

THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Opinion 2012-10  
(November 2012)

Inquirer represented a client in several matters, including two mortgage foreclosure actions billed on an hourly fee basis, a personal injury matter handled on a contingency fee basis, and an employment-related suit against Business X on an hourly basis. Client failed to pay for services on any of the hourly cases. We have not been provided copies of the fee agreements.

The Business X case resolved towards the end of 2010, and the inquirer received a check in January of 2011 from an insurance company for Business X in the amount of \$6,250.00 as proceeds in that case, payable to client and the inquirer. The inquirer requested the client's authority to retain the proceeds to pay the outstanding balances on the three matters billed on an hourly fee basis. The client declined, so the inquirer moved for leave to withdraw his appearance in the open foreclosure case and filed suit against the client in Municipal Court in March 2011. The inquirer obtained an award against client. Judgment was recently entered against the client in amount of \$7,637.81.

After the judgment was entered the inquirer asked client again for authority to endorse client's name to the check and allow him to retain the funds in complete satisfaction of the judgment he obtained against client. Client refused.

The inquirer asks whether he can "attach the proceeds" of the client's case against Business X, by, "in essence, levying on myself." He acknowledges that he "came into knowledge of the existence of the check" while still representing the client and asks whether the fact that he became aware of the check while representing the client limits his ability to take this action.

To answer the second question first, the inquirer is not precluded from using the information he received in the course of representation to collect a debt from the client. Rule of Professional Conduct 1.6 states, in relevant part:

c) A lawyer may reveal ... information [relating to representation of a client] to the extent the lawyer reasonable believes necessary:

(3) to establish a claim ... on behalf of the lawyer in a controversy between the lawyer and the client...

As to the first question, there is nothing for the inquirer upon which to execute. He is not in possession of any funds. The actual funds to which the client and/or the inquirer would be entitled as a consequence of the resolution of the Business X litigation are still in the possession of the maker of the check. All the inquirer possesses is a check

which, if properly endorsed, would be paid to an account as directed by the joint payees, but because the joint payees do not agree on where those funds should be deposited, the check has not been endorsed, and there is no reason to think that impasse will be resolved.

For that reason, were the inquirer to execute on himself by causing execution process to issue to himself, all that he could theoretically recover is the physical piece of paper constituting the check, and that piece of paper is worthless unless the client endorses it. Moreover, the inquirer has for some time retained the check which is permitted by virtue of the attorney's retaining lien.

The Committee will however, address the issue of the inquirer's rights in the funds in the event that somehow the inquirer is able to gain possession of the funds intended to be paid to him and the client by the defendant in the Business X litigation. Those funds would be Rule 1.15 Funds, as defined by RPC 1.15(a)(10), which states, in relevant part:

Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship...

Rule 1.15(e) states:

Except as stated in this Rule **or otherwise permitted by law** or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive.... (Emphasis added.)

To the extent that there is a dispute as to any portion of the proceeds as relates to the Business X litigation only, Rule 1.15(f) requires that Inquirer hold the disputed portion in escrow. That rule states, in relevant part:

When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute.

Under these rules, the inquirer's first duty, pending resolution of the dispute, would be immediately to place the funds in escrow. Then, the inquirer could address whether he could retain the funds. If the client agreed, then of course the inquirer could retain the funds. But presumably the client would not do so, and the question would then be whether the inquirer is "otherwise permitted by law" to retain the funds, despite the client's disagreement.

That might arise out of the law of retaining liens and charging liens. As stated in the Pennsylvania Ethics Handbook (2011 Edition), pp. 154-155, "Pennsylvania law recognizes two kinds of attorneys' liens: a charging lien and a retaining lien. ... [A] charging lien is one by which a lawyer can obtain actual payment for work performed, and a retaining lien is one by which the lawyer holds security in expectation of payment." "Charging liens are divided into two subcategories: equitable charging liens and legal charging liens. An equitable charging lien gives a lawyer a right to be paid out of a fund created by the lawyer's efforts. The fund must be in the control or possession of the court..." By contrast, a legal charging lien applies to all funds of a client in the lawyer's possession and may be applied to all outstanding debts of the client owed to the lawyer, not only to debts related to efforts in a particular case." See, also, PA Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2007-300.

"A retaining lien permits a lawyer to retain money, papers, or other property in the lawyer's possession to secure payment of costs or fees from the client, irrespective of whether the money or property was produced through the efforts of the lawyer." Ethics Handbook, p. 155. See also, Formal Opinion 2007-100. The inquirer is directed to the substantive law governing retaining liens to determine whether he could retain the proceeds.

The inquirer could also at that point execute on himself. That is, regardless of whether the funds were subject to any lien, he could, in his capacity as a judgment creditor, garnish the funds held in escrow. We see no reason he could not do that. As noted above, he is under no ethical prohibition to use information gained in the course of the attorney-client relationship to his benefit in his capacity as an unpaid judgment creditor of the client.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.