

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey



OPINION 748

RPC 1.15 (Safekeeping Property): Lawyers' Obligations to Honor Liens

The Advisory Committee on Professional Ethics received several inquiries through the attorney ethics research assistance hotline about Rule of Professional Conduct (RPC) 1.15 (Safekeeping Property) and lawyers' obligations to honor liens. Some hotline callers have asked whether they are obligated to pay, out of settlement or award proceeds, certain liens that they have been made aware of, such as liens for outstanding medical bills, child support payments, or prior judgments unrelated to the case the lawyer is handling.

The Committee finds that, in accordance with RPC 1.15, a lawyer must honor: (1) valid and undisputed statutory liens, including liens arising under child

support laws and liens pertaining to the representation and arising under ERISA¹, Medicare, Medicaid, and Workers Compensation laws; (2) liens that the lawyer has expressly agreed to pay from proceeds of the case, such as promises to pay medical providers that are reflected in a letter of protection; and (3) liens that the client has expressly agreed to pay from the proceeds of settlement or judgment, when the client has so notified the lawyer.² With regard to other liens that are brought to the lawyer's attention, the lienholder is not "entitled to receive" the monies from the lawyer; the lawyer may release the monies to the client but must inform the client about the lien and provide appropriate advice about potential liability.

RPC 1.15 (Safekeeping Property), provides, in part:

(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.

Hence, if a lawyer is aware that a third person "has an interest" in monies held by the lawyer, the lawyer shall deliver to the third person funds that he/she/they "is entitled to receive." RPC 1.15(b) furthers the policy that lawyers must deal fairly

¹ Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. Section 1001 et seq.

² Court orders or writs of execution applicable to the funds in the lawyer's possession are, of course, required to be honored by the lawyer holding the funds.

with third parties and lawyers should not, for example, give monies to an insistent client when those monies rightfully belong to another person.

The Committee previously considered these issues in a published opinion and an informal, unpublished response to an inquiry. In Opinion 727 (September 2013), the Committee reminded lawyers that they have an obligation to safeguard monies when they are aware there is an ERISA lien on the proceeds of a matter. The lawyer must honor that lien.

In an informal, unpublished matter, the Committee considered an inquiry of a lawyer who asked whether he had an ethical duty under RPC 1.15 to safeguard, in his trust account, settlement proceeds in a personal injury matter when he was aware that some of his client's medical bills had not been paid but he had not issued a letter of protection to the medical provider and had not been notified by the client or provider of a lien on those monies. The Committee found that, in those circumstances, the inquirer lawyer was not required, under RPC 1.15(b), to hold the monies in trust.

There are several New Jersey cases on the subject. In the discipline case In re Kernan, 118 N.J. 361 (1990), the lawyer Kernan was retained by the client after a personal injury matter was settled. The client's prior lawyer sent Kernan a portion of the settlement monies that would cover unpaid medical bills. Kernan sought to negotiate compromises for these unpaid medical bills and paid all bills

except one. He had contacted this last doctor, did not succeed in reducing the bill, and did not pay him. Kernan took a fee and forwarded the balance to the client.

The Supreme Court found that the instructions from the prior lawyer to Kernan about paying the remaining medical bills were ambiguous and it was not clear that Kernan “was under definitive instructions that clearly directed him to pay [the doctor’s] bill.” Id. at 366. “[W]ithout explicit instructions or a clear understanding to [pay this remaining bill] and, in the absence of any independent, antecedent duty to [this doctor], he was not obligated to do so.” Id. at 367. The Court noted that Kernan “acted unwisely and improperly in unilaterally determining how to dispose of the escrow moneys without clarifying his client’s wishes” but decided that the ethics charges were not proven. Id. at 367-68.

The Disciplinary Review Board, in In re Burns, Docket No. DRB 18-390 (August 12, 2019), found that a lawyer did not knowingly misappropriate monies when she failed to pay a lien from settlement proceeds. The DRB did not discuss RPC 1.15(b), as the special master had found that this failure to pay the lien was knowing misappropriation and RPC 1.15(b) was not charged. The DRB stated:

Although [the lienholder] issued a notice of lien to respondent, directing her to satisfy its lien prior to the disbursement of any other funds from [the client’s] settlement monies, the record does not contain evidence that respondent agreed to serve as an escrow agent for, or to assume a fiduciary duty to, [the lienholder]. Moreover, the notice of lien notwithstanding, we cannot find, as a matter of law, that respondent had a duty to ensure that [the client] complied with her

contractual obligation to [the lienholder]. Were we to do so, every attorney would be placed in the role of an escrow agent for any party who unilaterally claimed a lien against proceeds due to the client. We, thus, determine that respondent did not knowingly misappropriate funds that [the client] owed to [the lienholder].

[In re Burns, supra, pages 23-24.]

Other jurisdictions have also discussed lawyers' obligations to honor liens.

Virginia issued an ethics opinion that states:

[I]f the third party has not taken the steps necessary in order to perfect its lien or claim to the funds in the lawyer's possession, or has no contract, order or statute establishing entitlement to the funds, the lawyer's primary duty is to the client. Under those circumstances, the lawyer may ethically follow the client's direction to disregard the third party claim and deliver the funds to the client. Of course, if the lawyer releases the funds to the client, the lawyer should inform the client of the risks involved in disregarding a third person's claim. For example, the lawyer should explain that while the lawyer may not have an *ethical* duty under the rules to deliver funds to the third party, the third party may nonetheless have a civil claim or other remedies against the client that may be pursued after the funds have been released to the client.

[Virginia Legal Ethics Opinion 1865 (November 16, 2012).]

The Committee agrees with this Virginia ethics opinion.

Further, lawyers often receive bills from medical care providers that, after review, may not comprise monies that the providers are entitled to receive. The medical provider may be attempting to "balance bill," may have improperly billed health insurance instead of Personal Injury Protection (PIP), or may have billed for medical provider services not related to the underlying accident. While these may

be valid liens, a lawyer has no ethical obligation to pay them from the proceeds of settlement or judgment absent an express agreement with the client or medical provider.

Hence, pursuant to RPC 1.15, a lawyer must honor: (1) valid and undisputed statutory liens, including liens arising under child support laws and liens pertaining to the representation and arising under ERISA, Medicare, Medicaid, and Workers Compensation laws; (2) liens that the lawyer has expressly agreed to pay from proceeds of the case, such as promises to pay medical providers that are reflected in a letter of protection; and (3) liens that the client has expressly agreed to pay from the proceeds of settlement or judgment, when the client has so notified the lawyer. With regard to other liens that are brought to the lawyer's attention, the lienholder is not "entitled to receive" the monies from the lawyer; the lawyer may release the monies to the client but must inform the client about the lien and provide appropriate advice about the client's potential liability.