

Advisory Opinion 1986-6

An attorney has requested an opinion as to whether the sharing of depositions of expert medical witnesses with other attorneys for their own use in preparing for a deposition of the same witness in unrelated cases violates any ethical consideration, particularly any attorney-client privileges.

While no case or opinion concerning this issue has been located, the sharing of depositions for such a purpose does not seem to contravene any of the Canons or Disciplinary Rules set forth in the New Mexico Code of Professional Responsibility, provided a court order has not been issued or the parties have not entered into an agreement or contract limiting the use or disclosure of the deposition or its contents.

The deposition of an expert medical witness does not appear to fall within the category of the types of communications subject to the attorney-client privilege. In particular, the sharing of depositions would not seem to violate Canon 4 regarding the preservation of client confidences and secrets. Canon 4-101(A) provides in pertinent part:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or disclosure of which would be embarrassing or would be likely to be detrimental to the client. N.M.S.A. Code Prof. Resp. Canon 4-101(A) (1978 Comp.).

The attorney-client privilege is only applied to protect privileges-not facts. *State, ex rel. State Highway Commission v. Steinkraus*, 76 N.M. 617, 417 P.2d 431 (1966). The depositions in question are of medical experts taken in court proceedings at which opposing counsel is present. They are not confidences or secrets revealed to counsel by his client. If a deposition inquires into matters which the client wishes to keep confidential, during the course of the deposition a deposed witness or an attorney on behalf of his client may invoke applicable privileges, including the work product privilege. N.M. Stat. Ann. § 38-6-6 (1978 Comp.); N.M.S.A. R. Civ. P. 26(B) (1978 Comp.); and *Hickman v. Taylor*, 329 U.S. 495 (1945). Thus, the sharing of testimony given during a deposition for which applicable privileges were not invoked would not appear to violate any attorney-client privileges.

Secondly, depositions are deemed to be public records. Following the taking of a deposition and its signing by the deposed person, the deposition must "promptly [be filed] with the court in which the action is pending...." N.M.S.A. R. Civ. P. 30(F) (1978 Comp.). See also Rule 30(F) of the Federal Rules of Civil Procedure. Following this filing, court records become a matter of public record. As such, each citizen of the State of New Mexico has a right to inspect the court records. N.M. Stat. Ann. § 14-2-1 (1978 Comp.). The right of a citizen to inspect court records can be limited by the court upon the motion of a deposed person pursuant to N.M.S.A. R. Civ. P. 26(C) (1978 Comp.) for a protective order sealing the deposition, any opening or disclosure of which would be subject to approval by the court. See also Rule 26(C) of the Federal Rules of Civil Procedure. However, absent the granting of such a protective order by the court, it would not appear to be a violation of the New Mexico Code of Professional Responsibility or any court order to share a deposition. It should be noted that when depositions are filed, they are sealed. Rule 30(l) of the Rules of Civil Procedure for the District Courts of the State of New Mexico provides that a sealed deposition may be opened by the court clerk upon the application of any attorney of record in the case. N.M.S.A. R. Civ. P. 30(l) (1978 Comp.). Similarly, Rule 8(d) of the Rules of the United States District Court for the District of New Mexico specifically provides:

d. Examination of Depositions: Unless otherwise ordered by the Court, or done by the Court, depositions filed in pending cases may be opened by the clerk for examination upon application of any attorney of record in the case, and thereafter may be inspected by any person.

It would also appear that any person could petition the court to open a sealed deposition for inspection at any time. It is recognized that at the present time, depositions are not routinely filed in cases in many judicial districts throughout New Mexico. However, it is our understanding that the rules restricting the filing of depositions are the result of a desire by the courts to limit the volume of documents filed in the court files and not because of any confidentiality or a desire to prevent a document from being deemed a public record.

The final method restricting the disclosure of depositions of expert medical witnesses to individuals not parties or attorneys in a lawsuit is an agreement or contract among the parties to that effect. Obviously, the terms and conditions of such an agreement are binding upon the parties and their attorneys.

Therefore, it is the opinion of this Committee that absent a court order or an agreement among the parties limiting the disclosure of a deposition or its contents that it would not be a violation of any attorney-client privilege, statute, rule or regulation to permit another attorney to review a deposition of an expert medical witness. However, it seems that the better course of action for an attorney to take would be either (1) to seek his client's consent to share the deposition or (2) to suggest to the other attorney that he acquire a copy of the deposition from the court files.