ETHICAL PITFALLS ARISING OUT OF THE SETTLEMENT OF PERSONAL INJURY CASES

02-12-2021

I. CONFLICTS OF INTEREST

- **Rule 1.7. Conflict of Interest: Current Clients**

  (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

  (1) the representation will involve the lawyer in representing differing interests; or

  (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

NY CLS Rules Prof Conduct R 1.7

I. CONFLICTS OF INTEREST

- **Rule 1.7. Conflict of Interest: Current Clients**

  (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

  (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

  (2) the representation is not prohibited by law;

  (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

  (4) each affected client gives informed consent, confirmed in writing.

NY CLS Rules Prof Conduct R 1.7

In action arising from 2-car collision in which infant plaintiff did not assert any claims against his co-plaintiff mother who was driving car of which he was passenger but defendants associated with other car interposed counterclaim against her, plaintiffs' attorney was disqualified from representing either infant plaintiff or his mother even though mother was represented by separate counsel on counterclaim, because same attorney could not properly represent potentially differing interests of mother driver and infant passenger inasmuch as passenger should be advised to assert claim against driver, and mother's consent did not cure conflict.

Shaikh v Waiters, 185 Misc. 2d 52, 710 N.Y.S.2d 873, 2000 N.Y. Misc. LEXIS 272 (N.Y. Sup. Ct. 2000).

Attorney violated former DR 1-1-2(a)(5) and (7) when he executed retainer agreements with a driver and a passenger who were injured in an automobile accident in the driver's automobile, and did not disclose potential conflicts to clients and did not obtain consent to represent both. Attorney withdrew his representation from driver shortly before filing a lawsuit against him on behalf of the injured passenger.

Matter of Lazroe, 38 A.D.3d 17, 825 N.Y.S.2d 389, 2006 N.Y. App. Div. LEXIS 15642 (N.Y. App. Div. 4th Dep't 2006).

Despite the prohibition in former DR 5-105(A), N.Y. Comp. Codes R. & Regs. tit. 22, § former DR 5-105, and the provisions of in former DR 5-105(C), N.Y. Comp. Codes R. & Regs. tit. 22, § former DR 5-105, lawyers violated their ethical duties under the Disciplinary Rules when they represented a client, who was a passenger, and her husband, who was the driver, in their personal injury action against another river, and malpractice resulted. The husband was driving the car, the client was his passenger and did not see what happened, her injuries were greater for his and exceeded the limits of the other driver's policy, and it was clear that the lawyers, from several of their actions, had recognized the risks of their dual representation. LaRusso v Katz, 30 A.D.3d 240, 818 N.Y.S.2d 17, 2006 N.Y. App. Div. LEXIS 8039 (N.Y. App. Div. 1st Dep't 2006).

NY CLS Rules Prof Conduct R 1.7

RULE 1.14. CLIENT WITH DIMINISHED CAPACITY

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

NY CLS Rules Prof Conduct R 1.14

RULE 1.14. CLIENT WITH DIMINISHED CAPACITY

- The proposed infant compromise order seeks court authorization to pay, from the infant's portion of the net proceeds, the sum of $5,580 to Cardinal for an advance obtained by Ms. Trelles. This request is denied.
- In the initial submission, plaintiff's counsel represented this amount to be "to repay a loan made by Cardinal Litigation Services to Jennifer Trelles to secure an apartment." This "loan" was memorialized in a purchase and sale agreement. Notably, in her affidavit submitted in support of the application, Ms. Trelles attested that the monies secured from Cardinal was for "payment of rent, car insurance, two car payments and phone bill and purchase of food." (See ¶ 12 [***43] of Trelles' aff dated Mar. 13, 2018.) When queried, counsel advised that the affidavit misstated the purpose of the "loan." Regardless, for the reasons stated herein, the request is improper. Indeed, the purchase and sale agreement specifically denies the monies advanced being a loan.
- Rather, the purchase and sale agreement revealed that on February 9, 2016, Ms. Trelles received $4,500 from Cardinal as an advance against a settlement of "her" claims.

(S.D. v St. Luke's Cornwall Hosp., 63 Misc 3d 384, 411 [Sup Ct, Orange County 2019])

RULE 1.14. CLIENT WITH DIMINISHED CAPACITY

Summary

- The court is extremely troubled by the approach of plaintiff's counsel to this matter. There can be no dispute that counsel has attempted to elevate consideration of his fees and costs and the fees of his appellate counsel and the litigation fees of his brother's litigation funding company above those of his brain injured infant client. This court refuses to stand idly by and allow counsel to skirt the fringes of the ethical rules pertaining to these matters and to profit therefrom.
- Simply put, brain injured children should not be treated by their lawyers (or lawyer's relatives or colleagues) as cash cows to be milked with excessive, unwarranted and undisclosed fees. Hence, the request for reimbursement of assumption of risk charges asserted by Cardinal is denied and the financing agreement is voided as to those charges. Ms. Trelles lacked authority, absent court approval, to pledge such [***52] exorbitant percentages of any recovery away.

(S.D. v St. Luke's Cornwall Hosp., 63 Misc 3d 384, 416 [Sup Ct, Orange County 2019])

RULE 1.14. CLIENT WITH DIMINISHED CAPACITY

- Contrary to the appellant's contention, the guardian lacked authority to execute the retainer. Although HN1 a guardian appointed pursuant to Mental Hygiene Law article 81 "has the inherent authority to retain counsel" (Matter of Theodore T. v [*1038] [Michael T.-Diana C.T.], 83 AD3d 852, 853, 920 N.Y.S.2d 688), here, the guardian executed the retainer on August 20, 2014, prior to her commencement of this proceeding in October 2014, and her appointment as guardian on February 4, 2015. Further, there is no indication in the record that the guardian possessed actual or apparent authority to execute the retainer on the IP's behalf (see generally Hallock v State of New York, 64 NY2d 224, 231, 474 N.E.2d 1178, 485 N.Y.S.2d 510). Accordingly, we agree with the Supreme Court's determination, in effect, denying that branch of Emma's motion which was [***5] to approve an attorney's fee to the appellant in the sum of $335,133.33.

(Matter of Christopher A., 180 AD3d 1036, 1037-1038 [2d Dept 2020])

NY RULES OF PROFESSIONAL CONDUCT

- **RULE 1.1: COMPETENCE**

  (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

  (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

RULE 1.1: COMPETENCE

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- In 1982, Christina Grillo was injured at birth at a hospital in Texas. She suffered quadriplegia, blindness, and seizures allegedly resulting from negligence of the attending physician. Life care plans prepared for the child pegged the cost of caring for the child over her lifetime at about $20 million.

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- During the pendency of a medical malpractice lawsuit against the physicians, the defendants offered a structured settlement costing $1.2 million that would, over the lifetime of the child, have paid out more than $100 million. The child's representatives rejected the structured settlement proposal and, in 1990, settled the case for a cash payment of $2.5 million. The cash settlement was recommended by both the child's attorney and by the attorney appointed by the court as guardian ad litem.

Grillo v Pettiete et al., 96-45090-92, 96th District Court, Tarrant County, Texas.

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- Like most lump sum settlements, Christina Grillo's cash settlement was completely gone within a few short years.
- The Grillo family sued the child's attorney and the guardian ad litem for negligence and legal malpractice, arguing that the child's case should never have been settled for cash, and that the attorneys should have insisted upon a structured settlement.
- Eventually the defendants in the legal malpractice case settled for a combined amount in excess of $4 million (a sizeable portion of which was structured!)

Grillo v Pettiete et al., 96-45090-92, 96th District Court, Tarrant County, Texas.

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- STRUCTURED SETTLEMENTS IN GENERAL – BENEFITS :
  1. Payments are Always STATE and FEDERAL tax exempt; IRC §§ 104(a)(2), 130
  2. Structured Settlements Provide Benefits that the Plaintiff Cannot Outlive
  3. Structured Settlements are the only Financial Product to use "Rated Ages" to Enhance Lifetime Benefits;
  4. Structured Settlements Provide Protection from Dissipation and from the Claims of Creditors: In Swimelar v. Baker (In re Baker), 604 F.3d 727, 728, 2010 U.S. App. LEXIS 9871; Bankruptcy case-Held-Structure protected.

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- STRUCTURED SETTLEMENTS IN GENERAL – BENEFITS:
  5. Structured Settlements Help to Maintain MAGI Medicaid Coverage: Structured Settlements do not count against eligibility Affordable Care Act extension version of Medicaid (MAGI Medicaid);
  6. Structured Settlements Help to Reduce/Eliminate Trustees' Commissions, Management Fees, Taxes and Accounting Fees- No annual trustee fees or asset management fees on structured component of settlement;
  7. Provide Guaranteed Benefits Which Pass Directly to Beneficiaries Outside of the "Estate"- Generally, not subject to Estate creditors and MEDICAID ESTATE RECOVERY.

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- STRUCTURED SETTLEMENTS IN GENERAL – BENEFITS:

  8. Structured Settlements Can Provide Guaranteed Discounted Funding for Replacement of Hard Assets:

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

For : Suzy Smith			Female, Date of Birth: Unknown, Age: 15
Benefit Description	**Guaranteed Benefit**	**Expected Benefit**	**Cost**
• Handicapped Accessible Van Age 25 • **Guaranteed Lump Sum -** $50,000.00 paid on 04/10/2026.	$50,000.00	$50,000.00	$47,985.50
• Handicapped Accessible Van Age 30 • **Guaranteed Lump Sum -** $53,000.00 paid on 04/10/2031.	$53,000.00	$53,000.00	$44,685.36
• Handicapped Accessible Van Age 35 • **Guaranteed Lump Sum -** $55,000.00 paid on 04/10/2036.	$55,000.00	$55,000.00	$40,352.40
• Handicapped Accessible Van Age 40 • **Guaranteed Lump Sum -** $60,000.00 paid on 04/10/2041.	$60,000.00	$60,000.00	$38,753.40
• Handicapped Accessible Van Age 45 • **Guaranteed Lump Sum -** $63,000.00 paid on 04/10/2046.	$63,000.00	$63,000.00	$35,642.88
• Handicapped Accessible Van Age 50 • **Guaranteed Lump Sum -** $68,000.00 paid on 04/10/2051.	$68,000.00	$68,000.00	$33,347.88
• Handicapped Accessible Van Age 55 • **Guaranteed Lump Sum -** $70,000.00 paid on 04/10/2056.	$70,000.00	$70,000.00	$29,756.30
• Handicapped Accessible Van Age 60 • **Guaranteed Lump Sum -** $75,000.00 paid on 04/10/2061.	$75,000.00	$75,000.00	$27,635.25
Subtotal For: Suzy Smith	**$494,000.00**	**$494,000.00**	**$298,158.97**

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- STRUCTURED SETTLEMENTS IN GENERAL – BENEFITS:

  9. Structured Settlements Can Provide Guaranteed Discounted Funding for College Planning

Settlement Proposal for: Suzy`s College Plan

Owner State :	Delaware (0.00% tax)	Quote Date:	02/08/2021
Rate Series:	RB210108	Purchase Date:	03/10/2021
Rates Effective:	01/08/2021	Expiration Date:	02/15/2021
Case Type:	Assigned		

For : Suzy Smith — **Female, Date of Birth: Unknown, Age: 5**

Benefit Description	Guaranteed Benefit	Expected Benefit	Cost
• College at age 18 • **Period Certain Annuity** - $15,000.00 payable semi-annually, guaranteed for 4 year(s) which is 8 payments, beginning on 09/10/2034 at age 18, with the last guaranteed payment on 03/10/2038 at age 22.	$120,000.00	$120,000.00	$87,940.20
Subtotal For: Suzy Smith	**$120,000.00**	**$120,000.00**	**$87,940.20**

II. THE FAILURE TO DISCUSS STRUCTURED SETTLEMENTS

- STRUCTURED SETTLEMENTS IN GENERAL – BENEFITS:

  10. Structured Settlement should not be counted for Financial Aid applications as an Asset owned or as Income. Not a disqualification event.- Future Payment streams are not owned by the parent or student.

41. As of today, what is your (and spouse's) total current balance of cash, savings, and checking accounts? **Don't include** student financial aid. $

42. As of today, what is the net worth of your (and spouse's) investments, including real estate? **Don't include** the home you live in. **See Notes page 9.** $

43. As of today, what is the net worth of your (and spouse's) current businesses and/or investment farms? **Don't include** a family farm or family business with 100 or fewer full-time or full-time equivalent employees. **See Notes page 9**. $

II. THE FAILURE TO REVIEW STRUCTURED SETTLEMENTS

- (Lyons by Lyons v Med. Malpractice Ins. Assn., 237 AD2d 416, 416-417 [2d Dept 1997])
  - In *Lyons*, the defendant offered $265,000 in cash and offered a structured settlement annuity which would pay
  - $3,000 per month for the plaintiff's life, with 20 years guaranteed. The represented cost for this structure was
  - $675,180.
  - The total represented settlement value was $940,180.
  - The plaintiff's attorney accepted this at face value and calculated his fee based upon this represented value.

II. THE FAILURE TO REVIEW STRUCTURED SETTLEMENTS

- The Truth:
- Defendants conducted medical underwriting and obtained an Age Uprate, which lowered the actual cost of the structured annuity to $409,544.50 (not the amount represented to be).
- TOTAL Settlement Value is really $674,544.50
- Plaintiff's Attorneys are sued for Malpractice. Carrier is sued for Fraud.

(Lyons by Lyons v Med. Malpractice Ins. Assn., 237 AD2d 416, 416-417 [2d Dept 1997])

RULE 2.1. ADVISOR

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

  NY CLS Rules Prof Conduct R 2.1

- Have the deep conversation with your clients or refer them to someone who will.
- Documents the conversation with a "Grillo Waiver"

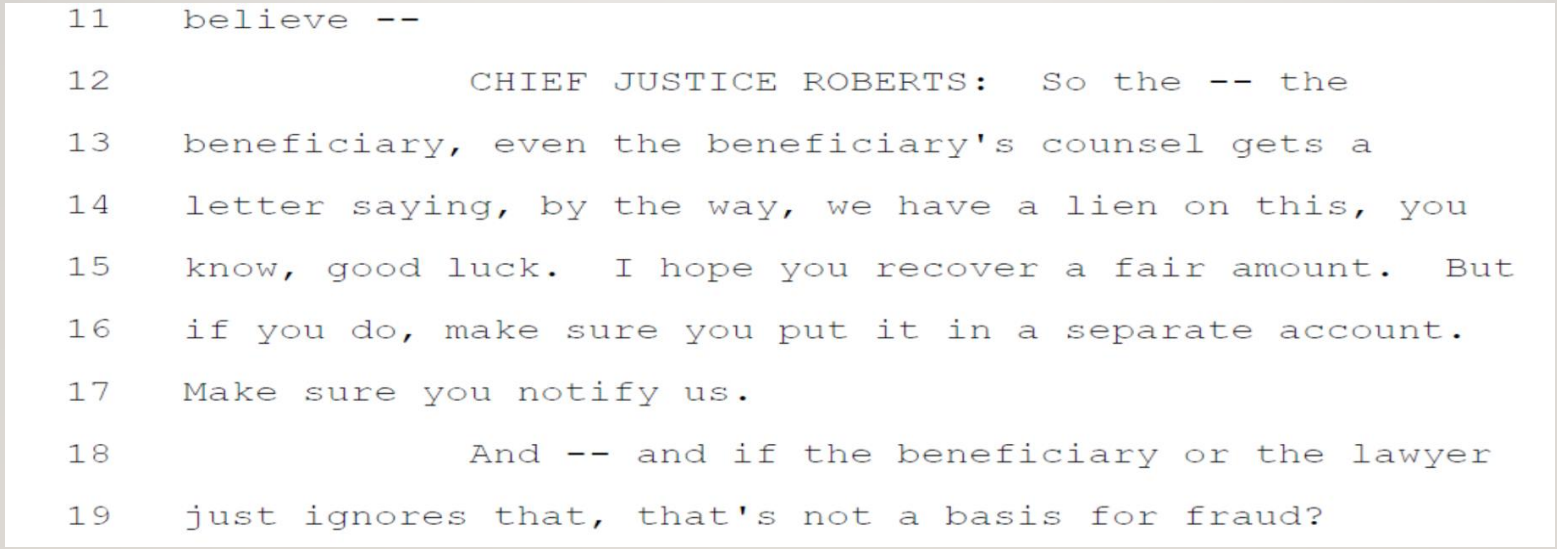
THE "GRILLO WAIVER"

Document in a writing signed by the client that:

- The benefits of structured settlement were explained;
- The dissipation and investment risks of cash settlements were explained;
- The tax consequences and guaranteed component were generally explained;
- The potential loss of public benefits was explained;
- The settlement decision not to structure is irrevocable;
- Referrals for competent financial and tax advice were offered.

III. THE FAILURE TO ADDRESS LIENS APPROPRIATELY

- Rule 1.15. Preserving Identity of Funds and Property of Others;



believe --

CHIEF JUSTICE ROBERTS: So the -- the beneficiary, even the beneficiary's counsel gets a letter saying, by the way, we have a lien on this, you know, good luck. I hope you recover a fair amount. But if you do, make sure you put it in a separate account. Make sure you notify us.

And -- and if the beneficiary or the lawyer just ignores that, that's not a basis for fraud?

Montanile v. Bd. of Trs. Of the Nat'l Elevator Indus. Health Ben. Plan, 575 U.S. 934, 2015 U.S. LEXIS 2305, 135 S. Ct. 1700 (2015)

THE FAILURE TO ADDRESS LIENS APPROPRIATELY

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

NY CLS Rules Prof Conduct R 1.15

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;
(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

NY CLS Rules Prof Conduct R 1.15

NY CLS RULES PROF CONDUCT R 1.15, COMMENT

- [4] Paragraph (c)(4) also recognizes that 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 until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, 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.

B. Ethics Opinions Regarding Rule 1.15

1. NYS Bar Association Opinion 717

"If a provider undisputedly has a valid lien through statute or assignment by the client, the attorney should pay the provider directly from the proceeds of the check. If the client disputes the validity of the lien or assignment, pending resolution of the dispute the attorney should hold the disputed funds while disbursing any funds that are not in dispute. If the check is payable to the client and the client refuses to endorse it for deposit in the attorney's trust account, the lawyer should hold the check itself until the dispute is resolved. An interpleader action would be an appropriate procedure to resolve the dispute. If the provider with a valid lien is no longer in business and reasonable search locates no successor with a valid claim to the entity's assets, the attorney should consider several options, including applying to the Supreme Court for an order directing the money to be paid to the Lawyers' Fund for Client Protection"

In *Kaiser Foundation Health Plan Inc. v. Aguiluz*, No. A070477 (Calif. App., 1st Dist., July 10, 1996), a personal injury lawyer disbursed the entire amount of a settlement to his client even though the attorney knew that the client had agreed to repay his health care provider out of anticipated settlement proceeds. The court therefore held that the attorney was personally liable to the health care provider, and upheld a $23,000 judgment that the health care provider had obtained against the attorney in the trial below.

. . .

The essence of these opinions is that an attorney holding settlement proceeds in escrow may not disburse any disputed proceeds until the dispute is resolved one way or another. It is beyond the jurisdiction of this Committee to determine whether a given lien is valid, because the validity of a lien is a question of law."

C. Is There a Duty to Notify Potential Lienholders of a Pending Claim?

- The Rules make it clear that there is a duty to notify third parties with "valid claims" upon receipt of the settlement proceeds. Compliance with that rule, however, is fraught with potential problems as described above.

- But is there a duty to notify a potential lienholder of a pending personal injury claim, thus placing the third party on alert and giving it a chance to assert its claim?

- Your client may have a contractual obligation to do so. Regardless, in most instances, communication with potential lienholders may be required to actually determine if a given claim is "valid," thus triggering the ethical obligations imposed by Rule 1.15.

Trs. of the 1199SEIU Nat'l Ben. Fund for Health & Human Serv. Emples. v. Cotto

- This case is disturbing for a number of reasons.
  - The court grants 100% recovery of a $25,000 (limits of coverage) automobile settlement to 1199SEIU Health Fund, on a case where shoulder surgery was performed, and a number of other serious injuries were inflicted on the Plaintiff*.
  - The Court rejected the "Common fund Doctrine" argument stating:
    - "In other words, the plan expressly limits the common-fund doctrine by providing that the Fund's recovery takes priority over the payment of the defendants' attorneys' fees. "Neither general principles of unjust enrichment nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the applicable contract." McCutchen, 569 U.S. at 106. Therefore, the defendants are not entitled [*17] to recover their attorneys' fees until the Fund is paid in full." Cotto, 2020 U.S. Dist. LEXIS 178207 at *16-17.... Click to read more

Trs. of the 1199SEIU Nat'l Ben. Fund for Health & Human Serv. Emples. v. Cotto

"Defendants are directed to turn over the entire amount of the settlement recoveries, up to $38,262.19, to the plaintiff immediately upon receipt of this order or as soon as such funds become available."

Trs. of the 1199SEIU Nat'l Ben. Fund for Health & Human Serv. Emples. v. Cotto, 2020 U.S. Dist. LEXIS 178207, *17, 2020 WL 5763942, *6 (E.D.N.Y. Sept. 28, 2020) (click to download the decision).

E. Outsourcing Lien Resolution Services.

1. NYCLA Ethics Opinion 739: Fees for specialized counsel retained to negotiate a plaintiff's complex Medicare, Medicaid, or private health insurance lien may be charged to the settlement as a disbursement under certain conditions.

- "It is ethically permissible for a plaintiff's personal injury attorney to retain a specialty firm to handle the resolution of a Medicare, Medicaid or private healthcare lien on a settled lawsuit. Under the following conditions, the fee for said outside service may be charged as a disbursement against the total proceeds of the settlement: (a) at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without any overage or surcharge) and must be reasonable; (c) the transaction results in a net benefit to the client on each lien negotiated; (d) the transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product."

contracting counsel's services are billed as an expense, they should not be greater than the actual cost incurred, plus those costs that are associated directly with the provision of services, unless there has been a specific agreement with the client otherwise.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling."

IN THE MATTER OF ROBERT J. MULLER, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, PETITIONER

The Referee found that, in late March 2003, respondent's law office prepared a settlement statement indicating that respondent's law firm had, inter alia, taken a legal fee from the settlement proceeds in the amount of $137,430.36, pursuant to Judiciary Law § 474-a, and set aside funds in the amount of $97,701.64, which were maintained in the law firm's trust account and earmarked for the Medicare lien.

MATTER OF MULLER CONTINUED

- The Referee further found that Medicare thereafter agreed to compromise the lien and, on April 29, 2003, respondent remitted to Medicare funds in the amount of $60,000 in full satisfaction of the lien. The Referee found that, on May 27, 2003, respondent caused his law firm to receive an additional legal fee in the amount of $30,000 from the settlement proceeds that previously had been earmarked for the Medicare lien, and respondent remitted to the clients the residual balance of the earmarked funds, or $7,701.64.

MATTER OF MULLER CONTINUED

- We confirm the factual findings of the Referee and conclude that respondent has violated the following former Disciplinary Rules of the Code of Professional Responsibility:**2
- DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7])—engaging in conduct that adversely reflects on his fitness as a lawyer;
- DR 9-102 (a) (22 NYCRR 1200.46 [a])—misappropriating client funds; and
- DR 9-102 (c) (4) (22 NYCRR 1200.46 [c] [4])—failing to pay or deliver to a client in a prompt manner as requested by the client the funds, securities or other properties in his possession that the client is entitled to receive.

E. Outsourcing Lien Resolution Services.

1. NYCLA Ethics Opinion 739: Fees for specialized counsel retained to negotiate a plaintiff's complex Medicare, Medicaid, or private health insurance lien may be charged to the settlement as a disbursement under certain conditions.

- "It is ethically permissible for a plaintiff's personal injury attorney to retain a specialty firm to handle the resolution of a Medicare, Medicaid or private healthcare lien on a settled lawsuit. Under the following conditions, the fee for said outside service may be charged as a disbursement against the total proceeds of the settlement: (a) at the outset of the representation, the Retainer Agreement with the client provides that the attorney may do so, and the client has given informed consent thereto; (b) the actual charges are passed on to the client at cost (without any overage or surcharge) and must be reasonable; (c) the transaction results in a net benefit to the client on each lien negotiated; (d) the transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Division rules; and (e) the referring attorney remains responsible for the overall work product."

contracting counsel's services are billed as an expense, they should not be greater than the actual cost incurred, plus those costs that are associated directly with the provision of services, unless there has been a specific agreement with the client otherwise.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling."

Finally, the plain language of Judiciary Law § 488(2](d) and 22 NYCRR 1022.31 affords a good faith basis for a personal injury attorney to believe that the fees charged by an outside lien resolution firm may not constitute an expense "of litigation," an expense or disbursement "chargeable to the enforcement of the claim or prosecution of the action" or a cost or expense "of the action" (emphasis added). Rather, "litigation," "claim," and "action" could be understood as relating to the personal injury aspect of the matter, and the lien resolution firm' s fee could be considered independent of that aspect.

Excerpt from Private Opinion Secured by Precision Lien Resolution, LLC.

WHO SHOULD PAY FOR OUTSOURCED LIEN RESOLUTION SERVICES?

Although the opinion suggests it is a common practice for fees for services in the fields of bankruptcy, etc., to be charged as a disbursement in connection with the personal injury case, my inquiry reveals that the local norm is for counsel in the ancillary: field to be compensated based on independent arrangements made with the injured party and for that compensation not to be charged as a disbursement against the recovery on the personal injury claim. See Rule of Professional Conduct 1.5(a)(3). Based on the analysis in Opinion 739 there is no sound reason why similar arrangements cannot be made in regard to lien resolution services handled by attorneys.

Excerpt from Private Opinion Secured by Precision Lien Resolution, LLC.

CONCLUSION

For the reasons discussed above, it is my opinion that personal injury attorneys in New York, as well as Precision, properly can conform their conduct to Opinion 739. More particularly, there is a good faith basis to believe that where the five criteria addressed in that opinion are satisfied, it is legally and ethically permissible for Precision to charge and accept a fee for resolving liens that is separate from, and in addition to, the contingent fee earned by and paid to the personal injury lawyer whom the plaintiff engaged principally to handle the liability and damages elements of the case.

Excerpt from Private Opinion Secured by Precision Lien Resolution, LLC.

CONCLUSION

1. Be diligent throughout the case.
2. Do not rush to the Release possibly overlooking the best interests of your client.
3. Refer multiple claimants of the same fund out, where necessary. If not, at lease secure a detailed conflict waiver.
4. With children and incompetents (CPLR 1206 Terms), be sure person signing the retainer has legal authority to sign.
5. Secure all lien information early and often (with rare exceptions).

CONCLUSION

6. If lien is problematic – outsource it!
7. Always explain opportunity to structure part of the settlement and the unique benefits of structures.
8. Outsource the consult regarding structures and future needs to an expert.
9. If the client declines to structure, use "Grillo Waiver."

Thank You

Paul K. Isaac, Esq.
Paramount Settlement Planning, LLC
Precision Lien Resolution, LLC