

ETHICS OPINION

RO-2003-02

OFFICE OF GENERAL COUNSEL

QUESTION :

Does an attorney have an ethical obligation to honor "protection letters" sent by the attorney to the creditors of a client, either at the client's request or with the client's knowledge and approval, when the client subsequently instructs the attorney not to pay the creditors?

ANSWER :

An attorney is ethically compelled to fulfill commitments made to a client's creditors pursuant to Rules 4.1(a), 8.4(c), 1.15(b) and 1.2(d) of the Rules of Professional Conduct.

DISCUSSION :

It is a frequent occurrence in the legal profession that an attorney will represent a client who has a meritorious cause of action but who has also incurred substantial indebtedness. The client may have incurred medical expenses for treatment of the injuries which form the basis of the cause of action or the indebtedness may be the result of the client's inability to work due to such injuries or it may be that for some other reason the client is unable to meet his or her financial obligations. If the anticipated recovery on behalf of the client would be sufficient to pay the client's

debts, the client may ask the attorney to, or agree for the attorney to, contact the client's creditors and request forbearance in collection efforts in exchange for promise of payment upon receipt of settlement or judgment proceeds from the client's pending cause of action. Such written commitments on the part of the attorney are commonly referred to as "protection letters".

It sometimes happens that upon receipt of the proceeds the client will have a change of heart and, despite the previous instruction or authorization, will instruct the attorney not to pay the client's creditors, thus placing the attorney in an ethical dilemma. The attorney is faced with the choice of either disregarding the client's express directive or giving the appearance of having lied to the client's creditors.

However, the Rules of Professional Conduct provide ethical guidance in addressing this dilemma. Rule 4.1(a), for example, provides, in pertinent part, as follows:

"Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person"**

Of similar import is Rule 8.4(c):

"Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."**

While in many, if not most instances, protection letters are provided in good faith, an attorney would be guilty of violating Rule 4.1(a) and Rule 8.4(c) if, at the time protection letters were sent, the attorney had reason to believe, or even suspect, that the client did not really intend to pay the creditor.¹

Further guidance is found in Rule 1.15(b) which addresses an attorney's ethical obligations upon receipt of funds or other property in which a third person has an interest.

"Rule 1.15 Safekeeping Property

Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise

¹ This predicament can be avoided by obtaining from the client written authorization to pay creditors. Such authorization should include language to the effect that the client acknowledges that the authorization is irrevocable and the client understands that, when the attorney has made a commitment to pay the creditor pursuant to that authorization, the attorney is ethically obligated to do so, regardless of whether the client's preference in the matter may change. This language may be included in the attorney's employment contract with the client.

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 person, shall promptly render a full accounting regarding that property."

It is the opinion of the Disciplinary Commission that an attorney who has sent a protection letter to a client's creditor and who is holding in trust, funds to pay the creditor, is ethically obligated by the above-quoted Rule to pay the creditor those funds which the creditor "is entitled to receive".

Perhaps the Rule most relevant to the issues presented here is Rule 1.2(d), which provides, in part, as follows:

"Rule 1.2 Scope of Representation

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"

In RO-90-48, the Disciplinary Commission concluded that an attorney who releases all settlement or judgment proceeds to the client, after having told the client's creditors that the proceeds would be used to pay the client's debts, has assisted the client in a fraudulent act as expressly prohibited by Disciplinary Rule 7-102(A)(7), which is the verbatim predecessor, under the previous Code

of Professional Responsibility, to the above-quoted Rule 1.2(d). A copy of formal opinion RO-90-48 is attached hereto for reference purposes.

However, the Disciplinary Commission is of the opinion that RO-90-48 is due to be modified in one respect. The inquiry of the attorney requesting that opinion was whether he could ethically interplead the money claimed by a client's creditor when the client refused to authorize payment to the creditor. The Disciplinary Commission opined that he could ethically do so. The Commission wishes to refine this position further by holding that money which an attorney has promised to pay creditors should not be interpled unless there is a dispute between the client and the creditor as to existence of the debt, the amount of the debt or the reasonableness of the debt. Accordingly, RO-90-48 is hereby modified in accordance with this opinion.

In summation, it is the opinion of the Disciplinary Commission that the Rules of Professional Conduct ethically preclude an attorney from failing or refusing to honor his commitment to pay a client's creditors. The attorney is ethically obligated to fulfill his commitment and pay the creditors, despite the client's insistence that he not do so. However, this ethical obligation exists only where the debt, and the amount thereof, is reasonable and undisputed. If there is a

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legitimate question concerning the debt, or the amount of the debt, the attorney should interplead the disputed funds and let the court reach a determination regarding the creditor's claim.

LGK/vf

8/28/03

ETHICS OPINION

RO-90-48

QUESTION:

"As per our phone conversation of June 5, 1990, I write this letter to you requesting some guidance pursuant to a dispute between my clients and the clients' health care provider. In the case of O█████ and P█████ C█████ vs. B█████ E█████, et al., case no ██████-█████ & ██████ settlement was agreed to by all parties for the sum of \$17,000.00. Of this sum, \$5,047.00 had been assigned by the clients to M█████ & R█████ P.C. Chiropractors, in G█████ Alabama. This assignment was sent to us by the chiropractor's office when we wrote the chiropractor's office requesting their records for exhibit purposes.

At the time the settlement proceeds cleared our trust account, we were prepared to disburse funds, and at that time our client, O█████ C█████ disallowed us from sending the assigned benefits, \$5,047.00 to M█████ & R█████ on behalf of he and his daughter, P█████ C█████.

Of course, to not send the proceeds would put us in violation of what purports to be a valid contractual assignment between the C█████s and M█████ & R█████, P.C. Additionally, to pay the monies to M█████ & R█████, P.C. against our clients' wishes would also put us at tremendous odds with our client, as well.

Therefore, an interpleader has been prepared wherein the law firm is named as the plaintiff and the clients and chiropractor's office are defendants, wherein we are requesting the circuit court through declaratory judgment to declare where the money should be paid and relinquishing us of responsibility for said proceeds.

Please advise if this is the suitable course to follow, and if interpleader is not the suitable course, please recommend that procedure we should follow to resolve this dispute."

* * *

ANSWER:

In our opinion, an interpleader action wherein the disputed funds are paid into court and both parties claiming an interest in the funds are required to appear before the court is an appropriate and ethical response to the dilemma posed.

Disciplinary Rule 7-102(A)(7) provides that a lawyer may not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent and Disciplinary Rule 7-102(A)(1) provides that a lawyer shall take no action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another. In the present fact situation, your client authorized you to assign certain sums to a firm of chiropractors in order to obtain from those chiropractors records to be used in connection with the client's litigation. Upon settlement, the client revoked, ex parte, that agreement in effect attempting to perpetrate a fraud upon the chiropractor. In our opinion, you were justified in not assisting the client in that action by paying the disputed funds over to him and have taken appropriate action by interpleading the funds into the circuit court, where he may establish his right to the money in question and assert any defenses or counterclaims that might affect the chiropractor's claim.

AWJ/vf

6/15/90