SUPREME COURT, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, Colorado 80202 Certiorari from the Colorado Court of Appeals Case No. 08CA1867 The Honorable Robert D. Hawthorne (Dailey and Carparelli, JJ, concurring) **Petitioners:** ACCIDENT AND INJURY MEDICAL SPECIALISTS, P.C., ELITE CHIROPRACTIC CARE, INC., PHYSICAL THERAPY, INC., MYOCARE, INC., A SHI ACUPUNTURE, INC., COMPREHENSIVE DIAGNOSTIC SERVICES, INC., MILE HIGH MEDICAL GROUP, L.L.C., AND GLOBAL PHYSICIAN SERVICES, P.C. v. **Respondents:** DAVID J. MINTZ **Attorneys for Amicus Curiae Colorado Bar Association** David L. Masters, # 15869 President Colorado Bar Association 1900 Grant Street, Suite 900 Denver, CO 80203 Troy R. Rackham, #32033 Fennemore Craig, P.C. 1700 Lincoln Street, , Ste. 2900 Denver, Colorado 80203 Phone: (303) 291-3209 E-mail: trackham@fclaw.com	**▲ COURT USE ONLY ▲** Case No. 2011-SC-210

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COLORADO BAR ASSOCIATION'S AMICUS BRIEF

The Colorado Bar Association ("CBA"), by the undersigned counsel, hereby submits this Amicus Brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29, C.A.R. 28(g) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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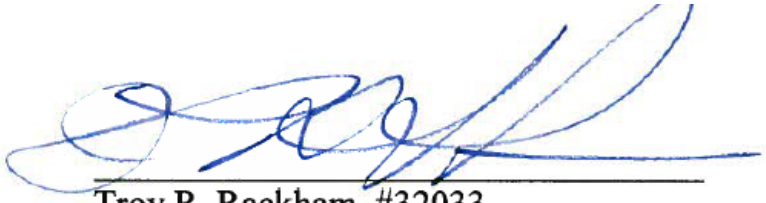

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I. ISSUE PRESENTED.

Whether an attorney owes fiduciary duties to third parties who are entitled to funds from Colorado Lawyer Trust Account Foundation ("COLTAF") trust accounts?

II. SUMMARY RESPONSE OF AMICUS CURIAE.

The CBA strongly urges the Court to conclude that an attorney does not, and should not, owe fiduciary duties to third parties who are entitled to funds from COLTAF accounts. It has long been the rule in Colorado that lawyers[1] are not liable to non-clients absent fraud or malice. *See Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. App. 1976); *Matter of Brooks' Estate*, 596 P.2d 1220, 1222 (Colo. App. 1979); *McGee v. Hyatt Legal Services, Inc.*, 813 P.2d 754, 757 (Colo. App. 1990); *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo. App. 1991).

This long-standing rule properly protects clients' interests in having a loyal and conflict-free lawyer. The rule also protects the client-lawyer relationship from erosion by the interest of third parties who are strangers to the client-lawyer

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[1] The term "attorney" and the term "lawyer" often are used interchangeably, including by the Petitioners (hereinafter "providers") in this case. The CBA uses the term "lawyer" in this *Amicus Brief* because that is the term used by the Colorado Rules of Professional Conduct and is the term more consistently used in Colorado's case law.

relationship. *See, e.g., Stone v. Satriana*, 41 P.3d 705, 709-10 (Colo. 2002); *Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994).

If the Court concludes that a lawyer owes a fiduciary duty to third parties who may claim an entitlement to funds contained in the trust account of the lawyer, the lawyer is placed in a web of conflicting duties that interfere with the lawyer's duty of loyalty to the client. The lawyer would have to protect the interests of third parties, even when the interest could be at the expense of the client. Clients would be disserved by a rule that imposes such obligations upon a lawyer and creates the inevitable division between the client's interest in having a loyal lawyer, and the lawyer's interest in avoiding liability for breach of fiduciary claims brought by a variety of non-clients, who might themselves have conflicting claims.

In advocating this position, the CBA is mindful that a lawyer has a duty to safeguard, segregate and account for funds that are deposited into the lawyer's trust account. Colorado Rule of Professional Conduct 1.15 properly and adequately ensures these ethical duties. A lawyer is subject to discipline for failing to adhere to these ethical duties. However, although these ethical duties sometimes may require a lawyer to refuse to acquiesce to a client's direction to disburse entrusted funds to a client in which a third party holds an interest, *e.g., People v. Fisher*, 89 P.3d 817 (Colo. 2004), they do not permit a lawyer to disburse funds to a third

party over the objection of a client, *CBA Formal Ethics Op. 94* (rev'd March 18, 2006). In addition, these ethical duties protect clients and the integrity of the legal profession. *See* Colo. R.P.C. Preamble, ¶¶ 1-14. These ethical duties do not, however, "give rise to a cause of action against a lawyer nor should [they] create any presumption in such a case that a legal duty has been breached." Colo. R.P.C. Preamble, at ¶ 20. The Colorado Rules of Professional Conduct "are not designed to be a basis of civil liability." *Id.*

There is a large difference between imposing an ethical duty upon a lawyer to safeguard, segregate and account for funds that are deposited into the lawyer's trust account, on the one hand, and imposing a fiduciary duty upon the lawyer that subjects the lawyer to claims of civil liability by third parties. The Court of Appeals correctly noted that "[a] fiduciary is a person who has undertaken a duty to act primarily for another's benefit in matters connected with the undertaking." *Mintz v. Accident & Injury Med. Specialists, P.C.*, --- P.3d ---, Case. No. 08CA1867 (Colo. App. Nov. 10, 2010), *slip. op.*, at 14 (citing *Brodeur v. American Home Assurance Co.*, 169 P.3d 139, 151 (Colo. 2007)). Although third parties may have valid claims to property held by a lawyer in a COLTAF account, it would be unwise and inaccurate to conclude that a lawyer in such a scenario has undertaken the duty to act primarily for the benefit of the third parties who claim

entitlement to the property. Rather, the lawyer undertakes duties to act on behalf of the client, who may have duties to third parties. The fact that the lawyer's client may have duties to third parties should not impose upon the lawyer fiduciary duties to protect third parties. Otherwise, the client-lawyer relationship – and its attendant duties of loyalty and confidentiality – erodes.

The CBA strongly urges the Court to resist a holding in this case that would erode the client-lawyer relationship and its paramount duties. The CBA therefore respectfully urges the Court to conclude that, under Colorado law, a lawyer does not owe a fiduciary duty to third parties who claim entitlement to COLTAF funds.

III. STATEMENT OF INTEREST OF AMICUS CURIAE.

This Brief is submitted on behalf of the Colorado Bar Association ("CBA"). The CBA is the largest professional association for lawyers in the state of Colorado. It is Colorado's representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law. The core values of the CBA "are to advance the science of jurisprudence, to secure the more efficient administration of justice, to encourage the adoption of proper legislation, to advocate thorough and continuing legal education, to uphold the honor and integrity of the bar, to cultivate cordial relations among the lawyers of Colorado, and to perpetuate the history of the profession and the memory of its

members." *The Colorado Bar Association Bylaws*, Art. 1.1 (May 7, 2011), available at http://www.cobar.org/index.cfm/ID/451.

The CBA's members – Colorado lawyers – directly are impacted by decisions that impose duties upon a lawyer that conflict with the lawyer's duty of undivided loyalty to the client. The CBA therefore has a strong interest in the question presented in this case.

IV. STATEMENT OF THE CASE.

The CBA assumes the accuracy of the statement of facts as set out by the court of appeals. *See Mintz*, --- P.3d ---, Case. No. 08CA1867, *Slip Op.*, at 2-4. The court explained that this case arises from a bifurcated proceeding in which Mintz, a lawyer who represented thirty-seven clients in automobile accident cases, was facing multiple, conflicting claims to money held in trust in the lawyer's Colorado Lawyer Trust Account Foundation ("COLTAF") account. *Id.*, at 2. Mintz's thirty-seven clients settled their claims. *Id.* The settlement funds were paid to Mintz's COLTAF account. *Id.*

The Petitioners, all of whom were medical or health care providers, claimed entitlement to $130,186.79 of the money deposited by Mintz into his COLTAF account as payment for the providers' services. *Id.* Mintz withheld payment of those funds. *Id.* Rather, Mintz "filed an interpleader complaint naming, as

pertinent here, the thirty-seven client-patients and the nine providers as defendants." *Id.*, at 3. Mintz asserted a variety of theories against the providers in support of his withholding of the funds and subsequent filing of the interpleader action. *Id.*

"In response to the interpleader, the providers asserted cross-claims against the clients for failing to pay their medical bills." *Id.* "The providers also filed counterclaims against Mintz, alleging abuse of process, breach of fiduciary duty, tortious interference with contract, and civil conspiracy." *Id.*

After bifurcating the case into two trials, the trial court held the first trial, which was to determine who was entitled to the money Mintz had secured in his trust account but not yet paid because of the dispute over the funds. *Id.* The trial court found for the providers and ruled that "they were entitled to the $ 130,186.79 in Mintz's COLTAF account." *Id.*, at 4.

"The court then held the second trial and found that Mintz abused the interpleader process and breached his fiduciary duties to the providers." *Id.* The trial court awarded the providers nearly twice the amount of the dispute – $284,050.09 – as compensatory damages reflecting the providers attorney fees incurred in the dispute. *Id.* The trial court also awarded the providers $2,000 in punitive damages. *Id.*

Mintz appealed and the providers cross-appealed. *Id.* The court of appeals reversed, concluding that the trial court erred in ruling that Mintz abused the interpleader process because the improper use element was not supported by the record. *Id.*, at 10. The court also reversed the trial court's judgment finding Mintz liable for breach of fiduciary duty. *Id.*, at 12-17. The court held that Mintz did not owe a fiduciary duty to the providers. *Id.*, at 16-17.

The providers petitioned this Court to review the case. On August 15, 2011, this Court granted certiorari on the question of whether an attorney owes fiduciary duties to third parties who are entitled to funds from COLTAF trust accounts.

V. ARGUMENT.

A. This Court Should Conclude that Colorado Lawyers Do Not Owe Fiduciary Duties to Third Parties Because of Colorado's Long-Standing Jurisprudence Limiting Lawyer Liability to Clients in the Absence of Fraud or Malice.

It is firmly established in Colorado that lawyers are not liable to nonclients absent fraud or malice. *See, e.g., Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. App. 1976); *McGee v. Hyatt Legal Services, Inc.*, 813 P.2d 754, 757 (Colo. App. 1990); *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo. App. 1991); *Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994); *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312-13 (Colo. App. 1998).

Recently, this Court has noted the critical importance of keeping distinct the duties that lawyers owe to clients from claims by third parties. *See, e.g., Allen v. Steele*, 252 P.3d 476, 485 (Colo. 2011) (rejecting the formulation of duties contained in *Restatement (Third) of the Law Governing Lawyers* § 15(1)(c) because it blurred the distinction between a client and a nonclient, which distinction "is fundamental to Colorado law."). This Court explained "[i]n Colorado, attorneys do not owe a duty of reasonable care to non-clients -- either for legal malpractice or under the ethical rules." *Id.* (citing *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver*, 892 P.2d 230, 240 (Colo. 1995) and Colo. RPC 1.18). There is no reason to depart from this jurisprudence less than a year later. Rather, this Court should adhere to the long-standing rule that a lawyer does not owe fiduciary duties, or a duty of reasonable care, to nonclients.

This long-standing rule limiting a lawyer's fiduciary duties and duties of care to clients, and precluding liability to third parties, is connected directly to the importance of preserving the loyalty and integrity of the client-lawyer relationship. *See, e.g., Stone v. Satriana*, 41 P.3d 705, 710 (Colo. 2002); *Mehaffy*, 892 P.2d at 235; *Glover*, 894 P.2d at 23. In *Glover*, the court of appeals explained:

> The rule that an attorney's liability to third parties is strictly limited rests upon three public policy bases: the protection of the attorney's duty of loyalty to and effective advocacy for his or her client; the nature of the potential for adversarial relationships between the

> attorney and third parties; and the attorney's potential for unlimited liability if his duty of care is extended to nonparties.

Id. The core of the client-lawyer relationship rests upon the ability of the client to trust, rely upon, and have confidence in the lawyer's independent representation of the client's interests. *See Olsen and Brown v. City of Englewood*, 889 P.2d 673, 675 (Colo. 1995).

The three public policy bases supporting the rule that strictly limits lawyer liability to third parties, which the *Glover* court identified, apply with equal force in a circumstance such as the one presented in this case, where nonclient third parties are claiming that the lawyer owed them fiduciary duties. The lawyer owes a duty of loyalty to a client. *Stone*, 41 P.3d at 710; *Glover*, 894 P.2d at 23. The comments to Colo. R.P.C. 1.7 explain "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." Colo. R.P.C. 1.7, at cmnt. 1. These essential elements become eroded when a lawyer is faced with exposure to third parties for acting in the client's interest.

For example, when a client is facing a claim by a creditor that may not be valid, or may be overstated, a lawyer exercising independent judgment and acting loyally to the client may advise the client to consider challenging the creditor's claim to payment. If the lawyer is held to owe a fiduciary duty to the creditor because the creditor may claim entitlement to funds held in the lawyer's COLTAF

account, the lawyer's advice to the client necessarily is exposed to interference by the interests of third parties. This Court has rejected previous attempts to interfere with the client-lawyer relationship in order to protect the loyalty and independent judgment that a lawyer owes to the client. *See Stone*, 41 P.3d at 710 (concluding that allowing a lawyer to be designated by opposing counsel as a nonparty at fault would inject into the client-lawyer relationship undesirable "'self-protective reservations'" on the part of the lawyer) (quoting *Holland v. Thacher*, 245 Cal. Rptr. 247 (Cal. App. 1988)). The Court should do so again here.

The *Glover* court also noted that the "rule that an attorney's liability to third parties is strictly limited" rests on the policy of mitigating a lawyer's potential "unlimited liability if his duty of care is extended to nonparties." *Glover*, 894 P.2d at 23. It is not hard to conceive of scenarios where a lawyer would have virtually unlimited liability if the Court concludes that a lawyer owes fiduciary duties to third parties who claim entitlement to client funds contained in the lawyer's trust account. In many circumstances, parties claiming entitlement to portions of client funds contained in the lawyer's trust account may themselves be in conflict with other creditors claiming the same entitlement. Not all the creditors' claims may be valid; nor may they be able to be satisfied fully. If not all of the creditors' claims are validated or can be satisfied, but the lawyer is held to owe fiduciary duties to

act in the best interests of all the creditors, the lawyer is virtually guaranteed to have exposure to some or all of the dissatisfied creditors. The "unlimited liability" feared by the *Glover* court is not merely "potential" in such scenarios, but instead is an "actual" risk against which a lawyer cannot possibly find protection.

Finally, the *Glover* court explained that "rule that an attorney's liability to third parties is strictly limited" rests on the policy of avoiding "the potential for adversarial relationships between the attorney and third parties…." *Glover*, 894 P.2d at 23 The CBA submits that the concern about avoiding adversarial relationships is particularly acute in a setting where a lawyer's injured client is in a dispute with a provider or creditor over funds paid as part of the settlement of a personal injury claim. The potential for adversarial relationships between the lawyer and third parties is not just theoretical in those settings; it is real. Colorado law has long held that, in such scenarios, the lawyer's duties are to the client and not to third parties. *E.g.*, *Klancke v. Smith*, 829 P.2d 464, 466 (Colo. App. 1991). It would be an unfortunate development if Colorado law began to impose fiduciary duties upon lawyers for the benefit of third parties in such settings.

For example, consider a situation where a personal injury claimant is in an auto accident and has severe injuries, was hospitalized and then treated by ten providers after the initial hospitalization. The claimant retains a lawyer who files

the claim and ultimately settles it for the at-fault driver's policy limits of $100,000. The injured claimant's hospital bill alone was $50,000. The other ten providers have claims for services rendered in various amounts totaling $50,000. Likewise, the lawyer representing the injured claimant has a claim for recovery of a contingent fee, validly earned.

In such a scenario, the client will want to get fully compensated for all damages. The hospital also likely will claim a statutory hospital lien, pursuant to C.R.S. § 38-27-101 et seq. (2010). Likewise, the other ten providers will assert claims as creditors for services rendered, totaling $50,000. There is simply no way in such a scenario for the lawyer to satisfy the client and all third parties.

If the Court imposes upon the lawyer fiduciary duties to act not only in the client's best interest, but also in the best interests of the various creditors who seek to recover some of the inadequate settlement funds paid to the client, the Court virtually guarantees the creation of irreconcilable conflicts for the lawyer because the lawyer cannot possibly avoid liability for breach of fiduciary duty to some dissatisfied provider or creditor.

In *Klancke*, 829 P.2d at 466, the court of appeals considered the undesirable affects attendant with imposing fiduciary duties upon lawyers to act for the benefit of third parties. In the case, the surviving spouse of the decedent retained the

defendant lawyer to pursue a wrongful death claim as a result of her husband's death. *Id.*, at 465. The wrongful death claim was filed in federal district court, properly naming only the surviving spouse as the plaintiff. *Id.* The wrongful death claim ultimately was tried and a jury awarded $465,000 for the wrongful death claim. *Id.*

There was a dispute between the surviving spouse and her stepchildren concerning the "childrens' rightful share in the proceeds of any potential recovery." *Id.* The judgment was satisfied and the lawyer for the surviving spouse, Mr. Smith, deposited the funds into his firm's trust account. *Id.*

"Before such satisfaction, the children filed a motion requesting the federal court to supervise distribution of the wrongful death proceeds, but that motion was denied on June 3, 1988." *Id.*, at 465-66. After the motion was denied, the lawyer "distributed the wrongful death proceeds in their entirety to his client, Ms. Klancke." *Id.*, at 466. As the providers do here, the stepchildren in *Klancke* argued that the lawyer for the surviving spouse acted as a trustee in holding the funds of his client and then distributing the funds wrongfully. *Id.* The *Klancke* majority specifically rejected that argument, explaining that "[a]n attorney is charged with a duty to act in the best interest of his or her client, and in fulfilling

this obligation, the attorney is liable for injuries to third parties only for conduct that is fraudulent or malicious." *Id.*, at 466-67 (citations omitted).

Klancke is consistent with the overwhelming authority that provides that a lawyer owes fiduciary duties only to the client; not to nonclient claimants. *See Weigel*, 549 P.2d at 1337 (rejecting a nonclient's claim that the lawyer owed fiduciary duties to nonclient because the lawyer acted as an "escrow agent" by handling settlement documents); *Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 330 (Colo. App. 1989) (agreeing with *Weigel* and explaining that "an attorney, while fulfilling his fiduciary duty to act in his client's best interest, is liable for injuries to third parties only when his conduct is fraudulent or malicious."); *Schmidt v. Frankewich*, 819 P.2d at 1079 (identifying all the reasons that "underscore the necessary policy of limiting an attorney's liability to third-party beneficiaries…."); *Turkey Creek, LLC v. Rosania*, 953 P.2d at 1313 (rejecting nonclient's attempt to pursue breach of fiduciary duty claims against lawyer for joint venture, even when the nonclient was a member of the joint venture and claimed to be pursuing the interests of the joint venture).

The CBA urges the Court to adhere to this well-established law and conclude a lawyer does not owe fiduciary duties to nonclients who claim entitlement to client funds in a lawyer's COLTAF account. Otherwise, Colorado

lawyers will be exposed to the undesirable conflicts identified by this Court in *Stone* and by the court of appeals in *Glover*. In such a circumstance, it ultimately will be the clients who suffer because they will be deprived of the loyalty and independence which is at the heart of the client-lawyer relationship.

B. Colorado Rule of Professional Conduct 1.15 Does Not Impose, and Was Not Intended to Impose, Fiduciary Duties Upon Lawyers to Act in the Best Interests of Third Parties.

The providers argue that Colo. R.P.C. 1.15 "does not distinguish between clients and third persons in addressing the duties owed by a trustee to those beneficiaries." *Opening Brief*, at 17. The providers suggest that, pursuant to Colo. R.P.C. 1.15, clients and third parties are both beneficiaries of COLTAF trust accounts. *Id.*, at 18 (citing Colo. R.P.C. 1.15(a), (f), (h)(1), (h)(2)(b), and (h)(3)). The providers therefore suggest that a rule imposing upon Colorado lawyers fiduciary duties to nonclients who claim entitlement to client funds maintained in a lawyer's COLTAF account is consistent with existing professional obligations of lawyers. The providers' argument is misplaced.

Colo. R.P.C. 1.15 specifically distinguishes between "clients" and "third parties." *See, e.g.*, Colo. R.P.C. 1.15(a), (b), (c), (h)(1), (h)(2)(b), (h)(3). Indeed, Colo. R.P.C. 1.15 is titled "*General Duties of Lawyers Regarding Property of Clients* ***and*** *Third Parties.*" *Id.* (emphasis supplied). This distinction is important

because, as this Court has explained, a lawyer owes very different duties to a client than to others. *See Allen v. Steele*, 252 P.3d at 485.

Colo. R.P.C. 1.15's purpose and focus is the protection of, and accounting for, property held by a lawyer. *See, e.g.,* Colo. R.P.C. 1.15(a), (b) and (c). Generally stated, the lawyer must segregate the property from the lawyer's own, protect the property, and account for it. *Id.* The comments to Colo. R.P.C. 1.15 explain that "[a] lawyer should hold property of others with the care required of a professional fiduciary." *Id.*, at cmnt. 1. The comments give examples of what "the care required of a professional fiduciary" means. A lawyer should keep "securities in a safe deposit box except when some other form of safekeeping is warranted by special circumstances." *Id.* All property held by the lawyer – whether a client's property or property of third parties – "should be kept separate from the lawyer's business and personal property…." *Id.* Trust accounts "must be interest bearing…" and should be reviewed at "reasonable intervals." *Id.*, at cmnt. 2.

The fact that the comments to Colo. R.P.C. 1.15 use the term "fiduciary" does not mean that, by adopting Colo. R.P.C. 1.15 and its comments, this Court intended to override the long-established case law discussed above. Rather, it means what it says: lawyers should hold property with the care used by a professional fiduciary, such as a banker or trustee. *See* Colo. R.P.C. 1.15, at cmnt.

1. Holding property with the care of a fiduciary is very different than imposing a fiduciary duty upon a lawyer to act for the benefit of third parties, even when doing so would be contrary to the client's interest.

Nothing in Colo. R.P.C. 1.15 suggests an intention to impose upon a lawyer a fiduciary duty to act for the benefit of third parties, which duty could give rise to civil liability. Rather, the preamble to the Rules of Professional Conduct explains that the Rules "are not designed to be a basis of civil liability." Colo. R.P.C., Preamble, ¶ 20; *see also Olsen and Brown*, 889 P.2d at 675 (noting the same).[2] Indeed, the preamble identifies the risk that the rules could be used by adversaries to gain an advantage in a dispute. *See* Colo. R.P.C., Preamble, ¶ 20. The rules would then be "subverted." *Id.* One possible subversion is when a party attempts to use the rules to gain an advantage against the lawyer and the client when there is

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[2] Although the CBA is urging the Court to conclude that a lawyer should not owe fiduciary duties to nonclients who claim entitlement to funds held in a lawyer's COLTAF account, the CBA is not suggesting that a lawyer owes **no** legal duties to third parties who claim entitlement to funds held in a trust account. If funds held in a lawyer's trust account were garnished or diminished because of the lawyer's commingling or failing to account for the funds, the aggrieved parties may have legal claims against the lawyer, whether the victims were clients or nonclients. Likewise, a lawyer could not steal or convert funds held in a trust account, whether those funds are client or nonclient funds. *See People v. Cozier*, 74 P.3d 531, 537 (Colo. 2003); *see also People v. Guyerson*, 898 P.2d 1062, 1063 (Colo. 1995) (involving conversion of funds from a law firm in which lawyer was a partner); *People v. Nulan*, 820 P.2d 1117, 1119 (Colo. 1991) (involving conversion of nonclient funds held in escrow). Neither of those factual settings exist here, however.

a dispute between the lawyer's client and the client's creditors over funds in a trust account.

The CBA Ethics Committee has explained the duties imposed by Colo. R.P.C. 1.15 in *CBA Formal Ethics Op. 94* (rev'd March 18, 2006) (attached hereto). As Ethics Opinion 94 explains, the fact that a lawyer owes an obligation to treat a nonclient's property with care does not, and should not be construed to, impose fiduciary obligations upon the lawyer to act for the benefit of third parties. Rather, "a lawyer's duty is generally to the client and not to third parties." *Id.* (citing *Klancke*, 829 P.2d at 464).

Ethics Opinion 94 is consistent with Section 44 of the Restatement (Third) of Law Governing Lawyers. *See Restatement (Third) of the Law Governing Lawyers*, ¶ 44 (ALI 2000 and supp. 2010). Section 44 explains that the lawyer's obligation is to safeguard, segregate and account for property:

> (1) A lawyer holding funds or other property of a client in connection with a representation, or such funds or other property in which a client claims an interest, must take reasonable steps to safeguard the funds or property. A similar obligation may be imposed by law on funds or other property so held and owned or claimed by a third person. In particular, the lawyer must hold such property separate from the lawyer's property, keep records of it, deposit funds in an account separate from the lawyer's own funds, identify tangible objects, and comply with related requirements imposed by regulatory authorities.
>
> (2) Upon receiving funds or other property in a professional capacity and in which a client or third person owns or claims an interest, a

> lawyer must promptly notify the client or third person. The lawyer must promptly render a full accounting regarding such property upon request by the client or third person.

Id. The comments to Section 44 explain that this rule exists for the protection of clients because it assures "safety of the property." *Id.*, at cmnt b. The comments also explain that requiring the property to be segregated and clearly identified "reduces the danger of conversion, negligent misappropriation, or loss and protects the property from seizure by creditors of the lawyer or of other clients…." *Id.*

Section 44 of the Restatement is clear that the rule imposing upon a lawyer the duty to safeguard, segregate and account for property does not impose a fiduciary duty upon a lawyer to act for the benefit of third parties. *Id.*, at cmnt. g. Rather, consistent with comments 4 and 5 to Colo. R.P.C. 1.15, and *CBA Formal Ethics Op. 94*, the lawyer's obligation is limited to securing property until a dispute between the lawyer's client and third party can resolved:

> *g. Claims of third persons against a client or a lawyer.* A lawyer might be in possession of property claimed both by the lawyer's client and by a third person, for example a creditor claiming an interest in the client's property, a previous lawyer of the client claiming a lien on the client's recovery (see §§ 40 & 43), or a person claiming that property deposited with the lawyer by the client was taken or withheld unlawfully from that person. **In such circumstances, this Section requires the lawyer to safeguard the contested property until the dispute has been resolved (see § 45, Comments *d* & *e*), but does not prescribe the rules for resolving it.** Those rules are to be found in other law. Thus, if a third person claims that property stolen from that person has been used by the client to pay the lawyer's fee, the

> lawyer's right to keep the payment depends on the law generally applicable to transfers of stolen property. The result might turn on whether the lawyer was a bona fide purchaser for value without notice of the theft, on whether the property was negotiable, or on other circumstances. It might also be affected by statutes providing for the forfeiture of property to the government, to the extent that such statutes validly apply to property used to pay lawyer's fees (see § 45, Comment *f*).

Restatement (Third) of the Law Governing Lawyers, ¶ 44, cmnt. g (emphasis supplied). Comment h to Section 44 of the Restatement further clarifies that "[w]hen the claimant is a third person whose interests conflict with those of the lawyer's client but to whom the lawyer owes a duty of **safekeeping or notification**, the lawyer must notify that person of the lawyer's receipt of the property." *Id.*, at cmnt. h (emphasis supplied).

Section 44 of the Restatement is consistent with *CBA Formal Ethics Opinion 94* and Colo. R.P.C. 1.15. Under each, when confronted with a dispute between the client and third parties who claim an interest in property held by the lawyer in a trust account, the lawyer's obligation is to keep the property safe, segregate it, and notify the client and third parties that the property is safe and segregated pending resolution of the dispute.

Contrary to these principles, the providers ask this Court to convert these modest, but important, duties of safekeeping, segregation and notification into a full-blown fiduciary duty on the part of a lawyer to act for the benefit of third

parties. Colorado law simply does not support such a transformation given that it would interfere with the client-lawyer relationship and inject into it conflicts that erode the core values of loyalty and independence. *See Klancke*, 829 P.2d at 466; *Weigel*, 549 P.2d at 1337; *Montano*, 778 P.2d at 330; *Schmidt v. Frankewich*, 819 P.2d at 1079; *Turkey Creek, LLC v. Rosania*, 953 P.2d at 1313.

The authorities that the providers rely upon also do not support the conversion of a lawyer's ethical obligations of safekeeping, segregation and notification into a fiduciary duty which could support a claim by nonclients against a lawyer for breach of fiduciary duty. For example, the providers cite *State ex rel. Oklahoma Bar Ass'n v. Taylor*, 4 P.3d 1242, 1250-51 (Okla. 2000). *Opening Brief*, at 17. *Taylor*, however, was a disciplinary case.

In *Taylor*, the disciplinary panel found grounds for discipline in the lawyer's actions in failing to notify the provider of funds in a timely fashion, having no legal excuse for the delay in notification, combined with the fact that the lawyer's wife forged the signature of the provider on the back of the check, and the fact that the lawyer distributed the disputed the funds without notifying the provider and giving the provider an opportunity to object. *Id.*, at 1251. *Taylor* did not consider – let alone impose upon the lawyer – a fiduciary duty to the third party which could give rise to civil liability for breach of fiduciary duty.

Similarly, the providers cite *In re Allen*, 802 N.E.2d 922, 925 (Ind. 2004). *Opening Brief*, at 21. *In re Allen*, 802 N.E. 2d at 925, was a disciplinary case in which the lawyer was disciplined for violating Rule 1.15(b). *Id.* After settling a claim, the client told the attorney that she would pay her provider directly with the settlement proceeds. *Id.*, at 924. The client failed to do so. The court held that the attorney violated Rule 1.15(b) when he "failed promptly to deliver to the chiropractor settlement funds to which the chiropractor was entitled." *Id.*, at 924-25.

Imposing discipline upon a lawyer under Rule 1.15, however, is very different than imposing upon a lawyer a fiduciary duty to act for the benefit of a third party, the breach of which could give rise to civil liability

The difference between imposing upon a lawyer an ethical obligation of safekeeping, segregation and notification, one the one hand, and a fiduciary obligation to act for the benefit of nonclients, on the other, is not merely rhetorical, as the providers assume. Rather, the difference is financially and practically enormous. While a lawyer always should be subject to discipline for knowingly violating an ethical rule, subjecting a lawyer to a breach of fiduciary duty claim by a nonclient creates enormous financial exposure that does not – and should not – exist under Colorado law.

A civil claim for breach of fiduciary duty requires a plaintiff to demonstrate that: (1) the defendant acted as a fiduciary of the plaintiff; (2) the defendant breached a fiduciary duty owed to the plaintiff; (3) the plaintiff incurred damages; and (4) the defendant's breach of fiduciary duty caused damages. *See Rupert v. Clayton Brokerage Co.*, 737 P.2d 1106, 1109 (Colo. 1987); *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1022 (Colo. App. 1993). A party that prevails on a claim for breach of fiduciary may recover compensatory damages, including damages for the value or profit the plaintiff should have received but for the breach and any loss to the value of the plaintiff's property or assets caused by the breach. *See Rupert*, 737 P.3d at 1112; *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 511 (Colo. 1986). The fiduciary or trustee also is individually liable for such damages. *See Buder v. Sartore*, 774 P.2d 1383, 1390 (Colo. 1989). Further, exemplary damages may be recoverable for a breach of fiduciary duty. *See Mahoney Mktg. Corp. v. Sentry Builders, Inc.*, 697 P.2d 1139, 1140-41 (Colo. App. 1985). Moreover, "[a]ttorney fees may be recoverable in an action for breach of fiduciary duty as a recognized exception to the American rule." *Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285, 1289 (Colo. 1996) (citing *Buder*, 774 P.2d 1391 and *Heller v. First Nat'l Bank, N.A.*, 657 P.2d 992 (Colo. App. 1982)).

Accordingly, if a lawyer is held to owe fiduciary duties to nonclients, the lawyer paradoxically could be exposed to a far greater damage award and financial consequences to the nonclient than the lawyer would have on a claim brought by the client. *See, e.g.*, *Smith v. Mehaffy*, 30 P.3d 727, 734 (Colo. App. 2000) (holding that breach of fiduciary duty claim brought by client against lawyer did not fall within the breach of fiduciary duty exception to the American rule so that an award of attorney fees was not proper). This Court should not endorse such an upside-down approach. The CBA submits that, although a lawyer is and should be exposed to discipline for ethical violations, including violations of Colo. R.P.C. 1.15, there is no principled reason to expose lawyers to such enormous financial liability to nonclients, particularly when the long-standing rule is that lawyers are not liable to nonclients in the absence of fraud or malice.

VI. CONCLUSION.

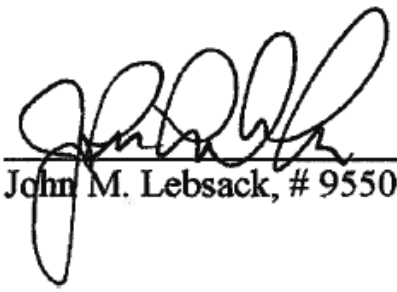
For these reasons and those articulated above, the CBA respectfully urges the Court to conclude that, under Colorado law, an attorney does not owe fiduciary duties to third parties who are entitled to funds from COLTAF trust accounts.

Respectfully submitted,

THE COLORADO BAR ASSOCIATION

David L. Masters, Esq.
President
Colorado Bar Association

Troy R. Rackham, #32033



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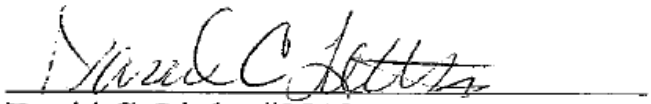

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CERTIFICATE OF MAILING

The undersigned certifies that on this 30th day of November, 2011, a true and correct copy of the foregoing **COLORADO BAR ASSOCIATION'S AMICUS BRIEF** was mailed in the U.S. mail, postage prepaid, and addressed as follows:

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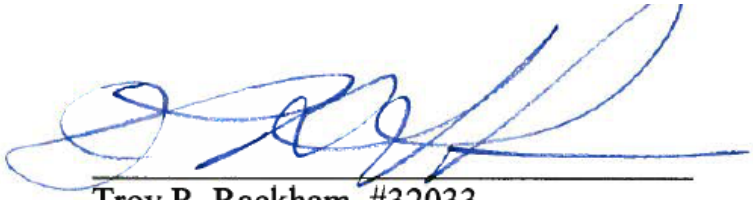

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APPENDIX:
CBA Formal Eth. Op. 94

Ethics Opinon 94: Ethical Duties Relating to a Client's Property Held by a Lawyer in which a Third Party has an Interest, 11/20/93; Addendum 2006

The following Formal Opinion was written by the Ethics Committee of the Colorado Bar Association

[*Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.*]

94 ETHICAL DUTIES RELATING TO A CLIENT'S PROPERTY HELD BY A LAWYER IN WHICH A THIRD PARTY HAS AN INTEREST

Adopted November 20, 1993; Addendum added March 18, 2006.

Introduction and Scope

This opinion addresses the ethical issues faced by a lawyer holding client funds to which a third party claims entitlement. Although the problem can arise in many contexts, it typically arises where a lawyer recovers funds as a result of a client's personal injury and a medical provider claims some right to those funds. Often the third party has had some contact with the lawyer which may place additional responsibilities on the lawyer.

Syllabus

1. Where the third party does not hold an interest as a result of a statutory lien[(1)] or a contract[(2)] or a court order, the property should be promptly distributed to the client.

2. Where the third party holds an undisputed interest as a result of a statutory lien, contract, or court order, the property should be distributed in accordance with the terms of the statutory lien, contract or court order.

3. If the validity or amount of the third party's claim is subject to dispute, any undisputed portion should be promptly distributed to the client, or if appropriate, to the third party in accordance with the terms of the lien, contract or court order. The balance should be subject to a negotiated settlement or a court proceeding.

4. Where the third party has been induced by the conduct of the lawyer to believe the third party will be paid from the property held by the lawyer, but the client disputes the third party's entitlement, the lawyer should advise the client and the third party to attempt to resolve the dispute. The lawyer should distribute the undisputed portions of the property. If the client and the third party are unable to resolve their dispute, the lawyer should file an interpleader action with regard to the portion in dispute.

5. (a) Where there is a statutory lien or court order and the client demands that the lawyer not disclose the fact that the lawyer is holding the property, Rule 1.15(b) requires the lawyer to distribute the funds in accordance with the statutory lien or court order, notwithstanding the client's wishes.

(b) Where the third party holds an interest pursuant to a contract with the client, but the client disputes the validity of the contract or the amount of the third party's claim and further demands that the lawyer not disclose that the lawyer is holding the property, the lawyer should maintain the confidentiality of the information, pursuant to Rule 1.6(a) and distribute the property to the client pursuant to Rules 1.2(a) and 1.15(b).

(c) Where the circumstances exist as described in (b) above, but in addition the third party has been induced by the lawyer to believe that the contract will be honored, the lawyer should attempt to have the client consent to disclosure and should further advise the client to attempt to resolve the dispute. If the client refuses, pursuant to Rule 1.15(b), the lawyer should interplead the disputed portion of the property, notwithstanding the client's request for confidentiality.

Discussion: Overview of Lawyer's Duty

A lawyer holding property on behalf of a client can be faced with ethical issues when a third party makes a claim to that property.[(3)] The ethical dilemma is compounded where the client "directs" the lawyer not to reveal the existence of the property to the third party and to distribute the property pursuant to the client's instructions. Rule 1.15(b) (concerning distribution of client's property), Rule 1.6 (concerning confidentiality of information) and Rule 1.2 (concerning scope of representation) of the Colorado Rules of Professional Conduct guide the lawyer's ethical conduct in these situations.

When a lawyer receives property on behalf of the client, the lawyer's duty (absent other agreement or law) is to *promptly* deliver the property to the client and/or third parties who (1) have an interest,[(4)] and (2) who are entitled to receive the property. Rule 1.15(b) provides:

> Upon receiving funds or other property in which a client or third person *has an interest,* a lawyer *shall promptly* or otherwise as permitted by law or by agreement with the client, deliver to the client or third person any funds or other property that the client or third person is *entitled to receive* and, upon request by the client or third person, render a full accounting regarding such property. (Emphasis added).

With respect to the client's property in a lawyer's possession, a lawyer's duty is generally to the client and not to third parties. *See, e.g., Klancke v. Smith,* 829 P.2d 464 (Colo. App. 1991) (lawyer's duty is to act in the best interest of the client; in the absence of fraud or malice, a lawyer is not liable to third parties for distribution of funds to the client). This general rule may be altered by statute, contract, or by court order.

> With regard to confidentiality, Rule 1.6(a) provides that:
>
> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, *except for disclosures that are impliedly authorized in order to carry out the representation,* and except as stated in paragraphs (b) and (c). (Emphasis added).
>
> With regard to scope of representation, Rule 1.2(d) provides that:
>
> A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a

lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

1. *Distribution where the third party does not hold an interest as a result of a statutory lien, a contract or a court order.*

Distribution to the client should be made promptly where the third party does not hold an interest as a result of a statutory lien, contract or court order. Rule 1.15(b) obligates the lawyer to distribute the funds or property only to parties "entitled to receive" the property. The Alaska Bar Association Ethics Committee has noted that under Rule 1.15(b), a lawyer has no duty to third parties unless there is either "[1] a valid assignment on its face or [2] a statutory lien which has been brought to the lawyer's attention." Alaska Bar Association Ethics Committee Opinion 92-3 (6/1/92).

Further, the lawyer is not required to allow the third party time to obtain a court order before delivering the property to the client. California State Bar Standing Committee on Professional Responsibility and Conduct, Opinion 1988-101; and *Klancke,* 829 P.2d at 464. In the absence of a statutory lien, contract or court order, the lawyer must distribute the property to the client, and the lawyer cannot rely on how a future court will view the strength of the third party's claim.[5]

2. *Distribution where the third person holds an undisputed interest as a result of a statutory lien, contract or a court order.*

Where the third person holds an undisputed interest as a result of a statutory lien, contract or court order, the lawyer is required to abide by Rule 1.15(b). The existence of a statutory lien or a contract creates a presumption that the client is not entitled to the property.[6] The lawyer should promptly deliver the property to the third person in accordance with the statutory lien, contract or order, and deliver the balance to the client.

3. *Distribution where there is a dispute about the validity or amount of the third party's claim.*

Where there is a dispute as to the validity or amount of the third party's claim, the lawyer should promptly distribute the undisputed portions. The balance should then be subject to a negotiated settlement between the client and the third party. The lawyer, however, should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* Committee Comment to Rule 1.15. The lawyer should encourage the client and the third party to resolve their differences promptly and amicably.

The lawyer cannot unilaterally hold the disputed property without the permission of the client and the third party.[7] Where the client and third party consent, the lawyer may retain the disputed property in a trust account pending resolution of the dispute between the client and third party. If the client and the third party cannot reach an agreement, the lawyer should interplead the property for disposition by the court. Filing fees and costs of service may be deducted from the property in dispute.

4. *Distribution to a third party where the lawyer has induced reliance by the third party, when there is no statutory lien, or court order.*

A lawyer may be contacted by a third party asserting a claim to the client's property. The lawyer should not engage in conduct which induces a third party to expect to share in the property and then later distribute the property solely to the client. The lawyer's conduct which may induce reliance can be explicit, *i.e.,* an express acceptance of the third party claim by the lawyer, or reliance can be induced by the lawyer's silence; *i.e.,* an implicit or tacit acceptance of the third party claim either by the lawyer's actions or inaction.

The Colorado Supreme Court privately censured a lawyer for inducing a third party to rely on the lawyer's assurance that her claim would be paid and then later distributing the property solely to the client. The client had provided a written assignment to the third party of a portion of his expected personal injury proceeds. The lawyer explained the workings of the assignment to the third party. When the third party became concerned about whether the assignment would be honored, she had her lawyer write a letter inquiring whether the client intended to be bound by the assignment. The client's lawyer did not respond, and instead, disbursed the proceeds of the personal injury claim to the client.

The Colorado Supreme Court concluded that the lawyer knew that the third party "was relying on the lawyer's representations that the assignment would be honored." 19 Colo. Law. 268 (Feb. 1990). The lawyer's conduct constituted "conduct involving dishonesty" in violation of the then applicable Code of Professional Responsibility.[8]

The Alaska Bar Association Ethics Committee has concluded that it is improper for a lawyer to induce such reliance, and that the lawyer had an affirmative duty to respond in a clear, unequivocal manner to a third party's inquiry. The Alaska Opinion 92-3, *supra,* noted that "it is inappropriate for the lawyer to remain silent after having received notice of such a potential claim." The Alaska Bar Association Ethics Committee suggested that the lawyer respond to a third party's lien claim by affirmatively stating that (1) the issue is one between the third party and the client, and (2) the lawyer will not assume responsibility for payment of the client's obligations.

This Committee agrees that a lawyer may not stand mute in response to a third party's claim to client funds. The lawyer should discuss the third party's claim with the client and decide what response should be made. The third party should then be informed of the client's decision with regard to the claim. Regardless of the client's decision, unless the lawyer intends to be personally responsible, the third party should be informed that the lawyer will not assume responsibility for payment of the client's obligations.

A situation such as this may also arise where the client has entered into a contract with a third party, and the client then instructs the lawyer to disregard the contract when the property or funds are received by the lawyer. If the lawyer has either explicitly or implicitly led the third party to believe that the property will be distributed pursuant to the contract between the client and the third party, the lawyer should advise the client and the third party to resolve the dispute. The lawyer should distribute the undisputed portions. Where the client and the third party consent, the disputed property may be retained in the lawyer's trust account pending resolution of the dispute between the client and third party. If the client and third party do not agree to place the property in a trust account or are unable to resolve their dispute, the lawyer should file an interpleader action with regard to the portion in dispute.

5. *Distribution where the client demands that the lawyer not disclose the existence of the funds to the third party.*

a. Where a third party has an interest in the property a result of a statutory lien or court order, and the client demands that the lawyer not disclose to the third party that the lawyer is holding the property, Rule 1.15(b) requires the lawyer to distribute the funds to the third party notwithstanding the client's instructions. Because the third party is legally entitled to receive the property, Rule 1.15(b) requires the lawyer promptly to distribute the property to the third party, and to render an accounting, if requested. The lawyer's duties under Rule 1.15(b) may conflict with the lawyer's duty of confidentiality under Rule 1.6. Under the circumstances discussed in this subsection, however, the Committee believes that the objectives of Rule 1.15(b) take precedence; thus the lawyer should distribute the property notwithstanding the client's request for confidentiality.[9]

b. Where the third party holds an interest pursuant to a contract with the client, but the client disputes the validity of the contract or amount of the third party's claim under the contract, and the third party has not been induced by the lawyer's conduct to believe that the third party will be paid from the property held by the lawyer, the lawyer should maintain the confidentiality of the existence of the property and distribute the property to the client, pursuant to Rules 1.2(a) and 1.6(a).[10] Even though the lawyer may be aware of potential liability which may be incurred by the client with regard to the third party, this Committee does not believe this vitiates the client's entitlement to the property under normal circumstances. However, the lawyer may not distribute the property to the client if to do so would be to engage in or assist the client in conduct that the lawyer knows is criminal or fraudulent in violation of Rule 1.2(d) or is otherwise not permitted by the Rules of Professional Conduct in violation of Rule 1.2(e). Under the latter circumstances, the lawyer should move to interplead the property. *See* Section 5(c) below and Rule 4.1(b).

c. Where there is a contract and the third party has been induced by the lawyer to believe the contract will be honored and the client disputes the validity of the contract or the amount of the third party's claim and demands that the lawyer not disclose that the lawyer is

holding the property, the lawyer should attempt to have the client permit disclosure regarding the property's existence. The lawyer should also advise the client to attempt to resolve the dispute. If the client refuses to allow disclosure of the property, the lawyer must interplead the property, naming both the client and the third party as necessary parties.

The interpleader action will disclose the existence of the property. However, this Committee believes that where the lawyer's duties under Rules 1.15(b) and 1.2(d) or (e) conflict with the duties under Rule 1.6, the confidentiality provision must be read in the context of the overall purpose of the Rules.

The ABA Committee on Ethics and Professional Responsibility noted that Rule 1.6(a)'s confidentiality provision can give way to Rules 1.16 and 1.2(d):

> While is it also true that neither Rule [1.16 or 1.2(d)] contains language explicitly overriding the confidentiality requirement of Rule 1.6 (as do Rules 3.3 and, of course, Rule 1.6 itself), the absence from their text of a preemption clause does not seem to us necessarily determinative of the proper course of conduct in a situation where compliance with Rules 1.16(a)(1) and 1.2(d) appears to require conduct that may have the collateral consequence of disclosing client confidences. In the absence of a clear textual indication of how such a conflict should be resolved, the Committee believes that the confidentiality requirement of Rule 1.6 should not be interpreted so rigidly as to prevent the lawyer from undertaking to the limited extent necessary that which is required to avoid a violation of Rules 1.2(d) and 1.16(a)(1).
>
> The exception here (if 'exception' is an appropriate term to describe the inevitable consequences of one rule's operation upon another) simply results from a recognition that fulfillment of the lawyer's obligations . . . may have the collateral effect of inferentially revealing a confidence. ABA Formal Opinion 92-366 at pp. 10-11 (*but see* Dissent to the Formal Opinion).

By analogy, the Committee believes that, although an interpleader action may have the collateral effect of revealing a client confidence (here, the existence of the property), Rule 1.15(b) does not permit a lawyer who has induced reliance to either retain the property or to ignore the interests of third parties who are relying on a contract which, unbeknownst to them, has been challenged or disputed by the client.

Conclusion

Distribution of property should be addressed with the client when the lawyer first learns of the statutory lien, contract or court order to prevent disputes from arising upon receipt of the funds by the lawyer. Early recognition of the potential for disputes between the client and the third party can avoid many of the complications discussed above.

2006 Addendum

A question may arise as to whether the lawyer may distribute the disputed property to the client where the statute of limitations has run. The Committee believes that it is proper for the lawyer to distribute the property if it is clear that the statute has run. However, if there is a question as to whether the statute of limitations has run, then the lawyer has an obligation to notify the third party and ask the third party whether he or she is making a claim to the property, giving the third party a reasonable time to state his or her position. If the third party makes a claim, then the lawyer should proceed in accordance with Section 3 above, which deals with distribution where there is a dispute as to the validity of the claim. If the lawyer does not receive a meaningful response from the third party, and the lawyer believes the statute of limitations has run, the lawyer may distribute the property to the client. In accordance with Section 4 above, the lawyer should be aware that if the lawyer has induced a third party to believe that he or she will be paid or that his or her interest will be protected whether or not a statute of limitations has run, and the lawyer fails to act in accordance therewith, the lawyer may be subject to discipline.

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1. For example, Colorado statutes provide for a lien in favor of a hospital. C.R.S. 38-27-101. Statutory liens also include those liens created by C.R.S. 26-4-403 which provides for recovery for certain payments made by the Medicaid Program and liens created by 1862 of the Social Security Act, codified at 42 U.S.C. 1395, which provides for recovery of certain payments made by the Medicare program. In some cases, a lawyer can be held personally liable for a distribution which is contrary to a statute. *See* C.R.S. 26-4-403.

2. An oral or written agreement between the client and a third party, granting the third party a right to receive funds which are expected to come under the control of the lawyer on behalf of the client as a result of that agreement, including by way of example: an assignment by the client, an agreement between a health care provider and the client for health care services, agreements between the client and an employer, a landlord, or an insurer.

3. Recent amendments to the Supreme Court Rule regarding contingency fees (Chapter 23.3, effective January 31, 1992) provide that the effect of third party liens shall be disclosed to the client in writing. It is advisable that this be discussed with the client whether or not a contingent fee agreement is in place.

4. The term "interest" is used to denote a right, claim or legal share in property, such as the right a third party has to property by virtue of a statutory lien, contract or court order.

5. Cleveland Bar Association Professional Ethics Committee Opinion 87-3 (3/29/88).

6. Alaska Bar Association Ethics Committee Opinion 92-3 (6/1/92).

7. California State Bar Standing Committee on Professional Responsibility and Conduct Opinion 1988-101.

8. Where the attorney personally executes the "lien," the attorney subjects himself or herself to personal liability *(Conyers v. Lee,* 511 P.2d 506 (Colo. App. 1973)) and potentially violates the Rules of Professional Conduct *(see* first tab, this book) by failing to honor the lien.

9. This section assumes that the client has taken no court action to challenge the validity or amount of the statutory lien or court order. If such action has been taken, resolution of the dispute should be accomplished in a fashion similar to that set forth in Section 3 above.

10. Rule 1.2(a) provides:

A lawyer shall abide by a client's decision concerning the objectives of representation, subject to paragraphs c, d, and e, and shall consult with the client as to the means by which they are to be pursued.

Rule 1.6(a) provides that:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in paragraphs (b) and (c).

The fact that client property is being held by the lawyer constitutes "information relating to representation of a client," as described in Rule 1.6(a). While the fact that such property exists may not rise to the level of information protected by the attorney-client privilege, the confidentiality requirement of Rule 1.6(a) is not limited to only privileged information. Rather, the Rule prohibits disclosure of any information relating to the lawyer's representation of that client.

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