

ETHICS ADVISORY PANEL
OPINION #93-81 REQUEST #423
Issued December 8, 1993

The inquiring attorney represented a client in a matter in which a judge awarded the client benefits. The trial judge's award is unclear in respect to the amount of money owed to the client. Under one interpretation, the client is entitled to receive \$X in benefits; under the other interpretation, the client is entitled to receive \$Y which is less than \$X. Both the inquiring attorney and the client believe that the judge intended the client to receive \$Y and the inquiring attorney so advised the insurance company's attorney. Neither party has requested the judge to clarify the award. The client was issued a check for \$X by the insurance company. The inquiring attorney disbursed \$Y to the client and retained in escrow the difference between \$X and \$Y pending the advice of this Panel. The inquiring attorney asks whether he/she must notify the other side that it may have paid more than it was required to pay pursuant to the judge's award.

As an initial matter, the Panel notes that the client may be committing the crime of larceny if he/she takes possession of funds that he/she believes were paid by mistake. State v. Hector, 402 A.2d 595 (1979). The Panel does not here undertake an analysis of the elements of that crime to determine whether such a charge could be sustained. Rather, the Panel focuses on the inquiring attorney's ethical obligations under the Rules of Professional Conduct.

Based on the facts as presented by the inquiring attorney, the Panel believes that the inquiring attorney must notify the other side that he/she is holding in escrow the funds that it may have overpaid pursuant to Rule 1.15(b). That Rule provides as follows:

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third persons, shall promptly render a full accounting regarding such property.

Under these facts, it appears that the other side has an interest in the funds inasmuch as it may have paid the funds by mistake. It is therefore the Panel's opinion that the inquiring attorney must notify the other side that he/she is holding the funds.

Rule 1.2(d) also addresses the inquiring attorney's ethical obligations and provides as follows:

A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. (emphasis added)

As stated above, the Panel believes the client or the inquiring attorney may be committing larceny if he/she takes possession of funds that he/she believes were paid by mistake. The Panel therefore cautions the inquiring attorney that he/she may be assisting the client commit a criminal act in violation of Rule 1.2(d) if he/she enables the client to take possession of the funds.

Rules 4.1(b) similarly addresses a lawyer's obligation to avoid assisting criminal conduct by a client. That Rule provides as follows:

Rule 4.1 Truthfulness in Statements to Others. -
In the course of representing a client a lawyer shall not knowingly:
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Comment to Rule 4.1 provides that:

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Under the facts of this inquiry, the Panel does not believe that Rule 1.6 (Confidentiality of Information) requires the inquiring attorney to obtain the client's consent in order to disclose the possible mistake in overpayment to the other side. The Panel believes that disclosure is impliedly authorized in order to carry out the representation. See, Opinion #93-45 (Issued August 25, 1993). Therefore, pursuant to Rule 4.1(b), the inquiring attorney should disclose the information to the other side to avoid being deemed to have assisted a potentially criminal act by the client.

Finally, the Panel notes that the inquiring attorney is also obligated to reveal the possible overpayment pursuant to Rule 8.4(c). That Rule provides as follows:

8.4 Misconduct. - It is professional misconduct for a lawyer to

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

The Panel believes that it is dishonest for the inquiring attorney to allow his/her client to take possession of funds that the inquiring attorney believes were paid by mistake and to fail to disclose that information to the other side.

The Panel's guidance is restricted to interpretations of the Rules of Professional Conduct and does not extend to issues under the State Ethics Code or any other rules, regulations or laws that may have bearing on the issue raised by this inquiry.