speaking of ethics

By Saul Jay Singer

Mick Wiggins

In Trust Accounts We Trust

After Laurie Lawyer expended hundreds of hours representing Calvin Client in a personal injury case, and after Laurie's firm fronted more than $50,000 in expenses in the case, the defendant settled on the eve of trial for $600,000. Laurie deposits the settlement check into Firm's trust account and prepares a final accounting as follows:

$200,000	Contingency fee as per retainer agreement
$50,000	Legal expenses
$100,000	Outstanding fees due to Cal's medical providers as per negotiated agreements
$350,000	Total Disbursements
$600,000	Total Settlement Proceeds
$250,000	**Balance Due to Calvin Client**

The first inkling of trouble begins when Laurie receives a call from Cal's ex-wife, advising that Cal owes $15,000 for outstanding court-ordered child support. In the days that follow, Laurie hears from Pain Specialist, who claims that Cal had been ignoring his $1,000 invoice for more than a year; Spiritual Healer, who claims $25,000 for providing "spiritual guidance to help Cal deal with back pain;" the Internal Revenue Service (IRS), which advises that Cal owes federal income taxes and serves notice of a $10,000 lien against any trust funds held by Laurie on Cal's behalf; and Sam the Deli Guy, who claims that Cal had walked out without paying for his corned beef sandwich and diet cream soda. Sam demands payment of $15, plus unspecified damages for "emotional distress."

When Laurie calls Cal to ask about these various claims, he accuses her of manufacturing lies and demands immediate receipt of "my $600,000." When she tries to explain the various deductions that had to be taken against the aggregate settlement, Cal angrily replies that:

- Laurie wasn't entitled to *any* fee because "you wore a yellow blazer at our meeting last week, and you know how much I hate all things yellow;" and
- Firm could not recoup expenses because "I never agreed to pay expenses and, in fact, Paul Partner assured me that my case was so strong and so large that any lawyer would happily agree to eat the expenses."

As to the third-party claims, a heated Cal declares that his ex-wife had cheated on him and, therefore, was not entitled to a monthly $1,000 court-ordered payment; that he neglected to tell Laurie about Pain Specialist because the doctor had failed to forward any invoice; that Spiritual Healer was a charlatan, with bad breath to boot; and that the corned beef sandwich was inedible. As to the IRS lien, Cal asserts The Steve Martin Defense—"I forgot"—invoked during his classic *Saturday Night Live* routine.

Laurie easily determines that: (1) no reasonable finder of fact could possibly deny her fee because she "wore a yellow blazer," (2) the retainer agreement can entertain no interpretation other than that Cal must pay Firm's expenses, and (3) she will not undertake to adjudicate the merits (*vel non*) of the third-party claims and, thereby, subject herself to potential liability. She transfers $250,000 from Firm's trust account to its operating account, and advises Cal that the $350,000 balance will remain protected in Firm's trust account pending final resolution of all third-party claims, known and unknown, against the settlement proceeds.

Laurie is wrong on almost all counts. She has committed multiple violations of Rule 1.15(c) of the District of Columbia Rules of Professional Conduct, which details a lawyer's duties when disputes arise with respect to the ownership of trust funds under a lawyer's control:

> When in the course of a representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved . . . .

Comment [5] to Rule 1.15 elaborates:

> 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.

But this begs the question: While Laurie "*may* have a duty" to protect third-party claims, when does she actually have the affirmative duty to do so? Moreover, if Laurie "should not unilaterally assume to arbitrate" the dispute, how is she to decide whether the third-party claim is a "*just* claim"—or just a claim?

The D.C. Bar Legal Ethics Committee provides significant guidance on this issue in Opinion 293, which begins by drawing an important distinction between claims against trust funds by clients and claims by third parties. Because of a lawyer's paramount duty of loyalty to a client, even the mere assertion of a claim by a client constitutes sufficient grounds to prevent a lawyer from withdrawing any disputed property, and "there is no requirement that the dispute be genuine, serious, or bona fide."[1] As such—and though there could be few claims as preposterous as Cal's

detestation of Laurie's yellow blazer—Laurie's transfer of her contingency fee (and Firm's expenses) to Firm's operating account was improper.[2]

As to the third-party claims, Opinion 293 defines a *just claim* that must be honored by the lawyer as one relating to *the particular funds in the lawyer's possession*, and not merely a general, unsecured client debt. Thus, when an attachment or garnishment arising out of a money judgment against Cal establishes a third party's entitlement to specific settlement proceeds in Laurie's trust account and is served upon her, she must protect these funds, whether or not the order is related specifically to Cal's case.

Despite claims by Pain Specialist, Spiritual Healer, and Sam the Deli Guy, where none of these third parties has perfected a garnishment/attachment of the settlement proceeds, Laurie may—indeed, she *must*[3]—distribute the "disputed" funds to her client, even in the face of these pending claims.[4] The same is true with respect to the ex-wife's claim, even though she approaches Laurie with a court order in hand for child support, because that order does not relate specifically to the settlement proceeds. However, as Opinion 293 makes clear, Laurie must protect a statutory lien that applies to the settlement proceeds in the matter she is handling. The IRS lien in this case is such a lien, and Laurie has the duty to retain $10,000 in the trust account to satisfy it.

Conclusion

- Notwithstanding a D.C. lawyer's broad duty of client loyalty, Laurie may refuse to distribute to Cal $250,000 that she and Firm claim as a contingency fee ($200,000) and outstanding expenses ($50,000). However, she may not take distribution of these funds until either Cal consents to such distribution or the fee and expense dispute is adjudicated in Laurie's favor.
- While Laurie must preserve $10,000 to satisfy the IRS lien, she need not retain any additional funds to satisfy any of the other third-party claims.
- As soon as practicable, Laurie must distribute $240,000 to Cal, representing the $600,000 in aggregate proceeds, less: (a) $250,000 contingency and expenses; (b) $10,000 for the IRS; and (c) $100,000 to providers, the distribution of which Cal does not dispute. She need not fear any additional third-party claims—even as to perfected liens specifically against the trust funds—of which she is unaware at the time of the distribution.[5]

Practice Tip

A lawyer must carefully walk the line between the duty of loyalty and the duty to disburse client funds on the one hand, and the duty to protect funds relating to certain third-party claims on the other hand. When it comes to trust accounts, there will, indeed, be a significant penalty for early withdrawal!

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 3231 and 3232, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995).

2 Laurie's remedy is to file suit against Cal to recover her fee (and Firm's expenses). Such an action is subject to Rule 1.6(e)(5) ("A lawyer may use or reveal client confidences or secrets . . . to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee.")

3 *See*, e.g., Comment [4] to Rule 1.15: "The undisputed portion of the funds should be promptly distributed."

4 In marked distinction is the case where the lawyer has executed an authorization and assignment pursuant to which the lawyer ratifies a contract between the client and the medical provider to pay certain funds in the lawyer's possession. In such instances, the lawyer must retain the disputed funds at issue in the trust account.

5 As Opinion 293 makes clear: "to begin with, the rule [to preserve trust funds as to which there is a 'just claim'] does not apply to claims of which the lawyer lacks knowledge."

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE JAMES W. BEANE JR. Bar No. 444920. December 22, 2009. On remand from the D.C. Court of Appeals, regarding the issue of the "appropriateness of a negotiated discipline," the Board on Professional Responsibility recommends that the court reject the proposed sanction, a six-month suspension with fitness.

IN RE ANDREW J. KLINE. Bar No. 358547. December 22, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Kline for 18 months, with the suspension stayed after nine months, on the condition that Kline agrees to be placed on monitored probation for two years with conditions as stated in the Board Report and Recommendation. Kline negligently misappropriated and commingled entrusted funds and "committed a significant number of serious ethical violations" while representing a client in a litigation matter. Specifically, Kline failed to make crucial litigation filings, and, as a result, a default judgment was entered against his client. Without telling his client about the default judgment, Kline negotiated settlement terms with the adverse parties under which his client was to pay $50,000. He did not bring these terms to his client's attention; instead, he submitted a draft agreement that called for the dismissal of his client's $7,500 contract claim but required no monetary payment from his client. When even those terms were not acceptable to his client, Kline forged his client's signature on a settlement agreement containing the terms he had negotiated; paid the adverse parties $50,000 of his own funds; and presented the forged agreement to them as a valid settlement agreement. Rules 1.1(a), 1.2(a), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 1.4(c), 8.4(b), 8.4(c) and D.C. Bar R. XI, § 19(f).

IN RE THEODORE S. SILVA JR. Bar No. 412894. December 31, 2009. In a consolidated reciprocal and original matter, the Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Silva for three years and require that he demonstrate fitness as a condition for reinstatement, showing that he has beaten his cocaine addiction and not used the drug during the period of his suspension. It is also recommended that the court require the Office of Bar Counsel to publish the discipline imposed by the Virginia State Bar Disciplinary Board in accordance with D.C. Bar Rule XI, § 11(c). The original matter relates to Silva's admitted failure to complete work for a client; his subsequent falsification of the signatures of others, including falsely notarizing documents; and falsely advising his client and supervising partner that work had been completed. The reciprocal discipline matter arises out of Virginia's public reprimand with terms based on Silva's guilty plea for cocaine possession in late 2002 in Arlington, Virginia. Silva's conviction was vacated upon his completion of the conditions of his sentence and probation. Rules 1.3(a), 1.3(b)(1), 1.3(c), 1.4(a), 1.4(b), 8.4(b), and 8.4(c).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE TOAN Q. THAI. Bar No. 439343. December 24, 2009. The D.C. Court of Appeals suspended Thai for 60 days, with the suspension stayed after the first 30 days in favor of probation for one year, provided that, within the first 30 days, he files an affidavit with the Board on Pro-

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BPR Requests Volunteers for Hearing Committees

The Board on Professional Responsibility (BPR) is seeking volunteers for its Hearing Committees. The committees hear lawyer discipline cases and draft reports with findings of fact, conclusions of law, and recommended sanctions.

Hearing Committee members, composed of D.C. Bar members and members of the public, are appointed periodically by the BPR and are eligible to serve two consecutive three-year terms.

Interested parties should submit a cover letter and résumé to Elizabeth J. Branda, Executive Attorney, Board on Professional Responsibility, 430 E Street NW, Suite 138, Building D, Washington, DC 20001. For more information, call 202-638-4290.

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fessional Responsibility and the Office of Bar Counsel certifying that he accepts the conditions of probation. The court further ordered that as a condition of Thai's probation, he shall take six hours of continuing legal education courses in both legal ethics and law office management, as approved by the Office of Bar Counsel, within the first six months of his probation. Finally, the court ordered that Thai pay his client restitution in the amount of $4,500, plus interest at the usual legal rate, for his failure to provide adequate representation in his client's immigration case. For purposes of restitution, interest shall be calculated from February 24, 2003, the date his client's deportation order was issued. While retained to represent a foreign national in an immigration matter before the Immigration Court, Thai failed to provide competent representation, serve his client with skill and care, represent his client zealously and diligently within the bounds of the law, act with reasonable promptness in representing his client, keep his client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and surrender papers and property (the client file) to which the client was entitled as soon as reasonably practicable. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), and 1.16(d).

Reciprocal Matters

IN RE ELMER D. ELLIS. Bar No. 423276. December 3, 2009. In a reciprocal matter from the United States Court of Appeals for the District of Columbia Circuit, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Ellis for 120 days, with reinstatement conditioned upon the satisfaction of the continuing legal education requirements imposed by the D.C. Circuit.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*