

Final

ETHICS ADVISORY PANEL
OPINION # 95-60, - REQUEST # 637
ISSUED - MARCH 14, 1996

Facts:

The inquiring attorney brought suit on behalf of a client who was injured in an automobile accident. The client's health insurance company paid all the client's medical bills and notified the inquiring attorney that it was placing a "lien" on the proceeds of the case in an amount equal to the medical bills it paid. The attorney did not undertake a contractual obligation to pay the insurance company out of the proceeds. The case was settled, however, the client directed the inquiring attorney not to pay the health insurer.

Issue Presented:

Is the inquiring attorney obligated to pay the health insurer from the settlement proceeds or to respect the client's request?

Opinion:

Under the circumstances described here, if the health insurer has a legally enforceable interest in the funds, the inquiring attorney must notify the health insurer and pay over the funds due it. If the health insurer has a mere claim to the funds, the Panel recommends the attorney notify the health insurer that the money will be disbursed to the client thirty (30) days hence unless he/she receives notice that the health insurer has a legally enforceable interest in the funds.

Reasoning:

The inquiring attorney's dilemma is reflected in the juxtaposition of a lawyer's obligation to abide by his or her client's decisions concerning the objectives of representation (Rule 1.2) and a lawyer's obligation under Rule 1.15 with respect to funds in which a client or a third person has an a legally enforceable interest (hereinafter "Interest"). Rule 1.15(b) imposes three duties on a the lawyer receiving funds in which a client or a third person has an interest: the duty to promptly notify, the duty to promptly deliver and the duty to fully account. In the instant situation, it is unclear whether the health insurer has an interest in the funds. Whether or not the health insurer has such an interest is a question of substantive law. It has been held that if, under applicable law, the third party has a right to the funds by virtue of a statutory lien for example, the lawyer

Final Opinion 95-60

Request # 637

Page 2

has a duty to protect the third party's interest by notifying the third party, delivering the funds and fully accounting to him. Breach of that duty may constitute conversion by the lawyer. See Unigard Insurance Co. v. Tremont 430 A2d 30 (Conn Super Ct App Sess, 1981).

A lawyer may not follow a client's instructions to disregard a facially valid assignment or statutory lien in favor of the client's creditor. The equivalent body to this panel in other jurisdictions has opined that in such a case the lawyer should advise the client that he/she will withhold the disputed funds and, unless the dispute can be resolved amicably, deposit them into court. See Alaska Bar Association Opinion No. 92-3 (6/1/92), California Bar Opinion 1988 - No. 101; and Los Angeles County Bar Association Opinion No. 478 (7/18/94).

If, however, the lawyer merely is aware of a claim against the funds on the part of a third party, his/her duties are less clear. It has been held that notice of a third party claim that is neither an assignment nor a perfected statutory lien does not destroy the client's entitlement to the funds. See Alaska Bar Opinion above. The Alaska Bar Opinion advises that the lawyer receiving such notice may follow the client's instructions with respect to the funds, but should inform the creditor that the claim should be asserted directly against the client. Id.

The Panel advises the inquiring attorney to determine whether the health insurer has an interest in the settlement funds under applicable law. Perhaps an examination of the client's health insurance policy will aid in that determination. If the lawyer determines that the health insurer has such an interest, the lawyer must notify the health insurer, pay over the funds in which the health insurer has an interest and render a full accounting.

If, on the other hand, the lawyer determines that under applicable law, the health insurer does not have an interest in the funds by virtue of an assignment or a lien, but merely a claim thereto, the inquiring attorney may disburse the funds to the client with notice to the health insurer. The Panel recommends that the inquiring attorney notify the health insurer and the client that he/she will disburse the funds to the client thirty (30) days hence unless he/she receives notice that the health insurer has a legally enforceable interest in the funds.

As to substantive law issues, the Panel declines to render an advisory opinion pursuant to Panel Rule 2(g).