

## ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

### OPINION 724

#### **Lawyer Appointed by a Health Care Provider to Represent an Injured Person in a Personal Injury Protection (PIP) Arbitration**

The Advisory Committee on Professional Ethics received an inquiry from a personal injury lawyer who represents plaintiffs. Inquirer asked whether a lawyer may, consistent with the *Rules of Professional Conduct*, name both the injured person and the health care provider as petitioners in Personal Injury Protection (PIP) arbitration proceedings against insurance companies. Inquirer further asked whether a lawyer who represents the injured person in the arbitration has an obligation to give notice to the lawyer representing the person in an underlying personal injury lawsuit.

A PIP arbitration petition is filed when the automobile insurance company has denied payment for health care services provided to an injured person. When receiving medical care, an injured person may sign an assignment of benefits to the health care provider, authorizing the health care provider to pursue payment directly from the insurer. “[I]n the context of assignment of PIP claims, it has been held that the health care provider is the real party in interest and that the assignment of a patient’s PIP claims against its insurer divests the patient of a right to bring a separate action.” *Lech v. State Farm Ins. Co.*, 335 N.J. Super. 254, 258 (App. Div. 2000).

Inquirer presented to the Committee an assignment of benefits providing that the injured person authorizes the provider to appoint a lawyer and file a PIP arbitration petition in the injured person's own name if the assignment is found invalid or is not accepted by the insurer. Inquirer stated that a small number of lawyers for health care providers are relying on this language to routinely file PIP arbitration petitions in the name of both the provider and the individual injured person.

Ordinarily, since the claim of the assignee divests the assignor of a separate claim, one of these two parties would be dismissed from the proceeding when the validity of the assignment is stipulated or decided. It is not clear from the inquiry whether the PIP arbitrator permits the filing of an action naming both parties with an eye to dismissing one of the parties after making the appropriate finding on the validity of the assignment, or merely ignores the procedural inconsistency and proceeds with the two petitioners in the action. The propriety of naming both parties on a petition for arbitration is less a matter of ethics than of procedure. The Committee will not address questions of procedural (or substantive) law.

Inquirer further asked whether the PIP arbitration lawyer has an obligation to give notice to a lawyer representing the injured person in an underlying personal injury lawsuit. *Rule of Professional Conduct 4.2* prohibits a lawyer from communicating with a person represented by counsel about the subject matter of the representation unless the other counsel consents. In this situation, the client has agreed to appointment of a lawyer for the PIP arbitration in the event the assignment of benefits is not accepted by the insurer or is held invalid.

Clients are free to retain more than one lawyer for the same, or similar, claims. A second lawyer retained by the client has no ethical obligation to notify the first lawyer and there is no violation of *Rule of Professional Conduct 4.2* when the second lawyer, here the PIP lawyer, talks

to the client about the case. For reasons discussed below, however, the PIP lawyer should advise the client to inform his or her personal injury lawyer of the arbitration.

When an injured person pursues a PIP claim in his or her individual capacity, instead of through an assignee, the disposition of the PIP claim may have an adverse effect on a subsequent personal injury lawsuit. Issues decided by a PIP arbitrator include causation, whether the injuries for which treatment was rendered were caused by the automobile accident or were the result of a pre-existing injury, and whether the treatment is medically necessary. If the arbitrator finds that the injury was not proximately caused by the automobile accident, and the injured person filed the petition for arbitration in an individual capacity, principles of collateral estoppel may bar relitigation of the finding on causation in a subsequent personal injury suit. *Lopez v. Patel*, 407 N.J. Super. 79, 88-89 (App. Div. 2009); *Habick v. Liberty Mutual Fire Ins. Co.*, 320 N.J. Super. 244, 257 (App. Div.) *certif. den.* 161 N.J. 149 (1999). If the PIP arbitration was brought not by the individual but, rather, by a health care provider as assignee, collateral estoppel generally will not apply. *Pace v. Kuchinsky*, 347 N.J. Super. 202, 217 (App. Div. 2002) (noting that the assignee provider did not have the requisite “incentive to make a case”).

*Rule of Professional Conduct* 1.4(c) requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” A lawyer appointed by a health care provider to represent an injured person in a PIP arbitration has an obligation to inform the client of the nature of the representation and the potential adverse effect on a subsequent personal injury lawsuit. In the course of that initial consultation, the lawyer should inquire whether the injured person has consulted with a personal injury lawyer and, if so, advise the client to discuss the arbitration with that lawyer.

Further, if the injured person received medical care from other health care providers and payment was denied, the entire controversy doctrine may require all claims brought in the

injured person's individual capacity to be presented in one PIP petition. *Rule of Professional Conduct* 1.2(c) permits limited representation provided "the limitation is reasonable under the circumstances and the client gives informed consent." Representation of the injured person in an individual capacity for just one of the claims is limited in scope and may not be reasonable under the circumstances.

The appointed PIP arbitration lawyer also may have a conflict of interest under *Rule of Professional Conduct* 1.7(a)(2) when he or she represents both the injured person and the health care provider. While the injured person and the health care provider have a common interest in obtaining payment for medical expenses, the interests of the injured person may exceed those of the health care provider when the medical expense claim is small or there are difficult questions of causation. The health care provider may lack the requisite incentive to fully litigate the matter.

Accordingly, a lawyer who represents an injured person in a PIP arbitration does not have an obligation to notify a lawyer representing the injured person in an underlying personal injury lawsuit. The lawyer, however, must communicate directly with the injured person about the arbitration and explain the potential adverse effect the arbitration findings may have on any subsequent personal injury lawsuit. *RPC* 1.4(c). In the course of this consultation, the lawyer should inquire whether the injured person has consulted with a personal injury lawyer and advise the client to discuss the arbitration with that lawyer. If the injured person has received medical care from other health care providers, the representation may not be reasonable under the circumstances, violating *Rule of Professional Conduct* 1.2(c). Lastly, a lawyer who represents both the injured person and the health care provider may have a conflict of interest under *Rule of Professional Conduct* 1.7.