

**MULTISTATE PERFORMANCE TEST
FEBRUARY 2013**

The MPT Question administered by the State Board of Law Examiners for the February 2013 Maryland bar examination was *In Re Wendy Martel*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “Point Sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website.

Materials for an unsuccessful applicant: An applicant who was unsuccessful on the February 2013 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the February 2013 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of their answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is July 2, 2013.

Materials for anyone other than an unsuccessful applicant: Anyone else may obtain the MPT Question and the “point sheet” only by purchasing them at the NCBE Online Store.

Use the following link to access the NCBE Online Store: www.ncbex2.org/catalog/

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REPRESENTATIVE GOOD ANSWER 1

To: Wendy
From Applicant
Re: Disbursement of Award
Date Feb, 26, 2012

Question Presented:

What is the appropriate course of action when a client requests their attorney to interfere with the contractual obligation to the previous attorney with regard to distribution of a contingency fee?

Answer:

The attorney presented with this ethical problem has a duty to inform the client about the relevant limitation to the lawyer's conduct, to not engage or assist client in criminal or fraudulent conduct and disburse only the portion of the award that the client is entitled to and protect against any wrongful interference by the client to the previous attorney.

Facts:

Our firm has been retained by Wendy to draft an opinion letter with regard to her client's request to not distribute to the previously discharged attorney the portion of the contingency fee recovered. Blair is the previously discharged attorney who filed the complaint and engaged in limited discovery prior to being discharged based solely on personal matters. Wendy has obtained a settlement in the amount of \$600,000 and has a contingency fee agreement with Mr. Panelli in the amount of 30%. Blair similarly has a contingency fee agreement in the amount of 30% of the settlement. Mr. Panelli has sent an email indicating that Wendy is forbidden from telling Blair anything about the settlement or to give her anything.

Discussion:

Scope of Representation:

Rules of Professional Conduct prohibit a lawyer from counseling a client to engage, or assist a client in conduct that the lawyer knows to be criminal or fraudulent. (RPC 1.2(d)). In this matter, Wendy is being instructed by her client to withhold knowledge of the settlement of Panelli's claim. This is clearly unlawful interference with a contractual obligation and Wendy has a duty to counsel and or assist the client in understanding that his actions may constitute unlawful interference with a contractual obligation and the consequences.

Communications:

Rule 1.4 requires the lawyer to consult with the client about any limitation of the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the RPC or other law. In this matter, it is against the rules of professional conduct and the laws of the state for the lawyer to engage in the client's instructions. Wendy must explain this situation and her obligation to the other attorney and advise her client that she can

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disclose this information. RPC 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these rules or other law."

Confidentiality of Information:

A lawyer may reveal information relating to the representation of a client to protect the financial interests of another to no greater extent than necessary to protect the financial interests of Blair. (1.6(b)(2) and comment 16.). Therefore, Wendy may reveal the information to Blair that there was a settlement of \$600,000, but nothing about the instructions from Dr. Panelli.

Duty to Third Parties:

An attorney who has knowledge of the existence of a Third Party's claim has a duty to protect that interest. Rule 1.15: An attorney may have a duty to protect such a third-party claim against wrongful interference by the client, when the attorney entered into a fiduciary relationship with the third party. (RPC 1.15) In this matter, Wendy owes a fiduciary duty to Blair because Wendy has knowledge of Blair's interest and must deal with Blair with utmost good faith and fairness to disclose to Blair relating to her interest in the funds (Johnson v. State Bar.)

Greebaum is distinguished in that the third party was a doctor entitled to medical bill reimbursement from the client. The attorney must disburse all funds not in dispute that the client is entitled to receive. In this matter, only the 1/3 contingency is in dispute. Thus, the other 2/3 of the settlement (\$400k) must be disbursed immediately to the client.

Safekeeping Property:

A lawyer shall withhold disputed funds separately until the dispute is resolved. In this matter, Wendy must promptly distribute Panelli's portion of the settlement and hold onto Blair's portion of the fee in a separate account. Wendy shall not under any circumstances give Panelli Blair's portion of the fee. Because a dispute exists between Wendy and Blair as to the amounts of Blair's fee then Wendy must hold the funds until the dispute is resolved.

Distribution of Award:

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. The contingency specified may occur after the attorney's representation. In this matter, the contingency or recovery of damages have occurred and Blair is entitled to her fee. Blair's fee is limited to quantum meruit, the reasonable value of the services rendered during his or her representation paid as a share of the total fees payable to the successor attorney. Share of the total fees, indicates that a percentage of the fee should be paid to Blair as her share. This could include none or all of the fee and the trial courts are to strike an appropriate balance. (Clements v. Summerfield) In this matter, Wendy should seek the assistance of the court to determine Blair's fee.

Conclusion:

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Wendy must counsel Panelli with regard to Blair's interest in the fee and explain that she cannot engage in the conduct as he requested. Wendy must advise Panelli that his interference with Blair's fee could result in a lawsuit against him for interference with contract by Blair or breach of contract. Wendy owes a fiduciary duty to Blair as a third party which has an interest in the contingency fee agreement. Wendy may breach the confidences of Panelli by disclosing to Blair the settlement only to the extent necessary to determine Blair's proportional interest. Wendy shall distribute to Panelli his entitled award promptly and seek the guidance of the court regarding Blair's fees, if Panelli and Blair cannot resolve that issue.

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REPRESENTATIVE GOOD ANSWER 2

To: Wendy Martel, Esq.
From: Examinee
Re: Opinion Letter
Date: February 26, 2013

I. Question Presented

How, if at all, should a successor attorney disburse funds obtained by settlement of client's case where the discharged attorney has a lien on the proceeds and the client refuses to allow disbursement to discharged attorney and forbids disclosure of settlement to discharged attorney.

II. Concise Answer

- 1.) Consult with Dr. Panelli about Ms. Martel's limitation on her conduct. Specifically, Ms. Martel must explain her fiduciary duty to Ms. Blair and the legitimacy of Ms. Blair's claim on the proceeds; Ms. Martel must also advise Dr. Panelli that withholding the funds and information about the settlement may constitute fraud, or breach of contract and attempt to counsel Dr. Panelli out of this conduct. Advise Dr. Panelli that Ms. Martel cannot represent either him or Ms. Blair in the dispute as to Ms. Blair's fees.
- 2.) Disclose material information to Ms. Blair and advise her that she cannot represent her or Dr. Panelli in the dispute.
- 3.) Advise both Ms. Blair and Dr. Panelli that Ms. Martel will retain the disputed funds in a trust until they resolve the dispute; in absence of such an agreement Ms. Martel should seek guidance from the court.
- 4.) To the extent that funds are not disputed, Ms. Martel can disburse them to Dr. Panelli.
- 5.) Ms. Martel should be wary of disbursing any funds to herself because she may have to pay Ms. Blair's fees out of hers.

III. Analysis

A. Attorney's Obligation to 3rd Parties Under the Franklin Rules of Professional Conduct (RPC), attorneys owe a number of duties to third parties. Specifically, an attorney shall promptly notify third persons with an interest in funds when such funds have been received. RPC 1.1 5(d). Additionally, in the course of representing a client, an attorney must not knowingly make a false statement of material fact to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting fraudulent acts by a client. RPC 4.1.

Under Greenbaum an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. However, Greenbaum emphasized that an attorney must only disburse such funds "to which the client is entitled." Specifically, where any portion of the funds is in conflict those funds are not required to be disbursed, even when contrary to the client's instructions.

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Ethics Opinion No. 2003-101 applied the holding in Greenbaum and found that where an attorney has knowledge of the existence of a third party's interest in the funds in question, the attorney has a fiduciary duty to deal with the third party with "utmost good faith and fairness" and also to disclose material facts relating to the third party's interest in the funds. In so advising, the Ethics Committee relied on Johnson, where an attorney was found to have subjected herself to the fiduciary duties owed to a chiropractor who had a lien on her client's recovery. Accordingly, a disbursement of the disputed funds to the client would make the attorney liable for compensatory or even punitive damages and would also make the client liable for breach of contract.

Under the instant facts, Ms. Martel knew that Dr. Panelli had previously retained Ms. Blair on a contingency basis, that Ms. Blair had executed a statutory lien against Dr. Panelli's judgment secured by a security interest and Ms. Martel obligated herself to pay any claim Ms. Blair might have out of the \$600,000. Accordingly, Ms. Martel owes fiduciary duties to Ms. Blair and must protect Ms. Blair "against wrongful interference by the client" and may also not refuse to disclose the material facts relating to the settlement. RPC 1.15 .

B. Attorney's Obligation to Client

1. Confidentiality and Scope of Representation

Under the Franklin Rules of Professional Conduct (RPC), attorneys owe a number of duties to their clients. Specifically, an attorney must abide by a client's decisions concerning the objectives of representation, but must also refuse to counsel a client to engage in conduct that the attorney knows is criminal or fraudulent. RPC 1.2. Additionally, an attorney may not reveal confidential information, in the absence of the client's informed consent - almost without exception. RPC 1.6(a): cmt. 2. However, exceptions are permitted where the attorney reasonably believes that revealing the information is necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of another. RPC 1.6(b)(2).

Here, Dr. Panelli has instructed her not to disclose any information regarding the settlement to Ms. Blair and not to give Ms. Blair any portion of the proceeds, despite the statutory lien and knowledge of Ms. Blair's work on the case. Accordingly, Ms. Martel is obligated to keep the information confidential and to do as her client instructs.

However, such conduct would constitute fraud. The facts establish that Ms. Blair's work was of adequate quality, that she filed the complaint on Dr. Panelli's behalf and initiated discovery and executed a statutory lien against the potential proceeds of Dr. Panelli's case. Accordingly, not disclosing the information to Ms. Blair would effectively conceal the settlement and hide from Ms. Blair the potential proceeds she is entitled to. Under these facts Ms. Martel has a fiduciary obligation to disclose the settlement to Ms. Blair, she may be justified in disclosing the information relating to the settlement to prevent fraud, but may only disclose as much as necessary to advise Ms. Blair of the settlement proceeds.

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2. Distribution of Funds

As explained above, an attorney is obligated to disburse all funds to which the client is entitled. However, where an attorney gains possession of property in which two or more persons claim interests, the property shall be kept separate by the attorney until the dispute is resolved and the attorney shall promptly distribute all portions of the property as to which the interests are not in dispute. In *Clements*, the court explained that a former attorney who had a contingency agreement only has a claim to his fees after the client retains recovery - before then the cause of action is not ripe. However, after a client gains a recovery, the former attorney may be entitled to fees based on *quantum meruit*, or the reasonable value of the services rendered during his representation - paid as a share of the total fees payable to the successor attorney. *Clements*. Though not decided by the *Clements* court, a footnote explained that should a successor attorney subsequently obtain recovery, the discharged attorney would be entitled to receive whatever share, if any of the fee received by the successor attorney that the court determined to be the reasonable value of his services under the circumstances. *Clements*, fn. 1. However, the *Clements* court did not explain which party would be the proper defendant; in other words whether the discharged attorney would bring an action against the client or the successor attorney.

In Ethics Opinion No. 2003-101 the Committee emphasized that it would be risky for an attorney to unilaterally determine how much to pay to the third party. Further, because the reasons why the client challenges the disbursement may not be known to the attorney, may not be legitimate or may be ill advised. Thus, the Committee explained that it would be ill-advised to prejudge the merits of such a dispute and act in favor of either the client or the third party.

Here, 2/3 of the settlement which belongs to Dr. Panelli must be immediately disbursed to him because that portion is not in dispute. The facts establish that Ms. Blair's work was of adequate quality, that she filed the complaint on Dr. Panelli's behalf and initiated discovery - Ms. Blair would likely be entitled to recovery under a *quantum meruit* theory, but Ms. Martel should seek the court's guidance to determine the amount. Thus, the disputed amount (1/3) must be held in a separate account until the dispute can be resolved.

2. Advice to Client

Ms. Martel must consult with Dr. Panelli about her limitations on following certain aspects of Dr. Panelli's instructions. Specifically, Ms. Martel must explain her fiduciary duty to Ms. Blair and the legitimacy of Ms. Blair's claim on the proceeds. Ms. Martel must also advise Dr. Panelli that withholding the funds and information about the settlement may constitute fraud, or breach of contract and attempt to counsel Dr. Panelli out of this conduct. Advise Dr. Panelli that Ms. Martel cannot represent either him or Ms. Blair in the dispute as to Ms. Blair's fees.