



Hypothetically Speaking: Placement of Disputed Funds

by Randall Difuntorum

In a personal injury matter, attorney successfully negotiates a favorable settlement for plaintiff without going to trial and the proceeds are deposited into the client trust account. Attorney sends plaintiff a notice indicating that once the check has cleared, then various disbursements will be made including attorney fees at the agreed written fee contract rate of forty percent of the total recovery. Plaintiff thereafter contacts attorney's office by telephone to complain about the net recovery and, at one point, states, "the attorney fees are too high, most other attorneys charge only thirty three and a third percent of the recovery when there has been no trial work." What is the ethical obligation of the attorney as to disbursement of attorney fees?

Rule 4-100 of the California Rules of Professional Conduct (Preserving Identity of Funds and Property of a Client) requires that all funds received or held for the benefit of clients must be deposited into the client trust account including funds belonging in part presently or potentially to the attorney. Rule 4-100(A)(2) specifically requires that the portion belonging to the attorney must be withdrawn at the earliest reasonable time after the member's interest becomes fixed.

Based on rule 4-100, the potential for an ethical violation in this situation is twofold. If the attorney disburses funds to herself without clear client authorization then her conduct might be characterized as misappropriation through a unilateral determination of attorney fees. (See *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 328-329 [276 Cal.Rptr. 346]; *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 899 [126 Cal. Rptr. 785] and L.A. Cty. Bar Assn. Formal Ethics Opn. No. 438 (1985).) If the attorney allows any portion of funds to remain in the trust account after her interest in those portions have become fixed, then her conduct could be criticized as commingling. (See *Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777 [268 Cal.Rptr. 741] and *Black v. State Bar* (1962) 57 Cal.2d 219, 226 [18 Cal.Rptr. 518].) Moreover, both misappropriation and commingling are violations that can potentially involve a finding of moral turpitude and result in significant discipline. (See Bus. & Prof. Code, § 6106; *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060-1061 [275 Cal.Rptr. 381]; *Fitzpatrick v. State Bar* (1977) 20 Cal.3d 73, 86-88 [141 Cal.Rptr. 169] and *Resner v. State Bar* (1960) 53 Cal.2d 605, 612-614 [2 Cal.Rptr. 461].)

In this situation, it is unclear whether a fee dispute exists. It is also unclear whether the attorney may transfer any amount out of the trust account as payment of attorney fees. The attorney should promptly consult the client to determine whether or not an actual fee dispute exists. The client's determination that the attorney is presently entitled to receive any amount of trust funds as fees obliges the attorney to promptly disburse that amount. Any amount which is disputed must remain in the trust account until the dispute is resolved. For example, if the attorney contacts the client and the client agrees that the attorney is entitled to at least thirty three and third percent of the total recovery then that portion should be disbursed and the difference between that amount and the forty percent claimed by the attorney should remain in trust until the dispute is resolved.

(The information provided in Hypothetically Speaking is intended to provide basic guidance on the issues raised by the question. The authorities listed are a starting point for more comprehensive research and are not intended as an exhaustive compilation of all relevant citations.)

(Article taken from Vol. 1, No. 2; Fall 1993 *Ethics Hotliner*)

**A PUBLICATION OF
THE STATE BAR OF CALIFORNIA
ETHICS HOTLINE**



ETHICS HOTLINER

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