

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE

Opinion 2010-1
(February 2010)

The inquirer's client (the "Client") filed an uninsured motorist ("UM") claim against his insurance company as a result of a 1995 motor vehicle accident. The Client, who was a lawyer, represented himself for over 11 years. During that span of time, the claim was never settled although an examination under oath ("EUO") was taken. The insurance company was represented by a Pennsylvania law firm. Because of a dispute with the IRS, the Client was forced to close his legal practice. He left the United States in 2000 but continued to pursue his claim from abroad despite outstanding court orders that he appear for an independent medical examination ("IME").

The inquirer's firm was retained by the Client in August, 2008 (without full knowledge of some of the above) upon referral from another lawyer. The inquirer did a substantial amount of work on the file and moved quickly to prepare the case for a UM arbitration and to satisfy the outstanding discovery requests from the insurance company. The inquirer arranged for the Client to travel to the United States to prepare for his case, appear for a court-mandated IME, EUO and the arbitration, all to occur in December, 2008.

The three arbitrators in the UM panel had been selected years before the inquirer first began representing the Client.

In December, 2008, when the Client arrived in Philadelphia, he decided on his own to replace the party arbitrator for the plaintiff who had previously been selected, and retained another individual to serve in that capacity (the "Client's Arbitrator").

The inquirer did not retain the Client's Arbitrator nor was the inquirer ever advised of the details of any agreement between the Client's Arbitrator and the Client regarding compensation.

In early December, 2008, the IME was performed and on December 16, 2008, the EUO and arbitration hearing were held.

In late January, 2009, the arbitrators issued a UM arbitration award in favor of the Client in the amount of \$40,000. The award was entered for pain and suffering only; it did not include the Client's lost wage claim. Lost wages were a part of the Client's case and, therefore, the inquirer filed a motion for reconsideration solely on the issue of an award of economic damages.

After legal briefs were filed, the three arbitrators, including the Client's Arbitrator, convened by telephone conference, and ultimately the Client's Arbitrator and the neutral arbitrator issued a 2-1 reconsideration award in the Client's favor for \$10,000, which was dissented to by the insurance company's arbitrator.

Post-arbitration motions were filed, and ultimately oral argument was heard on August 7, 2009. The court ruled in the Client's favor and ordered the insurance company to pay the additional \$10,000.

By September, 2009, the insurance company had paid the full \$50,000 UM award. All of the money was placed into escrow and distributions have been made pursuant to the contingent fee agreement and invoices presented and approved by the Client, which included the fee for the Client's medical expert, and 50% of the costs for the legal services of the neutral arbitrator (which by agreement were shared by the Client and the insurance company).

In September, 2009, the Client's Arbitrator submitted an invoice in the amount of \$1,500.00 to be reimbursed for his UM arbitrator services.

In September, 2009, numerous vitriolic e-mails were exchanged between the Client and the Client's Arbitrator. The Client has specifically instructed the inquirer in writing several times not to pay the Client's Arbitrator and threatened legal action if the inquirer does so. The Client disputes both the bill and the value of any services.

The inquirer has advised the Client that the disputed amount of money is in the escrow account and that the Client's Arbitrator would likely assert some type of attorney's lien against those funds. The inquirer also advised the Client that it is the inquirer's belief that the Client's Arbitrator is entitled to a fee for the services and that the inquirer would seek an advisory opinion from the Professional Guidance Committee of the Philadelphia Bar Association.

The inquirer advised the Client's Arbitrator of the need to assert a lien pursuant to Rule 1.15 and explained why that was necessary.

The inquirer seeks a written advisory opinion from the Guidance Committee on whether the inquirer can pay the Client's Arbitrator out of the escrowed funds.

Pennsylvania Rule of Professional Conduct (the "Rules") 1.15(f) provides that:

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.

Rule 1.15a (10) provides that:

Rule 1.15 Funds. Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. When the term "property"

appears with "Rule 1.15 Funds," it means property of a client or third person which the lawyer receives in any of the foregoing capacities.

The commentary to Rule 1.15 provides as follows:

[8] Third parties may have lawful claims against specific funds or other property in a lawyer's custody such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client unless the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. When there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

In this instance, whether or not there are substantial grounds for the dispute is not clear. The Client's Arbitrator appears to have performed the services for which he was retained, although the exact terms of his retention are not known. If the inquirer's Client will not agree to the distribution of the funds to the Client's Arbitrator, then the inquirer should put the money reserved for the Client's Arbitrator in a non-IOLTA interest-bearing account. The inquirer cannot pay the funds to either the Client or the Client's Arbitrator because the payment of the funds is the subject of a dispute between the Client and the Client's Arbitrator. If the inquirer does not wish to hold the funds in escrow pending the outcome of the dispute between the Client and the Client's Arbitrator, then the inquirer may file an *interpleader* with the court.

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 court. It carries only such weight as an appropriate reviewing authority may choose to give it.