to the Father does not involve "representing" differing interests. Thus is no conflict of interest under Rule 1.7(a)(1). However, a conflict could exist under Rule 1.7(a)(2) if a reasonable lawyer would conclude that the inquirer's interest in continuing to receive fees from the Father for representing the Son would create a "significant risk" of adversely affecting the inquirer's professional judgment on behalf of the Mother. Even if such a personal interest conflict exists, which depends on questions of fact, the inquirer could still represent the Mother if he reasonably believes within the meaning of Rule 1.7(b)(1) that he could provide competent and diligent representation to the Mother, and if he obtains informed consent from the Mother, confirmed in writing, pursuant to Rule 1.7(b)(4). See Rule 1.7, Cmts. [18]-[20].

CONCLUSION

13. When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where a lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give the father reason to believe he himself was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

(14-15)