Advisory Opinion No 2007-03

Synopsis

A lawyer who is advised of a client's execution of an agreement with a medical provider that directs the lawyer to pay for the provider's services from the proceeds of a claim for personal injuries on which the lawyer is representing the client, is not required to formally acknowledge the agreement and may not sign it unless the client so directs.

Upon receipt of the settlement funds, the lawyer should (1) deposit the funds in a client trust account; (2) notify the client; (3) advise the client that the lawyer appears to have a duty to notify the provider and that the agreement signed by the client includes a direction to the lawyer to pay any balance due to the provider prior to distributing funds to the client.

Unless the client directs, the lawyer is not required to notify the medical provider of the receipt of the settlement funds. However, the funds should be kept separate until there is an accounting and severance of the respective interests of the client, provider and the lawyer. No funds may be disbursed until there is a resolution of any dispute concerning the amounts due to the respective parties.

Facts

The requesting attorney has received a letter from a New Hampshire medical provider who has rendered services to the lawyer's client for work-related injuries sustained by the client in Vermont. The attorney represents the client in a claim related to such injuries. The letter purports to be a "Doctor's Lien," signed by the client, that "authorizes and directs" the lawyer to pay for the provider's services prior to making any settlement or judgment payments to the client.

The letter further states that "in consideration of [provider's] agreement to take no action at this time to collect monies owed. I grant an irrevocable lien to [provider] upon the proceeds of such settlement of judgment." The letter acknowledges a balance owed and agrees to cover the costs of services received up to and including the date of distribution of any settlement or judgment proceeds.

The letter also includes a section that requests the signature of the attorney as follows:

> "The undersigned attorney represents the above named patient and acknowledges the patient's agreement to direct the undersigned attorney, prior to making any payment to the patient, to pay [provider] in full from any settlement or judgment the undersigned attorney collects on the patient's behalf. In the event that the patient subsequently directs the undersigned attorney to not pay [provider] as previously agreed, the undersigned attorney, consistent with Vermont Rules of Professional Responsibility Rule 1.15(c), agrees to hold sufficient funds to satisfy the lien until such dispute is resolved."

The requesting attorney responded to the medical provider, affirming that the attorney had seen "a prepared agreement which serves to protect the interests of [the provider] with regard to payment for medical services [to the client]." The attorney declined to "acknowledge" the agreement or to sign the "Doctor's Lien," citing our Advisory opinion No. 96-05 and "ethics rules which control my practice and prohibit me from entering into an agreement which serves to protect the doctor's interest."[1]

Questions Presented

Is the requesting lawyer under any ethical obligation either to sign or to refuse to sign the purported "Medical Lien? What are the lawyer's ethical obligations to the client; and to the requesting medical provider, if any?

Relevant Provisions of the Vermont Rules of Professional Conduct

Rule 1.15(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

[1] Advisory Opinion No 96-05, was decided prior to the adoption of the current Rule; it bases its advice on ABA Informal Opinion 1295(8/18/74) and EC-5-1: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties."

request by the client or third person, shall promptly render a full accounting regarding such property. (Emphasis added)

Rule 1.15(c) When in the course of representation a lawyer is in possession of *property in which both the lawyer and another person claim interests,* the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. (Emphasis added)

> **Comment to Rule 1.15 Safekeeping Property:** 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 their 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.* (Emphasis added)

Discussion

Duty Concerning Acknowledging or Signing the Agreement

Consistent with our Committee Rule 7, we do not offer an opinion as to whether the agreement signed by the client with the medical provider constitutes a valid statutory or equitable lien under Vermont or New Hampshire law, on any proceeds the client may receive by way of settlement or judgment. However, the facts presented here show that the client has signed an agreement with the provider that directs the lawyer to pay the medical expenses from any settlement prior to making any payment to the client. Thus, we assume that the lawyer knows that both the client and the medical provider "claim interests" in the potential settlement or judgment.[2]

[2] Rule 1.15 uses the words "funds" and "property" interchangeably; and also loosely refers to them in terms of the respective "interests" of the client, third party and lawyer. Because we do not offer an opinion as to whether these "interests" are established are established as entitlements a matter of law, we believe that thee is clear evidence that the client and provider do "claim" interests in the settlement proceeds when they are in fact received by the lawyer; and thus trigger the requirements of Rule 1.15

Of initial concern is whether the requesting lawyer has any ethical obligation either to formally acknowledge, sign or not sign the proposed "Doctor's Lien?" The Vermont Rules do not explicitly address whether the lawyer must acknowledge the existence of the purported lien or sign the document in the absence of any explicit direction from the client. Rule 1.15 is effective when the lawyer "receives" or is "in possession of "funds to which a reasonable lawyer would conclude the client and a third party assert claims.

Since the requesting attorney has not yet received any funds, there is no obligation under either Rule 1.15(b) or (c) to take any action with respect to the medical provider; thus, these Rules do not require the lawyer to acknowledge the medical provider's interest or to sign or to be personally bound by the proffered "medical lien" agreement to protect the third party's interests.

Our attention is directed to New Hampshire Bar Association Ethics Committee Formal Opinion No. 1998-99-03, which thoroughly discusses the issues concerned here. In that case, however, the requesting attorney had already agreed to protect a medical insurance carrier's statutory lien on personal injury settlement proceeds in exchange for the insurer's agreement to reduce the lien by one-third. When the funds were received, the attorney sent a trust account check to the lien holder for the agreed-upon amount. When the lien holder refused to deposit the check or renegotiate the amount of the lien, the attorney requested an advisory ethic opinion.

The New Hampshire Opinion determined that its Rule 1.15(b) required the attorney to promptly notify and deliver the agreed upon amounts to the third party who has a recognized and valid lien or agreement concerning the settlement funds. It should be noted that in the New Hampshire situation, the attorney was a party to the agreement and therefore had an independent fiduciary obligation to notify and deliver the settlement funds.[3]

[3] The Opinion notes that when the lawyer is a party to the agreement, personal liability to the third party could result from failure to pay the agreed amount and distributing the disputed amount to the client, citing cases). See also, Yorgan v. Durkin, 715 N.W. 2d 160, 290 Wis. 2d 671 (Wis. 2006) (Attorney who refuses to sign agreement that client had executed with medical provider, may not be held liable for payment when client refused to pay over personal injury settlement proceeds. No statutory or equitable lien found to exist. Opinion does not decide ethical obligations under Wisconsin Rules of Professional Conduct, but notes that such rules may impose upon the attorney who has knowledge of a dispute between the client and third party an obligation to segregate and withhold funds from the client and third party until the dispute is resolved.

In the instant case, while the client has signed an agreement, the requesting attorney has declined to do so, asserting an ethical obligation to protect the client's interests rather than be placed in the position of protecting the medical provider's interests. We believe that the attorney's actions are well within the letter and spirit of Rules 1.15(b) and (c).

Duty When Settlement the Proceeds are Received by the Lawyer

The facts indicate that no settlement funds have been received by the requesting attorney; and there is no indication at this time that the client has or will refuse to honor the agreement made with the medical provider when in fact funds are received. We assume that when the settlement funds are received the attorney will consult with the client to determine whether the client will authorize release of funds pursuant to the agreement the client has signed.

When the settlement proceeds are received, Rule 1.15(a) would require the attorney to regard them as "property of [a client] or third person" and deposit the funds in a client trust account. At a minimum, Rule 1.15(b) would require the attorney to promptly notify the client and determine if there is any dispute over allocation of amounts between the client, the attorney (for agreed-upon fees) and the provider. The client should be advised that the medical provider claims an interest but the proceeds are the client's property. The client should also be advised that while the agreement signed by the client does not require it, Rule 1.15(b) appears to require that the lawyer notify the provider that the funds have been received so that it may assert the claim that the agreement recognizes; and that the lawyer be prepared to render an accounting for both the client and the provider. If there is a dispute as to distribution of the funds, Rules 1.15 (b) and (c) read together require the attorney to hold the funds separate until the dispute is resolved.[4]

Conclusion

The requesting attorney has no ethical obligation to sign the proposed medical lien unless the client so directs. Because the attorney has already stated that the

[4] In Yorgan, the Wisconsin Supreme Court noted that an attorney holding funds in this type of situation has the option of seeking a declaratory judgment as to the respective interests. We do not offer an opinion as to what the attorney's options would be under the Rules when there is a dispute, but assume that the attorney would attempt to negotiate an agreement between the client and the medical provider.

agreement between the client and the medical provider "serve to protect the provider's interest with regard to payment for medical services," when any settlement funds are received, the attorney (1) may not distribute any of the funds without client direction; (2) is obliged to segregate the funds in a client trust account, (3) shall promptly notify the client that the funds have been received; (4) seek permission to notify the provider; and (5) determine whether a dispute exists with respect to distribution of the funds between the client, provider and the lawyer.