

LEGAL ETHICS OPINION 1747

ATTORNEY BREACHING CONTRACT
TO PAY MEDICAL BILLS OUT OF
SETTLEMENT PROCEEDS
(RECONSIDERATION OF LEO 1413
ISSUED JAN. 10, 1992)

You have presented a hypothetical situation in which a personal injury client [Client] sought medical treatment from Medical Group for injuries sustained in an automobile accident. Client did not have any health insurance coverage nor the means to pay for medical treatment. Client entered into an agreement with Medical Group authorizing Lawyer to pay directly to Medical Group sums due and owing for medical services rendered, and to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect Medical Group. Client also agreed to give a lien on his case to Medical Group against any and all proceeds of any settlement, judgment, or verdict which may be paid to Lawyer or Client as a result of the injuries for which he had been treated. Furthermore, Client agreed to be directly and fully responsible to Medical Group for all medical bills submitted for services rendered, and also agreed that payment was not contingent on any settlement, judgment, or verdict by which he might eventually recover such fee. Lawyer signed his name below language in the Agreement which stated that he agreed to observe all terms of the Agreement between Client and Medical Group and that he specifically agreed to withhold such sums from any settlement, judgment, or verdict as might be necessary to protect Medical Group. Medical Group provided treatment to client, deferred collection on Client's unpaid account, and cooperated with Lawyer by providing Lawyer with copies of medical bills and reports which Lawyer submitted to the tortfeasor's insurance carrier. In negotiating a settlement with the insurance carrier, Lawyer asserted that Medical Group's services and the fees charged were reasonable and necessary for the treatment of Client's accident-related injuries.

Lawyer subsequently received a settlement on Client's personal injury claim. Although Lawyer had received bills from Medical Group, he did not pay any of the settlement proceeds to Medical Group. Instead, Lawyer paid Medical Group's portion directly to Client who said he was having financial difficulties and that he preferred to pay Medical Group directly. Ultimately, Client did not pay any portion of the proceeds to Medical Group as payment of their bill.

Under the facts you have presented, you have asked the committee to opine on whether it was ethical for Lawyer to pay over the proceeds to Client, rather than Medical Group, when Lawyer had agreed to pay Medical Group directly for services rendered and to withhold such sums from any settlement as might be necessary to protect Medical Group.

The rule applicable to your inquiry is Rule 1.15(c)(4) of the Virginia Rules of Professional Conduct which provides:

(c) A lawyer shall:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

Neither the former Code of Professional Responsibility nor the Rules of Professional Conduct specifically address the lawyer's dilemma when both the client and a third party claim entitlement to the same funds. In LE Op. 1413 (1992) the committee addressed a situation identical to the facts you present. Applying DR:9-102(13)(4), which is identical to Rule 1.15(c)(4), the committee concluded that the determination of the ownership of the funds in question raised required a legal determination beyond its purview. *Id.* The committee also observed that the version of DR:9-102(13)(4) in effect at that time seemed to address only the preservation of *client* funds, rather than funds ostensibly owed to some third party. While it is true that the caption for DR:9-102 was entitled, "Preserving Identity of Funds and Property of a Client," the full text of DR:9-102 imposed more obligations than simply preserving the identity of client funds and property.

Well before LE Op. 1413 was issued, the Virginia Supreme Court concluded, in the context of a settlement attorney handling a real estate closing, that the lawyer's fiduciary duties under Canon 9 extended to protecting funds owed to or claimed by third parties, and not simply the client. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986) (decided under former DR:9-102). *Pickus*, a new attorney, allowed a coercive client, the seller, to receive directly the settlement proceeds without having determined whether a prior deed of trust lien on the subject real estate had been released. As things turned out, the prior lien had not been satisfied. The Court upheld the disciplinary board's finding that DR:9-102 had been violated, holding that DR:9-102 was promulgated to protect third parties as well as clients. 232 Va. at 14.

The committee believes that the issue is not who is "entitled" to the funds in the attorney's possession, but rather what does Rule 1.15(c)(4) require when both the client and a third party claim a right to those same funds? The committee's answer is that the attorney must take a course of action that will protect the interests of both the client and the third party. Thus it would be unethical for Lawyer to disburse the funds in question to the client when the client, by agreement or by law, is under a legal obligation to deliver those funds to another. *See Alaska Bar Ass'n Ethics Op. 92-3* (1992) (lawyer may not follow client's instruction to disregard facially valid assignment or statutory lien in favor of third party; lawyer should advise client that he will withhold funds until dispute is resolved). The committee believes that a lawyer's obligations under Rule 1.15(c)(4) do not extend to all general creditors of the client, but only those persons who have an interest in the settlement proceeds either by law or assignment.

Comment [3] to Rule 1.15 offers some guidance:

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and

accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

If a third party has a valid statutory lien,¹ contract or court order that grants an interest in the settlement proceeds, the lawyer may not ignore the third party's interests and deliver the funds in question to the client, even if the client directs the lawyer to do so. *See Aetna Casualty & Surety Co. v. Gilbreath*, 625 SW.2d 269 (Tenn. 1981) (lawyer has duty to honor employer's statutory workers' compensation lien against settlement with third party); California Formal Ethics Op. 1988-101 (lawyer whose client agreed to pay recovery proceeds to health care provider may not ignore agreement and disburse all funds to client upon client's instruction); Maryland Ethics Op. 94-19 (1993) (lawyer must disregard client's instruction not to pay creditor when client had valid assignment with creditor); Ohio Ethics Op. 95-12 (1995) (lawyer must disregard client's instruction not to pay physician when client had earlier agreed to pay medical bills from settlement proceeds); and South Carolina Ethics Op. 94-20 (1994) (if lawyer knows that client has executed valid doctor's lien he may not comply with client's instruction to disregard it; no principle of confidentiality or client loyalty permits lawyer to violate ethical obligations owed to third parties).

By the same token, a lawyer should not disburse the client's funds to a third party if the client contests such action. *See Connecticut Informal Ethics Op. 95-20* (1995) (lawyer cannot pay money over to creditor over client's objection); *Pennsylvania Bar Ass'n Ethics Op. 92-89* (1992) (lawyer, whose client was ordered to pay child support arrearage, cannot release funds from real estate sale without client consent).

The committee opines that a lawyer who knows that his client has made a valid assignment of rights to the proceeds of a settlement or has allowed for the creation of a consensual lien on the settlement cannot disregard the third party assignee or lienholder's rights, notwithstanding a client's directive to do so. Rule 1.15 recognizes circumstances in which a lawyer may refuse to surrender property or funds to a client when a third party asserts what appears to be a valid claim to such property or funds. In your hypothetical, Lawyer is charged with notice of Client's assignment to Medical Group since Lawyer also signed the Agreement. The lawyer's ethical duty does not require Lawyer to make a legal determination as to who is entitled to the proceeds, only that Lawyer protect the

¹ A physician, registered nurse, registered physical therapist and private and public hospitals have a statutory medical lien on the personal injury claim of any patient who is treated by such health care providers for injuries caused by the negligence of another. The physician, nurse, or therapist has a lien up to \$500. The hospital lien is protected up to \$2000. A pharmacy that fills prescriptions for medicine prescribed by a health care provider is protected as well up to \$500. Va. Code § 8.01-66.2 (Michie 1999). If the client's employer paid workers' compensation benefits, the employer may have a workers' compensation subrogation lien against a recovery from a third party tortfeasor. Va. Code § 65.2-310 (Michie 1995).

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interests of both the client and the third party who appear to have conflicting claims to the funds or property. It is the opinion of the committee that if a dispute arises concerning the rights of third parties to funds held by the attorney on behalf of a client, the attorney must segregate the amount in dispute until the dispute can be resolved. If the dispute cannot be resolved, the attorney may interplead the funds into court and request that the court determine the legal entitlement to the funds. *See Alabama Bar Ethics Op. 90-48 (1990)* (lawyer whose client executed assignment of proceeds to chiropractor but later instructed lawyer to disregard assignment should interplead the disputed funds into circuit court in order to establish the rights of the parties).

In conclusion, the committee opines that it was unethical for Lawyer to disburse funds to Client where Client had agreed to pay such funds to Medical Group out of the settlement proceeds and that Lawyer should have withheld or interpleaded the disputed funds assuming Client would not authorize payment to Medical Group. To the extent that this opinion is inconsistent with LE Op. 1413, that opinion is hereby overruled.

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