

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. VII

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No. 2



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"Georgia's Largest Law Firm"

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Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be doublespaced, typewritten on letter-size paper, with the article on disk together with a bio and picture of the author and forwarded to Cal Callier, Taylor, Harp & Callier, P.O. Box 2645, The Corporate Center, Columbus, Georgia 31902. **Published by Appleby & Associates, Austell, Georgia**



Happy New Year to one and all.

As we start the New Year and try to get used to writing "2003" instead of "2002," many of us make resolutions of self-improvement. I, for one, need to lose more weight than I am willing to disclose in this column. And, while I suspect many of us have lists that may not get completed, I would like for all of us to consider what we could do to demonstrate professionalism in our personal and professional lives. Yes, I mean to include our personal lives as well as our professional lives, because I believe professionalism is not just a part-time endeavor. Stated differently, I don't believe one can be truly professional only some of the time. Sure, as human beings we will have lapses, but largely I believe

individuals either consciously act professionally or they do not.

The Code of Professional Responsibility, by which we as lawyers are governed, calls each of us to "demonstrate respect for the law, the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." The Code of Professional Responsibility also directs us to "seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession."

Why is it important for lawyers to be professional? It is important that we act professionally because we represent people and causes before the courts of our State and Country and because we profess to be able to counsel people about how to conduct themselves and their business in ways that meet the requirements of the law. With our training and by virtue of admission to the bar, we have a status that gives us opportunities to earn a living and make positive change in our society and it is important for us to protect that status. Additionally, by virtue of the work we do and the role we play, we are the representatives of the legal system with whom most people have contact.

Why do I raise this issue now?

Because I believe lawyers will be under attack over the next two years in connection with the impending review on the civil justice system at both the state and federal levels and as Presidential politics for the 2004 election heat up. Some might wish to think that only those trial lawyers who represent plaintiffs in personal injury lawsuits will be affected and, while I agree that they will be the focus of much of the rhetorical battle, any limitations enacted on the civil justice system will affect all who utilize that system, whether it be for domestic, commercial, personal injury, or other matters. Moreover, I believe the public will paint all lawyers with a broad brush and not give dispensation to any group of lawyers more than another.

I also raise this issue because of a recent encounter with one of our own. Over the past twelve years I have come to enjoy my weekly Rotary club meeting at lunch on Fridays. Some weeks it marks the end of the work week and the beginning of the weekend. Other weeks it marks the beginning of a relatively quiet period of uninterrupted work time before Monday. In any event, unsuspecting, I went to my weekly meeting recently to find that the speaker was a lawyer and his topic was employment law issues. He was a partner with an Atlanta firm that specializes in employment law. As he started his

PowerPoint presentation, I was hoping to learn some things about employment law, an area I know absolutely nothing about. Instead, what the twenty or so judges and lawyers in the audience had to endure was a bashing of workplace laws, lawyers, and judges. (Somehow I don't think the guy realized just how many judges and lawyers were in the club.) The presentation provided little of substance - the only thing I can recall was the admonishment that employers shouldn't hire the riffraff because they are harder to get rid of, as if employers knowingly hire such folks in the first instance. What this lawyer did was give his canned business development presentation that he apparently gives to hard core small businessmen, and presumably, women. The only conclusion I drew from his presentation was that workplace civil rights, gender equity, and disability laws were only enacted to provide traps for small businesses, that lawyers were all money grubbing beasts (except, of course, the lawyers at his firm), and that judges were incompetent. There was nothing in the presentation that gave small business owners in the audience any guidance about how to operate in a manner that would be more efficient or promote a more favorable work environment. Too bad, because that is certainly what a lawyer who specialized in employment law would have shared with a civic group were he acting professionally.

In the weeks after the program I polled most of the judges and lawyers in the club and found every one of them were amazed at the attack and remained annoyed and even angry weeks later. If the judges and attorneys responded that way, what did the lay audience think? Some thought it was "a bit much," but others thought it was a truthful depiction of the problems they face in the workplace dealing with stupid

laws and obnoxious, greedy lawyers.

My call to professionalism should not be construed as a call for attorneys not to advocate changes in our system of justice. Quite the contrary, as the Code of Professional Responsibility advises, advocating improvement to the legal system is one of the obligations to our profession. Healthy debate on these issues serves us all well. It keeps the system in tune with the public and, hopefully, it will make the system more efficient while maintaining equal justice under law. I believe we can reach those goals, however, without lowering the discussion and debate to an attack on the other side particularly for the purpose of generating business. Indeed, I believe that while the Code of Professional

Responsibility requires us to advocate for a better system, it requires that we do so with respect for the views of others who may have a different view. Respect for the ideas and the individuals who express them is central to the professionalism we, as lawyers, must exhibit or else we invite further erosion of public trust and confidence in the legal system. It is my firm belief that the damage caused by such erosion could endanger the very form of government we enjoy, while respectful substantive debate on legal issues strengthens it.

In the words of Martin Luther King, Jr., "we must learn to live together as brothers or we will perish together as fools." n



PACK YOUR BAGS. WE ARE HEADING TO ST. SIMONS ISLAND FOR THE 2ND ANNUAL GENERAL PRACTICE AND TRIAL SECTION INSTITUTE, MARCH 20-22, 2003 AT THE BEAUTIFUL KING AND PRINCE HOTEL.

As Editor of the *Calendar Call*, I take particular pride in presenting to you in this issue two articles that I believe are extremely topical, timely and important. The first deals with the ever-present and ever-changing field of reimbursement/subrogation from personal injury proceeds. This topic is addressed numerous times each year in CLE programs across the State of Georgia. Reimbursement issues arise on many fronts, including workers' compensation, medical payments benefits, governmental benefits (Medicare and Medicaid), and the ever-evolving ERISA health insurance reimbursement requirements. In this issue, Charlie Cork, of Macon's Reynolds & McArthur, has prepared one of the most comprehensive articles on reimbursement/subrogation issues that I have seen. Charlie addresses the topic not only from the standpoint of enforceability of these reimbursement claims, but also by analyzing an attorney's ethical obligations under the new State Bar Rules, as those rules relate to reimbursement/subrogation issues. I highly recommend Charlie's well-researched and thoughtful

article on this important topic.

Not long ago, an attorney called me to discuss disbursement options in a substantial case he had recently concluded. We discussed traditional probate court guardianship issues, such as bonding, filing annual returns, limited investment options, limited access to principal, etc. We also discussed traditional structured settlement annuities. I inquired whether a settlement trust had been considered. He was not aware that this was an available option. Indeed, I was first introduced to the topic of settlement trusts through the work of Bill Dussault of Washington state several years ago. That was my introduction to special needs trusts as a method to retain governmental benefits. Eventually, I had the pleasure and privilege of meeting Kel Long, a trust and estate planning attorney in Atlanta. It was at that time that Kel taught me that trusts were not simply a way of preserving income-based benefits, but could also be used for the broader purpose of providing professional investment and money management services. These trust devices eliminate the bond requirement, open the door for

greater investment return, free up access to principal, and can be tailored to provide great flexibility to meet a client's financial needs. Since meeting Kel, he has helped my office successfully place substantial funds in various trusts on behalf of needy clients. A fine article by Kel appears in this issue. Although I am sure that many financial institutions provide these trust services, the reader can get further information by contacting Kel (404/238-0174) or by calling Bert Mullin at SunTrust Bank (706/649-3671).

Lastly, there is an outstanding article by Steve Clements, whose advice, if followed, is sure to improve the impact on the jury of your courtroom presentation and that of your expert and lay witnesses.

The *Calendar Call* is the official publication of the General Practice and Trial Section, the largest single section of the State Bar of Georgia. As always, the *Calendar Call* welcomes submission of articles for publication. Please direct any submissions to my attention at Taylor, Harp & Callier, P.O. Box 2645, Columbus, Georgia 31902-2645.

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Ethical Considerations Regarding Settlement Fund Disbursements and Third-Party Subrogation/Reimbursement Claims¹

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This paper will address ethical issues that arise from the assertion of a claim for payment by creditors of the client upon the proceeds of a tort suit. It will not cover the lawyer's civil liability for ignoring valid liens or claims for reimbursement.² The prime source of the lawyer's duty is Rule 1.15(I) of the Georgia Rules of Professional Conduct (GRPC). See Appendix.

A. Duties at the time of receipt of settlement funds

1.

The duties, in general.

The lawyer's duties to third persons are established by GRPC 1.15(I)(b), which provides as follows:

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

Under this rule, the duty to a third person depends on whether that person has an "interest" in the funds. If so, the lawyer has three duties. (1) The lawyer "shall promptly notify" the client or third person, without exception. (2) The

lawyer also has a duty promptly to disburse funds in which the client or creditor has an interest, but the duty is qualified by the phrase, "except as ... permitted by law or by agreement with the client." Laws permitting interpleader (OCGA § 9-11-22) are commonly regarded as providing an exception to this duty. (3) The lawyer has a duty to account fully to the client and third party that is triggered by a request.

There was no comparable rule that expressly recognized a lawyer's ethical duty to the client's creditors in the prior Code of Professional Responsibility. See, e.g., DR 9-102 and Standards 61, 63, and 65. Thus, until 2000, there was no ethical duty to the client's creditors that would stand in constant tension with the duties traditionally owed to the client, such as following the client's informed decisions (GRPC 1.2(a)), keeping client information confidential (GRPC 1.6(a)), avoiding conflicts of interest (GRPC 1.7(a)), not using information gained in representing the client to the disadvantage of the client (GRPC 1.8(b)),

Continued on next page

among others.

One may ask why the new ethics rules recognize any duty to the creditor. It is clear that they do not regard the creditor as a client or as having a personal fiduciary relation with the lawyer. Nor is there an express argument for the imposition of duties to the creditor in the rules or comments. Nevertheless, the comments strongly suggest that the duty was created to recognize and protect the creditor's legal rights to the funds. Comment [1] states that a lawyer should hold "property of others" with "the care required of a professional fiduciary" and that all "property of clients or third persons" should be kept separate from the lawyer's property. Comment [3] refers to a creditor's "just claims against funds" in the lawyer's possession or a lawyer's duty under applicable law "to protect such third-party claims against wrongful interference by the client." These comments suggest that the lawyer's obligations flow simply from the lawyer's role as the possessor of property of others, and the duties are mainly intended to prevent the lawyer from delivering the property to persons who are not entitled to (all of) it. The lawyer is not a fiduciary for the creditor, but must hold the funds with the care of a professional fiduciary. Comment [1].

Although GRPC 1.15 does not make the creditor a client of the lawyer, the lawyer's duties with regard to the funds as between the client and the creditor are the same. *Oklahoma Bar Assn. v. Taylor*, 4 P.3d 1242 (Okla. 2000); *Utah Bar Advisory Op. No. 00-04*; *Advance Finance Co. v. Trustees of Client's Security Trust Fund of Bar of Maryland*, 652 A.2d 660 (Md. App. 1995) (holding that since Rule 1.15 imposed fiduciary obligations to maintain funds for benefit of clients or creditors, the state fund that pays for lawyers' violations of fiduciary obligations was liable to a creditor). This ethical duty is owed to the

public and may be enforced by anyone, even if the creditors and client do not complain. *Prue v. Statewide Grievance Committee*, 690 A.2d 898 (Conn. Super. 1995) (former associate had standing to file bar complaint, even if client and creditors did not join).

2. Sanctions for violation of duty to creditors.

The maximum penalty for violation of GRPC 1.15 is disbarment. No Georgia case has imposed sanctions yet, but sanctions imposed for violations of other state's versions of 1.15 have been significant, particularly where the claimant's lawyer breached other ethical rules in the same representation. The reader will note that most of these cases are of recent vintage. Apparently, there is a trend afoot to enforce this duty.

See, e.g., *In re Loosemore*, 771 N.E.2d 1154 (Ind. 2002) (lawyer suspended for three years for various infractions, including failure to pay funds to medical creditor and subrogated insurer); *People v. Greene*, 2002 WL 1611555 (Colo. O. P. D. J.) (lawyer disciplined for failure to keep funds subject to Medicaid lien in separate account and for paying funds to a client that were due to a provider and subject to the provider's lien); *Attorney Grievance Commission of Maryland v. Hayes*, 789 A.2d 119 (Md. 2002) (90 day suspension for letting trust funds drop below amount retained to negotiate with creditors); *In re Gregory*, 790 A.2d 573 (D.C. 2002) (lawyer disbarred for misappropriation of client funds and failure to notify medical providers of his receipt of funds to which the providers were entitled; lawyer could not rely upon staff to perform this function unsupervised, and in any case, upon discovery, the lawyer breached a duty to take prompt remedial action); *In re White*, 791 So.2d 602 (La. 2001) (lawyer disbarred for, among many viola-

tions, withholding a part of the settlement funds to reimburse health care providers and then making no effort to disburse the funds to them); *In re Morris*, 541 S.E.2d 844 (S.C. 2001) (lawyer disbarred for, among many violations, failing to pay the client's medical bills from settlement proceeds and for failing to notify Medicare on four occasions that he settled cases and that he was holding Medicaid funds in trust, and for the later disappearance of the funds); *Cotton v. Mississippi Bar*, 809 So.2d 582 (Miss. 2000) (lawyer disbarred for deducting funds to pay doctor from settlement, but not actually paying until the client was sued); *Oklahoma Bar Assn. v. Taylor*, 4 P.3d 1242 (Okla. 2000) (lawyer suspended for failing to notify doctor that he received three checks payable to client, lawyer and doctor, for two months, without excuse); *In re Hanvik*, 609 N.W.2d 235 (Minn. 2000) (lawyer suspended indefinitely for falsely telling Medicare agent that the case settled for less than it actually settled for, and then failing to send even the reduced reimbursement to Medicare); *In re Caldwell*, 715 N.E.2d 362 (Ind. 1999) (lawyer sanctioned for failing to pay money to creditors, despite phone calls, until grievance was filed); *Oklahoma Bar Assn. v. Brown*, 990 P.2d 840 (Okla. 1998) (lawyer suspended for two years for, among other things, failing to use proceeds to satisfy army lien, but keeping the proceeds for almost a year); *In re Jones*, 721 So.2d 850 (La. 1998) (lawyer suspended for, among other things, retaining money from settlement for the asserted purpose of paying medical debts, then paying only a small debt, leaving others unpaid, and ignoring client inquiries about the money); *In re Moore*, 704 A.2d 1187 (D.C. 1997) (attorney disbarred for, among other things, not paying doctor after signing a letter of protection, though attorney negotiated the debt to the doctor

below the doctor's original claim).

3.

When does the creditor have an "interest"?

Whether the lawyer has any duties to third party creditors under GRPC 1.15 depends on whether the creditor has an "interest" and whether that interest is perfected and applicable to funds in the lawyer's possession.

a. What is an "interest"?

Though descriptions have differed among the writers addressing this subject, there appear to be two basic sorts of "interests" protected by rules like GRPC 1.15: (a) statutory or enforceable contractual rights to settlement funds, and (b) expectations of payment (e.g., "letters of protection") that arise from the words or conduct of the lawyer.

Georgia has not yet interpreted this term in an official way, but many other states have.³ Several ethics opinions have noted that rule speaks in terms of *having* an interest rather than *claiming* an interest. They deduce that an "interest" must be a legal or equitable right to a share of the proceeds, and that an interest is created by some law other than Rule 1.15 itself. In the absence of such a valid "interest," the lawyer has no duty to the creditors since the lawyer's duty is to act in the best interest of the client. *Klancke v. Smith*, 829 P.2d 464 (Colo. App. 1991); Alaska Bar Assn. Ethics Comm. Op. 92-3.

The ethics opinions all agree that an "interest" includes a statutory lien, a judgment lien, and a court order or judgment affecting the property. These are the clear cases. They disagree considerably over the sort of contractual agreements that would give the creditor an interest. Some would recognize a consensual security agreement, apparently giving the creditor a "security interest" in the proceeds of the case, as an "interest." Others would

recognize a simple assignment of the proceeds. Others would not recognize the contract as binding on the lawyer at all unless the lawyer participated in some way in the contract, such as promising to abide by it. See the discussion of "Letters of Protection" below. Others would require that the agreement directly relate to the lawyer's efforts to obtain the recovery and be intended to aid the lawyer in making the recovery.

Some of the variation in these positions may be a result of variations in state law on the assignability of the proceeds of a personal injury lawsuit. Georgia appears to prohibit the assignment of personal injury proceeds under OCGA § 44-12-24. See *Fouche v. Morris*, 112 Ga. 143, 37 S.E. 182 (1900) (claimant's assignments of proceeds to different creditors were not enforceable against funds upon receipt by the attorney); but see *Santiago v. Klosik*, 199 Ga. App. 276, 404 S.E.2d 604 (1991) (holding that OCGA § 44-12-24 does not bar an assignment of the proceeds of a lawsuit, but that absence of consideration for the lawyer's promise to pay the chiropractor from the proceeds would defeat the chiropractor's contract claim). Therefore, in the author's opinion, Georgia would not recognize a doctor's "lien" as an "interest" that triggers a duty to the doctor. Whether Georgia would recognize a lawyer's conduct in representing that the doctor would be paid from settlement proceeds as giving the doctor an "interest" is a novel, unresolved question, but the virtual unanimity of ethics opinions from other states inclines the author to conclude that Georgia would regard such conduct as creating an "interest" under Rule 1.15.

Various common third party claims are analyzed in part D below.

b. What is not an "interest"?

The mere assertion of an unsecured claim is not such an "interest" that

would create a duty to the creditor. GRPC 1.15 does not create such an "interest." *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. 1996), cert. dismissed, 699 A.2d 151 (Conn. 1997). Any other interpretation of Rule 1.15 would put lawyers into an untenable conflict situation and would create an unconstitutional prejudgment attachment of the property. Conn. Bar. Op. 95-20, citing *Sniadach v. Family Finance Corp. of Bay View* 395 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien. A letter from the medical provider that the client owes funds is not sufficient. But the lawyer should respond to the letter in order to clarify that the matter is between the client and the doctor. The attorney should not remain silent. A third party may construe the silence as a tacit agreement. Alaska Bar Assn. Ethics Comm. Op. 92-3.

As noted above, some authorities require that the lawyer participate in some way in the agreement in order for it to be binding on the lawyer. Under this line of authority, even a consensual security agreement is just a contract which bears no direct relation to the cause of action, and the lawyer should turn over the funds to the client even if the lawyer has actual knowledge of the agreement. Conn. Bar. Op. 95-20. Medical liens signed before the client employs the attorney are between the client and the doctor and, therefore, do not create a right to receive funds from the attorney. S.C. Bar Advisory Op. No. 91-10. An acknowledgment signed solely by the client that the debt would be paid from proceeds of the lawsuit is not binding on the attorney. *Leon v. Martinez: Attorneys'*
Continued on next page

Ethical Obligations to the Clients' Creditors, 67 N.Y. St. B.J. 40 (1995).

c. Is the "interest" viable, perfected, and present?

Even if the creditor's claim would otherwise qualify as an "interest," it may not suffice to impose ethical duties on the lawyer for various reasons. The lawyer should consider the following factors in determining whether the creditor has an "interest" in the funds in the lawyer's possession.

Does the "interest" attach to the funds while in the lawyer's possession, or only upon disbursement to the client? Conn. Bar. Op. 99-41; *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. 1996), cert. dismissed, 699 A.2d 151 (Conn. 1997) (the statutory lien was not perfected until the money was received by the client and, therefore, was not an "interest" that would prevent the lawyer from freely disbursing to the client). If the interest attaches only on funds in the hands of the client, the lawyer may ignore it.

Are there steps that the creditor must take to perfect the lien? If so, the attorney should determine whether the creditor has taken those steps, and if not, the attorney is free to disburse the funds to the client. Penn. Bar Informal Opinion No. 95-138.

If the interest is created by agreement, has a valid contract been created? Phila. Bar Guidance Op. No. 94-24 (where creditor rejects an offer of letter of protection by filing suit against the client, but later seeks to have the claim honored by the lawyer, the lawyer is free to disregard the claim and disburse to the client).

Is there a statutory defense to the lien? See, e.g., Penn. Bar Informal Opinion No. 98-101 (since judgment creditor's lien was subject to statutory exception for workers compensation recoveries, the lawyer may disburse to client).

What if the creditor could get an order or otherwise perfect its interest, given enough time? A lawyer is not required to wait for the creditor to

perfect its claim. Cal. State Bar. Op. 1988-101; Colo. Bar Op. 94-94.

4.

What degree of knowledge triggers the lawyer's duties?

The degree of knowledge that triggers a lawyer's duty *to a creditor* seems to be "actual" knowledge of the third party's interest. Arizona Ethics Op. 98-06; Conn. Bar. Op. 95-20. The use in Rule 1.15 of "just claims" and "duty under applicable law to protect" third-party claims and "unilaterally assume to arbitrate" strongly imply an actual knowledge standard. Utah Bar Advisory Op. No. 00-04. A lawyer's duty to the creditor is not triggered by knowledge that the creditor *may* have a valid "interest" in the settlement. Conn. Bar. Op. 98-13 (although client's medical bills were stamped with words "Medicaid" or "Welfare," lawyer had no duty to ask client whether he owed Medicaid, since inquiring about this might violate ethical duties against creating a conflict of interest or against using client information to the disadvantage of the client, and such liens applied to funds in lawyer's possession only upon receipt of written claim).

On the other hand, a lawyer's duty *to a client* to advise about the lawyer's obligations under Rule 1.15 arises when the client tells the lawyer that her medical benefits provider has a subrogation provision known by the lawyer to be enforceable. In such circumstances, the lawyer has a duty to recognize and determine the extent of the creditor's interest even in the absence of communications from the creditor and to advise the client accordingly. Until the creditor notifies the attorney of the claim, however, the attorney owes no duty to the creditor. S.C. Bar Advisory Op. No. 93-31.

This author has found no case addressing issues of liens that are perfected by filing in public dockets and which thereby give constructive

notice to the entire world. As noted above, various opinions hold that the rules do not impose on the lawyer an ethical duty to seek out creditors.

5.

What should the lawyer do if the respective rights are clear?

a. Creditor has no valid "interest."

If the lawyer concludes that the creditor's claim is erroneous or less than an "interest" as described above, the lawyer should promptly disburse to the client. Unless authorized by the client, the lawyer should not even notify the creditor. The lawyer has no duty to seek out creditors. Conn. Bar. Op. 95-20. Hence, for example, without a valid lien or letter of protection, the lawyer has no duty to see that doctors are paid out of settlement proceeds. Conn. Bar. Op. 95-28.

b. Creditor's interest is clearly valid.

If the lawyer concludes that the creditor's claim is a valid "interest" and the amount of the interest is undisputed, the lawyer should disburse directly to the creditor. For example, the lawyer may disburse to a judgment creditor from trust funds held for the client. Alaska Bar Assn. Ethics Comm. Op. 98-3. The lawyer may not deduct a fee for collecting the amount for the creditor, absent consent, particularly where doing so would result in double compensation. *Lawyer Disciplinary Board v. Hardison*, 518 S.E.2d 101 (W.Va. 1999) (lawyer sanctioned for, among other things, failing to handle the negotiation of medical expense claims in a reasonable period of time after deducting funds sufficient to do so from the closing with the client; court expressed disapproval of his habit of reducing amounts payable to medical providers by his contingent fee percentage, but he repaid those deductions by the time of discipline); *In re Brown*, 669 N.E.2d 989 (Ind. 1996) (lawyer given two month suspension for deducting from

Medicare reimbursement his 25% fees because the total fee he collected exceeded 25% of the total recovery, and for failing to remit interest on the money in trust to the client).

The lawyer also has a duty to advise the client about the legitimacy of the creditor's rights and may be sanctioned for giving the client false information. *In re Ragland*, 697 N.E.2d 44 (Ind. 1998) (attorney sanctioned for falsely telling client that Medicare reimbursement did not have to be paid out of the settlement).

c. What if the client objects?

If the client has a "good faith," "colorable," or "plausible" basis to object, the opinions agree that the debt should be treated in the same way that other uncertain claims are treated (see the next section): the lawyer must notify the creditor, protect the funds until the matter is resolved, and interplead the funds if the matter is not resolved promptly. Utah Advisory Opinion No. 00-04; Arizona Ethics Op. 98-06; Connecticut Informal Op. 95-20; District of Columbia Ethics Op. 251; Ohio Ethics Op. 95-12; Rhode Island General Informational Op. 7; S.C. Bar Advisory Op. 94-20; S.C. Bar Advisory Op. No. 93-14; Alaska Ethics Op. 92-3. Under these opinions, good faith reasons to object include at least: (1) whether consideration for the client's debt was provided, (2) the amount of the charge or debt, (3) whether the charge is reasonable, and (4) whether there is a defense or offset to the charge.

What if there is no basis for the client's objection? Here there is some disagreement. Some opinions state that the lawyer may disregard the client's mere direction that the lien not be paid and pay it. S.C. Bar Advisory Op. No. 93-14. Others state that the lawyer should advise the client that without a waiver or other compelling reason, the lawyer will withhold the disputed funds, and

absent amicable resolution, the funds will be paid into court. Alaska Bar Assn. Ethics Comm. Op. 92-3. Some simply list the options, suggesting that the most prudent course would be to commence an interpleader, hold the funds with consent, or some combination of the two, or to take the risks of paying the client or creditor. Cal. State Bar. Op. 1988-101.

If the lawyer does not pay the creditor, the lawyer should at least send (1) a letter to the creditor stating that the case has been settled but that the client directs the lawyer not to pay, and (2) a letter to the client advising that the creditor may sue.

6.

What should the lawyer do if the respective rights are uncertain?

First, if there is no dispute as to the disposition of *part* of the funds, those must be promptly paid to the client or third party. Colo. Bar Op. 94-94.

The lawyer may not arbitrate the dispute. GRPC 1.15(I) Comment [3]. Hence, the lawyer may not determine the sufficiency of the claim or resolve disputes over the amount of the claim. Colo. Bar Op. 94-94. Thus, the lawyer must abide by GRPC 1.15 duties to the creditor, even if the lawyer believes that the creditor's conduct has made the services worthless. Conn. Bar. Op. 02-04 (doctor whose testimony was sought lacked credibility after pleading guilty to fraudulent billing practices).

The authorities listed above do not specify what the lawyer should do first with the money. They suggest that the lawyer may immediately interplead it or may first place it in an interest-bearing account for a reasonable period of time in order to encourage settlement. They agree that the lawyer may not simply sit on the money for a prolonged period of time, since the lawyer has a duty of diligence under Rule 1.3. *The Dishonored Medical Lien: A New Trend*

in Bar Complaints, 25 Ariz. Attorney 17 (1989); *Leon v. Martinez: Attorneys' Ethical Obligations to the Clients' Creditors*, 67 N.Y. St. B.J. 40 (1995); Phila. Bar Guidance Op. No. 91-6. These rules are consistent with Georgia Formal Advisory Opinion No. 94-2, issued under the prior Code of Professional Responsibility, which states:

In those cases where it is not possible to ascertain who is entitled to disputed funds held by the lawyer, the lawyer may hold such disputed funds in the lawyer's trust account for a reasonable period of time while endeavoring to resolve the dispute. If a resolution cannot be reached, it would be appropriate for the lawyer to interplead such disputed funds into a court of competent jurisdiction.

In every case a lawyer has a duty to represent the client and the client's interest. The client's instructions should be followed whenever possible within the restrictions provided in the standards, including, but not limited to, Standard 45 [which related to fraudulent conduct], and applicable law.

7.

What if the lawyer truly believes that the debt may not be validly asserted?

The ethical guidance is unclear in cases where a lawyer must realize that because of changes or uncertainty in the law, there is a non-frivolous, good-faith basis for the creditor's claims, but nevertheless believes that those claims will be defeated as a matter of law. Several types of creditor claims, most notably ERISA claims, fall into this category. Certainly the "most prudent" course is to treat the claims as uncertain, to notify the client and creditor, place the funds in an escrow account, and

Continued on next page

if the matter is not resolved promptly, initiate an interpleader. *The Dishonored Medical Lien: A New Trend in Bar Complaints*, 25 Ariz. Attorney 17 (1989). But the issue in question is whether, consistently with GRPC 1.15, a lawyer may ignore a creditor's claim only if the assertion of that claim would be *frivolous*, or may the lawyer ignore it if the lawyer believes in good faith that the claim is *simply legally wrong*?

The question cannot be answered without test cases. Informal conversations with disciplinary counsel in the Office of General Counsel of the State Bar of Georgia indicate that they take the position that there will be no ethical problem if the lawyer is "confident" that the creditor's interest is invalid. Ethics advisory committees typically do not determine difficult and uncertain questions of law. Conn. Bar. Op. 99-41. Likewise, their informal opinions are not binding on the disciplinary apparatus of the State Bar or on the Supreme Court.

Existing informal opinions are often inconsistent on this issue. See, e.g., Phila. Bar Guidance Op. No. 92-18 (holding that if the lawyer is of the opinion that the creditor has no legal interest in the funds, 1.15(b) does not impose the duty to notify the creditor or deliver any funds to the creditor, but noting that it reached a different opinion before); Phila. Bar Guidance Op. No. 92-140 (holding under the same circumstances that the lawyer may not simply turn funds over to the client); Phila. Bar Guidance Op. No. 90-4 (holding that whether the attorney may simply turn the money over to the client can only be answered with finality by litigating whether the interest is legitimate). If the lawyer concludes that there is no ethical duty to the creditor, the lawyer should still confer with the client about the client's exposure and options.

8.

What if the client forbids disclosure to the creditor?

The lawyer must analyze the creditor's interests and whether the lawyer has induced reliance by the creditor.

If the creditor is a mere general creditor without a special lien or court order, and if the lawyer has not induced the creditor's reliance by a promise to pay the creditor, the lawyer should respect the client's wishes for confidentiality and disburse to the client. GRPC 1.2(a) (abiding by client's decisions on the objectives of the representation, including settlement); 1.6(a) (keeping client's information confidential). This duty would be subject only to rules against assisting the client in committing a fraud (GRPC 1.2(d)) or other violations of the rules or law (GRPC 1.2(e)). Assisting in the breach of a contract does not qualify as assisting in a fraud or a crime. S.C. Bar Advisory Op. No. 91-10. Absent fraud or dishonesty, the lawyer has no obligation to honor personally the client's agreements to pay medical providers out of a settlement or judgment. Utah Op. No. 96-03. This is distinct from agreements that expressly impose an obligation on the lawyer or create a lien on the funds that are handled by the lawyer. The lawyer's liability would only be a matter of substantive law (agency and contract) rather than ethics. Utah Op. No. 00-04.

On the other hand, if the creditor's claim is based on a statutory lien or court order, the lawyer should disclose it despite the client's wishes. Rule 1.15 takes precedence over confidentiality interests. Colo. Bar Op. 94-94. Likewise, if there is no valid lien, but the creditor has been led by the lawyer to expect payment, the lawyer should ask the client for permission to disclose, but if the client insists, the lawyer should file an interpleader. In these circum-

stances, Rule 1.15 supersedes confidentiality duties. Colo. Bar Op. 94-94.

9.

What if the funds do not cover the claims of multiple creditors?

The lawyer should engage in the same legal analysis of each of the claims as above. After eliminating those creditors who do not have an "interest," if the funds do not cover all creditors' claims, clear or disputed, the money should be placed in escrow and all creditors notified. Conn. Bar. Op. 99-39.

10.

May or must the lawyer represent the client in the interpleader?

The author has found no authority on whether the lawyer may represent the client in an interpleader or similar action, but believes that so long as the disputed funds are protected by paying them into court, the lawyer has satisfied the requirements of Rule 1.15 and has no other duty to the creditor that would prevent the lawyer from representing the client against the creditor. The creditor is not a "client" and the lawyer is not "representing" the creditor. Rules 1.7 and 2.2 do not require the lawyer's disqualification at the instance of the creditor. Therefore, the author believes that, if the lawyer has not otherwise undertaken to represent the creditor in the matter, the lawyer may ethically represent the client in an interpleader against the creditor. Although the interpleading lawyer will be a nominal plaintiff against the claimant and creditor, the lawyer will ordinarily be dismissed as a party. *Gilbert v. Montlick & Assoc., P.C.*, 248 Ga. App. 535, 536-37, 546 S.E.2d 895 (2001).

Whether the lawyer *must* represent the client in the interpleader will depend on the scope of the representation the lawyer has undertaken. GRPC 1.2(a) requires that the lawyer abide by a client's

decisions concerning the objectives of the representation. GRPC 1.2(c) authorizes the lawyer to limit the objectives of the representation "if the client consents after consultation." Typically, the duty will be limited by the terms of the contract of employment. A broad description of the services to be rendered may arguably include representing the client in the interpleader, and if so, an abandonment of the client would be ethically improper. A narrower description of the services, or better, a term addressing the lawyer's role in an interpleader, would be proper.

11.

Does the lawyer have other options for handling the situation?

Probably not. The lawyer may not simply disburse to the client with a signed agreement that the client will pay the creditor. *In re Norman*, 708 N.E.2d 867 (Ind. 1999) (lawyer reprimanded for failing to promptly pay the doctor's bill from settlement proceeds; instead, lawyer ignored a signed letter of protection and paid the funds to the client with a written agreement that the client would promptly pay the doctor); *In re Burns*, 679 P.2d 510 (Ariz. 1984) (lawyer suspended for one year for assisting client in illegal or fraudulent conduct by depositing settlement check made out to client, lawyer, and air force into his account without air force approval, disbursing his fee and all but the medical expenses to the client, advising the client of the air force's lien, and giving the client the option of paying the air force, leaving the money in trust, or distributing it to the client, who chose the latter option); *In re Minor*, 681 P.2d 1347 (Alaska 1983) (same; a lawyer who receives money on behalf of another becomes a fiduciary to that person in the absence of an agreement to the contrary).

Nor may the lawyer impose a deadline on the creditor with a valid lien, so as to "put the ball in the

creditor's court," beyond which the lawyer will "assume" that the creditor consents to the lawyer's disbursement to the client. Conn. Bar. Op. 94-8 (two months after placing funds in escrow, lawyer demands that creditor sue within 60 days or it will be deemed a release of the claim; creditor did not sue, but maintained its claim; lawyer was not authorized to arbitrate whether the claim was abandoned; only the lapse of the statute of limitations could do so). The conduct may not be sanctionable, however, if the creditor's lien is invalid, or if the lawyer truly believes that it is invalid, as noted above.

12.

Does the lawyer have other duties to the creditor?

Even if Rule 1.15 imposes no duties on the lawyer to the creditor, the lawyer must respond truthfully to inquiries from creditors, such as whether the case was settled (*see* GRPC 4.1, regarding truthfulness in statements to others), but the lawyer may refuse to comment⁴ (*see* GRPC 1.6, regarding confidentiality). S.C. Bar Advisory Op. No. 91-10. The lawyer will be sanctioned for lying about the amount the settlement. *In re Hanvik*, 609 N.W.2d 235 (Minn. 2000) (lawyer falsely told Medicare agent that the case settled for less than it actually settled for, and then failed to send even the reduced reimbursement to Medicare - indefinite suspension); *In re Williams*, 521 S.E.2d 497 (S.C. 1999) (lawyer sanctioned for sending misleading half-truths to lienor concerning the amount actually recovered by the plaintiff that was available to satisfy the lien).

B. Duties at Creation of a Medical Lien or Letter of Protection

1.

Duties to the Creditor.

A lawyer may not (a) make a false statement of material fact or law to a

third person or (b) fail to disclose a material fact if disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. GRPC 4.1.

A lawyer who signs a "lien" believing it to be unenforceable may be subject to discipline because this conduct tends to deceive the physician. The lawyer should either refrain from signing the document or otherwise make some disclaimer so that the provider does not rely on the appearance that the lawyer agrees that the lien is valid. *The Dishonored Medical Lien: A New Trend in Bar Complaints*, 25 Ariz. Attorney 17 (1989).

The lawyer may indicate that the creditor will be paid expressly or implicitly or tacitly. It is improper to induce reliance, and the lawyer has a duty to respond in a clear and unequivocal manner to the third party's inquiry as to whether the assignment would be honored. If the lawyer does not intend to be bound by the agreement, that fact should be expressed. Alaska Bar Assn. Ethics Comm. Op. 92-3. The lawyer may not remain mute, but should contact the client to discuss the matter. Colo. Bar Op. 94-94. Language such as the following is good:

Dear Dr. ____:

I acknowledge receipt of the "lien" form you sent me and I am willing to do what I can to protect your interest. However, please understand that there is no such thing as a doctor's lien against a settlement or judgment, and an attorney is powerless to withhold any money from a client's settlement or judgment to pay any doctor's bills if the client demands his money. For that reason, I always respectfully decline to sign "lien" forms myself.

I do not think there will be any problem at all in this case, and again, I will certainly do what I can to protect your interest. I simply do not want to mislead you or any other treating physician by appearing to agree to do something that I may not be able to do.

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2.

Duties to the Client.

Before signing, the lawyer should perform a conflict of interest analysis and make disclosures to the client on important issues such as how the fee is calculated, the lawyer's and client's desire to maintain good relationship with the lienholder and the costs and benefits of doing so, the client's liability if client dishonors the lien, the consequences of signing, the potential consequences of limitations on the enforceability of the lien, and the extent to which the signing may affect the client's subsequent rights against the provider. The lawyer should also consider the forensic effect of the document if it is disclosed to the adversary. Cf. *Sharp v Fagan*, 215 Ga. App. 44 (2) (1994) (lien signed by client). It is the client's ultimate decision whether to sign the lien. If the lawyer is asked to sign, the lawyer should explain to the client the ramifications, including the lawyer's potential ethical and civil liability, and obtain the client's informed consent. *The Dishonored Medical Lien: A New Trend in Bar Complaints*, 25 Ariz. Attorney 17 (1989).

3.

Terms of the "Letter of Protection"

A "letter of protection" is an agreement signed by the lawyer to pay a creditor out of settlement proceeds.⁵ The lawyer should recognize that s/he will be assumed by the creditor to be acting on the client's authority. For self-protection, the lawyer should address the following issues in the letter of protection, and for this reason, it is advisable that the lawyer use his/her own form rather than one provided by the creditor:

* Explain that the lawyer's undertaking is contingent upon receipt of funds. The lawyer will not be liable, for example, if the client prevents the lawyer's performance by discharging the lawyer or otherwise.

* Set forth a procedure for resolving any disputes about payment from the proceeds. Perhaps arbitration may be used.

* Expressly allow for the deduction for attorney's fees and expenses.

* Expressly set forth a procedure in case insufficient funds are received to pay all creditors.

If there is a successor counsel, the lawyer should make the successor aware of the letter and advise the service provider of the change.

4.

Dual Representation.

A lawyer may simultaneously represent both the claimant and the creditor against a third party if the assertions of both will not affect the lawyer's ability to pursue a full recovery against the third party, as long as the other requirements of GRPC 1.7 are met. The lawyer may not then represent either party against the other in determining the extent to which the creditor may recover from the claimant. Mich. State Bar. Op. No. RI-155.

C. Duties at Beginning of Representation

The foregoing discussion suggests several things that the lawyer should do at the beginning of the representation in order to fulfill the lawyer's duties to consult with the client about the objectives of the representation and to help the client make informed decisions. GRPC 1.2(a), 1.4. Most of these can be accomplished in the employment contract.

First, the scope of representation should be defined. If the payment of the client's creditors is to be a part of the representation, that should be specified at the outset. Language such as the following would suffice.

In the event of a recovery, Client agrees that Attorney may pay all or any portion of those unpaid medical expenses from Client's share of the recovery.

Such a term will not give the lawyer authority to pay claims over the client's objections for reasons given above, but it would define the mutual expectations of the lawyer and client in the absence of objection. Also regarding the scope of the representation, if the lawyer is willing and able to represent the client in any collateral litigation such as an interpleader, this fact should be stated and any fees for this service established. If the lawyer is either unwilling or unable to do so, however, the client should be informed and the contract should be clear that the lawyer will not be representing the client in such matters. A contract along these lines should suffice:

Client agrees that he/she is aware that if any health care providers have been paid by a third party (such as health or medical payments insurance, workers' compensation, medicare, medicaid), then the third party may claim a right to reimbursement and may sue Client for it. Client further agrees that he/she will be solely responsible for any such claims. The lawyer shall not be required to represent Client in any such litigation and, should client desire representation by the lawyer, Client must enter into a separate employment agreement with the lawyer in regard to such litigation.

The manner in which the contingent fee is calculated should be clear. If the percentage fee is based on the total recovery rather than the recovery after creditors are paid, the contract should leave no doubt about this.

D. Common Third Party Claims

1.

Hospital Liens

Hospital liens may be enforced against a plaintiff's "cause of action" even though the plaintiff is not

completely compensated. OCGA § 44-14-470; *Holland v. State Farm Mut. Auto. Ins. Co.*, 236 Ga. App. 832 (2), 513 S.E.2d 48 (1999). The lawyer clearly has duties under Rule 1.15 to the hospital.

2. Medicare

Medicare payments must be repaid before any recoveries may be distributed to the client. 42 U.S.C. § 1395y(b)(2)(b)(ii); 42 C.F.R. § 411.24(h). The duty attaches to recoveries of uninsured motorist insurance as well as typical liability insurance. 42 C.F.R. § 411.50(b). Reimbursement to Medicare must be made even though the plaintiff is not completely compensated. 42 C.F.R. §§ 411.24-411.26. The attorney and the liability insurer are liable for failure to pay Medicare. 42 U.S.C. § 1395y(b)(2)(b)(ii); 42 C.F.R. § 411.24(i). The lawyer clearly has duties under Rule 1.15 to Medicare.

3. Medicaid

Until recently, it was believed that reimbursement rights under Medicaid could be enforced against a plaintiff's cause of action. OCGA § 49-4-148 to 149; *Holland v. State Farm Mut. Auto. Ins. Co.*, 236 Ga. App. 832, 832 (2), 513 S.E.2d 48 (1999). These may now be considered in the "arguable" and uncertain category. See 42 U.S.C. § 1396p ("No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan"); *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002) (42 U.S.C. § 1396p preempted state medicaid lien). The lawyer's duties under Rule 1.15 to Medicaid depend on whether the Medicaid interest is valid.

4. Workers' compensation liens.

An employer/insurer may

subrogate to the employee's claims against third parties only if the employee is first "fully and completely compensated ... for all economic and noneconomic losses incurred as a result of the injury." The statute imposes the lien "against the recovery," but authorizes the lienor to protect the lien by intervening in the suit or, in some cases, initiating the suit. OCGA § 34-9-11.1(b). Since the lienor's "interest" is recognized by law to exist before the settlement proceeds get to the plaintiff, the lawyer has duties to the lienor under GRPC 1.15.

5. ERISA subrogation or reimbursement claims.

This author believes that claims for reimbursement or subrogation under ERISA are unenforceable, but because the case results are not yet definitive, ERISA reimbursement claims belong in the "arguable" or "uncertain" category.

a. Reimbursement is not "appropriate equitable relief"

The only statute conceivably available to an ERISA fiduciary (such as a benefit provider seeking reimbursement) as a plaintiff is 29 U.S.C. § 1132(a)(3), which authorizes the fiduciary to bring a civil action "to obtain other appropriate equitable relief (i) to redress such violations [of ERISA or ERISA plans] or (ii) to enforce any provisions of this subchapter or the terms of the plan." These terms "equitable" and "appropriate" have been finely parsed by Supreme Court decisions.

"Equitable." The basic purpose of § 1132(a)(3) is to provide a remedy for ERISA violations that are not otherwise addressed in § 1132. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). § 1132(a)(3) is therefore a "catch-all" provision for equitable relief, but it is not a catch-all for any conceivable relief. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 704 (2002);

Varity Corp. v. Howe, 516 U.S. 489 (1996). Conversely, a plaintiff may not get equitable relief "at large," but only for violations of ERISA. *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993).

"Equitable" in this context means something less than "all" relief. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 704 (2002); *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993). "Equitable" also does not refer to the general, historical control by equity courts over trusts, for that would again mean "all" relief. *Id.* Because the text of § 1132 precludes this construction, equitable relief is limited to "the categories of relief that were typically available at equity." *Id.* An attempt to impose liability for a contractual obligation to pay past due debts, such as by an injunction to pay a past due contractual debt, is essentially a legal remedy and not typically available in equity, and may therefore not be enforced under § 1132(a)(3). *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Kishter v. Principal Life Ins. Co.*, 186 F.Supp.2d 438 (S.D. N.Y. 2002). If the plaintiff must "dance around" the term "compensatory damages," the relief requested is really legal, not equitable. *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997).

"Appropriate." Whether equitable relief is "appropriate" depends on the special nature of ERISA plans and respect for Congress's chosen remedies. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). As "equity follows the law" in other contexts, what counts as "other appropriate equitable relief" must "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others.'" *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996). For example, because the provisions of § 1132

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preclude liability of non-fiduciaries for fiduciary violations, equitable relief under § 1132(a)(3) for the same thing would not be “appropriate.” *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), *Coyne v. Delaney*, 102 F.3d 712 (4th Cir. 1996) (fiduciary can’t seek reimbursement for benefits erroneously paid as “appropriate” equitable relief). The granting of a right to enforce plan terms for legal or equitable relief to beneficiaries under § 1132(a)(1)(B) but not to fiduciaries (§ 1132(a)(3) allows only equitable relief) shows that equitable relief that would have the effect of granting legal relief is not “appropriate.” Many cases can be cited that Congress’s limited choice of remedies in § 1132 precludes the implication of other remedies under ERISA and superpreempts other state law remedies. It follows that “appropriate” equitable relief must respect Congress’s decision that only beneficiaries and participants may recover damages under the terms of the plan. If the insurer is simply seeking damages for breach of an agreement to reimburse, equitable relief cannot be “appropriate” if it ignores congressional intent to preclude this sort of liability.

Restitution as “equitable relief.” The courts recognize that restitutionary relief, such as a constructive trust, can constitute “equitable” relief, but they recognize a distinction between legal and equitable forms of restitution. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 704 (2002); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999). The measure of *legal* restitution is the plaintiff’s loss. *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999). “What the plaintiff lost” is a compensatory measure of damages which is not available under the equitable remedy provisions of § 1132(a)(3). *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001). The measure of *equitable* resti-

tution is the defendant’s ill-gotten gains, thus removing his incentive to perform the wrongful act again. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999). Thus, to seek reimbursement under the terms of the ERISA plan is to seek *legal* restitution, not *equitable* restitution.

For this reason, courts after *Knudson* have begun to hold that the claims of ERISA plans for reimbursement are unenforceable. All circuit court opinions to date have reached this conclusion. *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002)⁶ (no federal question jurisdiction over creditor’s declaratory judgment action, since creditor was not entitled to relief under § 1132(a)(3) because no equitable constructive trust could be placed on the settlement funds that were received and paid into the registry of the court); *Sheet Metal Local #24 Anderson, Trustee v. Newman*, 35 Fed.Appx. 204, 2002 WL 1033739 (6th Cir. 2002) (reversing summary judgment for creditors because of lack of jurisdiction, since creditor’s claims for restitutionary relief were simply a “proxy for a suit for money damages,” creditor never gave the plaintiff the money and creditor did not own the money at the time the suit was filed); *Westaff(USA) Inc. v. Arce*, ___ F.3d ___, 2002 WL 1869615 (9th Cir. 2002) (looking to substance of remedy sought rather than label, plan was attempting to recover damages on a contractual obligation). See further *Primax Recoveries, Inc. v. Sevilla*, 2002 WL 58816 (N.D. Ill. 2002) (equitable relief that actually seeks to enforce legal remedies under the plan has been denied to fiduciaries by congress).

The few district court decisions that have reached the opposite conclusion⁷ do not address whether restitutionary relief, even if “equitable,” would otherwise be “appropriate.” In addition, they

distinguish *Knudson* solely on grounds that a constructive trust theory would be available for funds in the hands of the client or the lawyer (or their banks), and their holdings can be avoided by having the funds paid directly into the registry of the state court or into a special needs trust.

**b.
Constructive trusts are not
available**

According to Eleventh Circuit precedent, the funds in the lawyer’s hands received in settlement of a tort claim are not ERISA plan assets; instead, the ERISA plan has nothing more than “a contractual ‘claim’ for reimbursement of the ... medical expenses it had paid on behalf of” the client. *Chapman v. Klemick*. 3 F.3d 1508, 1510 (11th Cir. 1993). This recognition precludes the application of a constructive trust, even under the cases recognizing this theory, because the ERISA plan has no equitable ownership interest of the funds.

Another difficulty with the use of a constructive trust as “equitable relief” is in identifying the pile of money that is subject to the trust, given that the rules for *equitable* restitutionary relief differ from *legal* restitutionary relief. The rule cannot be the sum of money that the ERISA plan is entitled to receive under its terms, which is the measure of *legal* relief, but instead the amount of money that the ERISA defendant retains that is “ill-gotten.”⁸ Can one with certainty identify those dollars that went to the plaintiff’s medical bills (which might arguably be “ill-gotten” and subject to reimbursement) as opposed to those that went to pay for pain and suffering (which are not “ill-gotten” unless the tort system is somehow illicit)?⁹ Constructive trust theory requires that the plaintiff (ERISA plan) be able to identify a res over which the trust can be imposed. It is difficult to see

how the res can be identified under these circumstances. But even if this obstacle can be surmounted, it can be surmounted only by recognizing a “make whole” rule built into the definition of “equitable” that limits the “ill-gotten” gain to that money which remains after the plaintiff has been made whole for all other injuries.

c.

Lawyers are not proper ERISA defendants

The Eleventh Circuit has held that, in order for an ERISA-based claim to lie, the defendant must be identified by ERISA as a suitable defendant, and the universe of ERISA entities is limited to the employer, the plan, the plan fiduciaries, and the beneficiaries under the plan. *Morstein v. National Insurance Services, Inc.*, 93 F.3d 715, 722 (11th Cir. 1996) (ERISA-based claim not available against independent agent of insurer).

The most typical theoretical basis for the assertion of ERISA liability against a lawyer would require arguing that the lawyer is a “fiduciary,” and thus subject to liability under 29 U.S.C. §§ 1104, 1132(a)(2) and (a)(3), but lawyers for claimants have escaped the “fiduciary” category. 29 U.S.C. § 1002(21)(A) defines an ERISA “fiduciary” functionally in terms of persons who exercise discretionary authority or control over the plan, its administration, or the disposition of its assets. Persons with far more connections to the decisions under an ERISA plan are not fiduciaries, however. The lawyer for the plan is not usually a “fiduciary” of the plan. 29 C.F.R. 2509.75-3; *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993); *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991) (even if as a result the plan violates ERISA). Instead, the lawyer for the plan must perform more than the “usual professional services.” *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988); *Anoka Orthopaedic Assocs.*

v. Lechner, 910 F.2d 514, 517 (9th Cir. 1990); *Assocs. in Adolescent Psychiatry v. Home Life Ins. Co.*, 941 F.2d 561 (7th Cir. 1991). Doctors making mixed eligibility decisions for an HMO are not ERISA “fiduciaries.” *Pegram v. Herdrich*, 530 U.S. 211 (2000). Even an insurer that simply handles claim-processing, investigation and record-keeping under an independent contract with the employer is not a fiduciary under the employer’s ERISA plan. *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347 n.4 (11th Cir. 1998); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987).

Therefore, it is not surprising that the courts have held that lawyers for the participant, acting simply to recover compensation for them outside the plan against non-plan parties, are not thereby fiduciaries, and they do not become fiduciaries simply by receipt of funds to which the plan asserts subrogation rights.¹⁰ *Chapman v. Klemick*, 3 F.3d 1508, 1510 (11th Cir. 1993) (lawyer allowed signing post-injury subrogation agreement, but put recovery into trust account; agreement did not effectively create trust fund assets, just a contractual claim for reimbursement; at 1510); *Southern Council of Indus. Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996) (lawyer who signed subrogation agreement was not liable as a fiduciary, although he could be sued under § 1132(a)(3) for violation of the agreement); *Hotel Employees & Restaurant Employees Int’l Union Welfare Fund v. Gentner*, 815 F.Supp. 1354 (D.Nev. 1993), aff’d 50 F.3d 719 (9th Cir. 1995) (lawyer was not bound by client’s subrogation agreement and thus did not breach an ERISA fiduciary duty); *Witt v. Allstate Ins. Co.*, 50 F.3d 536 (8th Cir. 1995) (tortfeasor’s insurer was not an ERISA fiduciary even though it was aware of ERISA fund’s subrogation lien on settlement); *Rhodes, Inc. v. Morrow*, 937 F.Supp. 1202 (M.D.N.C. 1996) (participant’s

signature on reimbursement agreement did not render uninsured motorist settlement proceeds an ERISA trust asset); *Vest v. Gleason & Fritzhall*, 832 F.Supp. 1216 (N.D. Ill. 1993) (lawyer who forged plan’s name on settlement check payable to the client, the lawyer, and the plan, did not assume “lawful authority” over plan assets; a thief of trust assets does not render himself a fiduciary). One rationale behind these cases is that any other rule would create an unacceptable conflict of interest between the lawyer and the ERISA beneficiary (*Chapman, Vest*).

The only other possible ERISA-based claim against a non-fiduciary non-administrator, such as the claimant’s lawyer, would be to characterize the lawyer as a “party in interest” under 29 U.S.C. § 1002(14)(B) and to seek to impose liability under 29 U.S.C. § 1106 (prohibited transactions) and § 1132(a)(3). *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Herman v. South Carolina National Bank*, 140 F.3d 1413 (11th Cir. 1998). Liability on this theory seems to be limited to the sorts of prohibited transactions that are the subject of § 1106 (transactions that cause the plan to loan money to a party in interest, pay excessive compensation, or transfer plan assets to a party in interest), which is inapplicable here.

d.

Misc. reasons for finding the ERISA claim unenforceable

The ERISA creditor’s claim may not be enforceable against funds in the lawyer’s hands for other reasons.

The plan language may not extend to the particular recovery made (for example, uninsured motorist benefits) or to the particular party making recovery (for example, wrongful death plaintiffs or minor children). Contra proferentem as a rule of contract inter-

Continued on next page

pretation applies in ERISA cases. *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Ala.*, 41 F.3d 1476 (11th Cir. 1995); *Lee v. Blue Cross/Blue Shield of Ala.*, 10 F.3d 1547 (11th Cir. 1994); *Wheeler v. Dynamic Engineering, Inc.*, 62 F.3d 634 (4th Cir. 1995). The construction of an ERISA plan is, however, complicated by the standard of review accorded to the plan administrator. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321 (11th Cir. 2001); *Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1449 (11th Cir.1997). Though the point has not yet been litigated, the author believes that enforcing such an assignment may violate OCGA § 16-10-95, which prohibits barratry, champerty, and maintenance, and which parallels on the criminal side the civil prohibition on assigning personal injury causes of action.¹¹ ERISA does not preempt state criminal law. 29 U.S.C. § 1144(b)(4).

6.

Uninsured motorist carriers

In the uninsured motorist context, an uninsured motorist carrier is subrogated to the rights of the insured/victim against the tortfeasor. OCGA § 33-7-11(f). Although the statute provides only for an offset for the uninsured motorist carrier's proportional share of attorney's fees and expenses of litigation, case law has interpreted the statute to impose a complete compensation limit on the right of subrogation. *Johnson v. State Farm Mut. Auto. Ins. Co.*, 216 Ga. App. 541, 544, 455 S.E.2d 91 (1995); *Mullenberg v. K. J. Saxon Constr. Co.*, 192 Ga. App. 281, 282, 384 S.E.2d 418 (1989); *Cherokee Ins. Co. v. Lewis*, 187 Ga. App. 628, 371 S.E.2d 103 (1988), rev'd on other grounds, 258 Ga. 839, 375 S.E.2d 850 (1989). Because the right of subrogation is statutory and expressly applies to proceeds recovered from the tortfeasor, the attorney has duties under Rule 1.15

to the uninsured motorist carrier.

7.

Reimbursement claims of insurers under OCGA § 33-24-56

OCGA § 33-24-56.1 controls cases occurring on or after July 1, 1997. Under this statute, benefit providers may seek reimbursement from an insured upon a tort recovery, but only if the insured is completely compensated. OCGA § 33-24-56.1(b)(1), (c). Its terms limit the insurer to a contract claim against the insured to recover reimbursement and preclude the insurer from claiming a property interest in the funds by subrogation or otherwise. *Id.* at (e), (f). Because the rights allowed by this statute are exclusively contractual, the lawyer has no duties under Rule 1.15 to insurers seeking reimbursement under this statute.

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Appendix: RULE 1.15(I) SAFEKEEPING PROPERTY - GENERAL

September 3, 2002(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. ...

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall

promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The maximum penalty for a violation of this Rule is disbarment.

Comment to Rule 1.15 (I)

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is

not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a

lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[4] A "clients' security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

Footnotes

1. I wish to acknowledge and thank the following people who have provided their thoughts: Ken Shigley, Paula Frederick, Zack Dozier, and numerous members of the GAPI listserv who have debated these issues. The mistakes that remain in this paper are mine alone. I would also like to thank Rick Newton and Westlaw for giving me some free research time.

2. See, e.g., *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998) (liability based on lawyer's knowledge of statutory lien or valid assignment); *Western States Ins. Co. v. Louise E. Olivero & Associates*, 670 N.E.2d 333 (Ill. App. 1996) (firm's failure to honor subrogation lien constituted conversion); *Prewitt v. City of Dallas*, 713 S.W. 2d 720 (Tex. App. 1986) (a lawyer's constructive notice of the city's right to the first money paid to the firm's client rendered the law firm liable after it paid those monies out to its client); *Shelby Mut. Ins. Co. v. Della Ghelfa*, 513 A.2d 52 (1986) (insurer could enforce lien against lawyer who disbursed proceeds to insured); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102 (Ida. App. 1983) (law firm liable for failing to honor assignment which client, but not firm, had signed); *Unigard Ins. Co. v. Fremont*, 430 A.2d 30 (Conn. Super. Ct. 1981) (lawyer liable for conversion because of failure to honor a statutory insurer's lien); *Brinkman v. Moskovitz*, 238 N.Y.S.2d 876 (N.Y. App. 1962) (lawyer who knew that his client assigned a portion of the settlement proceeds to the plaintiff physician was liable for disbursing in derogation of the assignment).

3. This section summarizes the opinions in these texts: Conn. Bar Assn. Informal Opinion No. 02-04; Utah Bar Advisory Op. No. 00-04; Conn. Bar Assn. Informal Op. No. 95-20; *Ethical Duties Relating to a Client's Property Held by a Lawyer in Which a Third Party Has an Interest*, 23 Colo. Lawyer 549 (1994); Alaska Bar Assn. Op. No. 92-3.

4. If GRPC 1.15(b) applies, the creditor may require the lawyer to give a full accounting of the funds received.

5. This section comes primarily from Conn. Bar. Op. 95-18 ("*Letters of Protection*"), S.C. Advisory Op. No. 93-31, and Cal. State Bar. Op. 1988-101.

6. Apparently abrogating prior contrary decisions in *Sunbeam-Oster Benefits Plan v. Whitehurst*, 102 F.3d 1368 (5th Cir.1996), and *Walker v. Wal-Mart Stores*, 159 F.3d 938 (5th Cir. 1998).

7. *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt*, ___ F.Supp.2d ___, 2002 WL 1398549 (N.D. Tex. 2002) (distinguishing *Knudson* and *Bauhaus* on grounds that the lawyer retained the funds in an account, rather than placing them into a trust or paying them into the registry of the court); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F.Supp.2d 1376 (M.D. Ga. 2002) (funds placed in lawyer's interest bearing account); *Admin. Comm. of Wal-Mart Stores, Inc. v. Varco*, (N.D. Ill. 2002); *Bauer v. Gylten*, 2002 WL 664034 (D.N.D., 2002).

8. Money received in a proper fashion is not "ill-gotten" and thus not subject to restitution. *McLeod v. Oregon Lithoprint, Inc.*, 102 F.3d 376 (9th Cir. 1996) (plaintiff could not recover from her employer the amount that she would have recovered from an insurer if her employer had notified her of her right to cancer coverage); *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) (reimbursement of medical expenses improper because plaintiff did not get funds by fraud or wrong-doing); *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000) (same).

9. Using the ERISA plan's language as to determine the amount that is "ill-gotten" is identical to asserting a claim at law, which is not available, and subordinates traditional equity to the will of the plan's drafter.

10. The same is true of the liability insurer for the tortfeasor. *HCA-The Healthcare Co. v. Clemmons*, 162 F.Supp.2d 1374 (M.D. Ga. 2001); *Witt v. Allstate Ins. Co.*, 50 F.3d 536 (8th Cir. 1995); *Trustees of Central States, Southeast and Southwest Areas Health and Welfare Fund v. State Farm Mut. Ins. Co.*, 17 F.3d 1081 (7th Cir. 1994).

11. See OCGA § 44-12-24 (prohibiting the assignment of personal injury causes of action), which enforces common law prohibitions against barratry, champerty, and maintenance. *Central R. & B. Co. v. Brunswick & W. R. Co.*, 87 Ga. 386, 389, 13 S.E. 520 (1891). See also OCGA § 13-8-2(a)(2) (invalidating contracts that violate these rules).

Settlement Trusts and Medicaid Exempt Supplemental Needs Trusts - What the Georgia Plaintiff's Attorney Needs to Know

By: A. Kel Long, III



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Upon completion of the often long, grueling and expensive process of reaching a settlement for a client, the plaintiff's lawyer may believe that his job is fully done and give little thought to the consequences of handing over lump sum payment to the client. Or, as is often the case, the insurer may present an annuity as part of the settlement, which the plaintiff's attorney believes will help ensure that the client's future needs are provided for. While either of these two options may be appropriate in many cases, other situations may instead call for a third option, without which the client could incur substantial damages either in the form of loss of governmental benefits or mismanagement of funds. This third option is referred to herein generically as a Settlement Trust. Within the category of Settlement Trusts lies what is often referred to as a Medicaid exempt Supplemental Needs Trust, meaning that it is designed to supplement rather than supplant governmental needs based assistance such as Medicaid and Supplemental Security Income ("SSI").

REASONS FOR RECOMMENDING SETTLEMENT TRUSTS

Clearly, if lump sum receipt of the settlement proceeds or annuity payments would cause a client to immediately forfeit their Medicaid and/or SSI benefits, then the lawyer has a duty to inform his client of this

and advise them of the options, including methods by which the governmental assistance can be maintained. But, in cases where governmental benefits are not in the picture, what duty, if any does the lawyer have to advise the client of the Settlement Trust option as an alternative to outright lump sum payment. This is a particularly relevant question where the lawyer knows that the client is fiscally irresponsible, or where the plaintiff is a minor or adult ward and the funds would otherwise pass into guardianship.

Often, the primary purpose of suggesting a structured settlement or a Settlement Trust is to help insure that the proceeds are there to meet long term needs. All too often one hears stories of, or has seen first hand, a client who has received a large settlement intended to meet the client's long term financial needs, and who a few years later is left with nothing but debts. This wasting of assets can be blamed on many factors, but often times it is due to the fact that the client lacks experience with managing money, and/or wastes the settlement proceeds money on consumer goods having no long-term value. Based upon the knowledge that the client may very likely waste the proceeds that the lawyer has worked to provide, it is in the best interest of the client and the profession, that the lawyer fully inform and advise the client of the settlement alternatives available, the

advantages and disadvantages of each, and using the lawyer's experience in these matters, assist the client in making an appropriate decision.

In order to help the plaintiff's lawyer gain a general understanding of when to recommend a trust, this article discusses features and benefits of Settlement Trusts, including Medicaid exempt Supplemental Needs Trusts.

USE OF SETTLEMENT TRUSTS IN NON MEDICAID/SSI SITUATIONS

(a) Professional Management.

As noted above, in some cases where continued Medicaid and/or SSI eligibility is not a factor, a trust created for the benefit of the plaintiff, funded with litigation proceeds or an annuity stream may still be appropriate. Where there is concern over the client's ability to successfully manage the funds to meet the client's long term needs, a trust with a third party trustee should be considered. The third party trustee provides professional management and control over the distribution of trust funds. The trustee may also provide financial planning including helping the beneficiary with budgeting, forecasting and long term needs planning.

(b) Avoiding Georgia Guardianship.

In cases where the plaintiff is a minor or an adult ward (referred to herein collectively as a "ward"), lump sum settlement or the receipt of annuity payments will be subject to Georgia guardianship statutes. These statutes dictate a very restrictive court supervision process in order to protect the ward's property from theft or mismanagement. Where small dollar amounts are involved, a guardianship of the property may be the only viable solution. However, where the settlement funds are sufficient to economically justify and

attract a professional trustee, then a trust will usually provide a better long-term arrangement for the beneficiary. Court approval of the ward's trust will have to be obtained (see discussion below). Courts are generally receptive to the trust concept where adequate safeguards are included in the trust agreement. One of the key safeguards is the use of a professional or corporate trustee, with the financial strength to indemnify the trust. Also, under O.C.G.A. Section 53-12-174(e), corporate trustees are not required to post bond, with the benefit that this significant cost savings helps offset the corporate trustee's fees.

(c) Delaying Distribution Dates Until More Appropriate Ages.

Under the Georgia guardianship statutes, a minor is to receive their guardianship funds at age eighteen. Most parents agree that this is too young an age to receive a large amount of cash or property. By using a trust, with court approval, the age(s) of outright distribution can be extended to more appropriate ages. Commonly desired distribution ages are age thirty, at which time the beneficiary would receive one-half of the trust and age thirty-five at which time the beneficiary would receive the balance of the trust. Prior to those ages the trustee may make distributions for the beneficiary's needs as set out in the trust agreement. The goal is to extend the ages of outright distributions well beyond age eighteen, in order to protect the child from the potential negative effects of having access to excessive funds at too young of an age.

MEDICAID EXEMPT SUPPLEMENTAL NEEDS TRUSTS

A Supplemental Needs Trust (also commonly referred to as a special needs trust) is generally thought of as a trust created for someone who requires long term medical care and would otherwise be

Medicaid eligible. To be Medicaid eligible, one must be financially destitute, having only limited income and assets (referred to as resources). If the trust is treated as a resource, then it must be spent down (i.e., depleted) before the individual can become Medicaid eligible again. In the end, the client will be left in the same position as if he/she had never received the settlement proceeds. The goal of a Supplemental Needs Trust is to prevent the trust property from being treated as a resource, thus creating a nest egg for the client to be used for expenses not otherwise paid for by Medicaid. Payments from the trust could be made for additional rehabilitation and therapy, in home care (including payment to a family member), entertainment, transportation (including an automobile or van), travel costs, capital improvements to the home to facilitate the beneficiary's physical needs, and other items to make the client's life as pleasant as possible. These benefits often also indirectly benefit the family of the beneficiary.

(a) Supplemental Needs Trusts Rules Established Under OBRA 93.

Under the Omnibus Budget Reduction Act of 1993, any trust created at the direction or request of an individual will be treated as a resource of that individual for Medicaid eligibility purposes (42 U.S.C. §1396p(d)(2)(A)(iv)). Thus a Settlement Trust would be treated as a resource to the beneficiary of the trust. An exception applies if a trust is created by a parent, grandparent, guardian or a court for a disabled person (using the social security definition), under age 65, and if the state at the death of the person will be reimbursed for any medical assistance provided. These rules are codified in 42 U.S.C. §1396p(d)(4)(A) and thus another term used for the Supplemental Needs Trust is a "(d)(4)(A)" trust. Accordingly, if the

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(d)(4)(A) requirements are met then the trust will not be treated as an asset resource in determining Medicaid eligibility. To cause a Settlement Trust to be treated as a Medicaid exempt Supplemental Needs Trust under OBRA 93, it is therefore necessary to have either the parent/guardian or if neither of those is applicable to the case, then the court with jurisdiction over the tort case, create the trust for the benefit of the Medicaid needy client. Further, in order for the Supplemental Needs Trust to be Medicaid exempt and also to not affect SSI benefits, if applicable, the Trust must be irrevocable under state law.

(b) Repayment Obligation At Death.

As noted above, one of the requirements to be an exempt Trust is that at the beneficiary's death, any Medicaid payments made by the state subsequent to the time the trust was created must be repaid to the state. If the Medicaid reimbursement is less than the value of the trust, then the remainder will pass in accordance with the trust document, which is commonly to the heirs at law of the trust beneficiary. If the trust assets are less than the Medicaid reimbursement, then the state will get all of the trust property. Notwithstanding that after the repayment obligation to the state there might not be anything to pass to the family on the death of the Medicaid needy beneficiary, the Supplemental Needs Trust has great value as a nest egg for the beneficiary to be used to make the beneficiary's life as comfortable as possible and to provide the additional assistance that Medicaid will not pay for.

(c) Distributions From The Supplemental Needs Trust.

In addition to the asset test, state Medicaid rules provide monthly income limits, including in some cases, household limits, in order to maintain Medicaid eligibility. SSI

benefits and Social Security benefits (which are separate and distinct from the needs based SSI benefits) are counted in the income test. Under the Medicaid rules, any amounts which are paid to the trust beneficiary either in cash, which can be converted to cash, or which are for food, clothing or shelter, are counted as income when computing whether the income limits are exceeded. Thus, the Trustee must pay careful attention to the amount and type of disbursements so as not to cause the trust beneficiary to fail any of the applicable income limitations. If the trust beneficiary is also receiving SSI, then additional rules apply, which will need to be addressed if the trust beneficiary is to continue to receive SSI benefits. In other words, while the Trust may be written to comply with the (d)4(A) rules so that the trust is not treated as an asset, the trust must be administered properly on an ongoing basis so as to not violate the Medicaid income limitations.

(d) SSI Qualifications.

In 1999 congress changed the SSI income qualification rules for trusts to be similar to the Medicaid exempt trust qualification rules. As such one can now also continue SSI benefits while being the beneficiary of a trust. However, because the SSI income limits are much less than the Medicaid income limits, and because the SSI monthly benefit is relatively low (around \$500 per month) often times the Trustee may elect to waive the SSI benefits in order to be able to make larger distributions from the trust to the trust beneficiary under the more liberal Medicaid income limits.

(e) Community Trusts.

The discussion in this article has focused on a separate and single stand-alone trust, written for the beneficiary's particular needs, and which will not be treated as a resource for Medicaid eligibility purposes. As noted above, this is

what is referred to as a (d)(4)(A) trust. In addition to this exception for (d)(4)(A) trusts, a second exception applies to payments made to a "community trust" under 42 U.S.C. §1396p(d)(4)(C). To qualify, a community trust must be run by a non-profit organization, and while the funds must be pooled for investment purposes, separate accounts may be maintained for the individual beneficiaries. At death, any funds not retained by the community trust are to be repaid to the state up to the amount of Medicaid assistance provided. In Georgia, we are fortunate to have the Georgia Community Trust to serve in this function. Their web address is www.georgiacommunitytrust.com where copies of their master trust, joinder agreement, and other information can be found.

The use of a community trust to receive settlement proceeds is a viable option for Medicaid eligible clients, particularly when the settlement proceeds are small and the cost of establishing and maintaining a separate stand alone Supplemental Needs Trust cannot be justified. However, where the proceeds are sufficient to justify a separate trust, many clients will desire their own individual Supplemental Needs Trust; because it is tailored for their needs, and their funds will not then be pooled with others for investment purposes. Also, the option to replace a corporate or professional trustee is a feature of the stand alone Supplemental Needs Trust that many clients view as critical in this decision process.

ISSUES AFFECTING BOTH SETTLEMENT TRUSTS AND MEDICAID EXEMPT SUPPLEMENTAL NEEDS TRUSTS.

(a) Court Approval.

Georgia law (O.C.G.A. §29-2-16) requires court approval of the settlement of a minor's claim and to allow the settlement funds to pass to

a trust, rather than into guardianship. O.C.G.A. §29-5-4 makes O.C.G.A. §29-2-16 applicable to adult wards, thus all of the Georgia statutory provisions regarding establishing a trust for a minor or an adult ward are contained in O.C.G.A. Section 29-2-16. There one finds various rules for compromising claims and the annuity and trust approval process. The required process depends on the status of the case and dollar amounts involved.

(b) Tax Returns And Grantor Trust Income Tax Status.

The trust will likely be required to file a federal and state income tax return. In most cases, having the trust treated as a "grantor trust" under IRC §671, et. seq. will be the best strategy. Trusts that pay their own tax are presently disfavored under the federal tax brackets, as a trust enters the 38.6% tax bracket at \$9,200 (rates for 2002) of taxable income, versus a single individual who does not reach that bracket until \$307,050 of income. As a grantor trust, the trust is effectively ignored for income tax purposes and the trust income is reported on the beneficiary's individual income tax return (IRS Form 1040). Not only is a lower tax rate used, but also by reporting the trust income on the individual's 1040, his/her personal exemption and itemized deductions, including medical expenses, can be used to offset the trust's taxable income. One way to create grantor trust income tax treatment is to give the plaintiff/beneficiary a right to substitute trust property with property of equal value pursuant to IRC §675.

(c) Avoiding Designated Settlement Fund Tax Status (IRC Section 468B).

An income tax trap under IRC §468B arises in situations where the defendant makes a settlement payment directly to the trustee of any Settlement Trust, including a

Medicaid exempt Supplemental Needs Trust. Under that code section, if a defendant makes a payment to a trust to settle a tort claim, then unless the trust qualifies as a Designated Settlement Fund (or Qualified Settlement Fund under Treasury Regulation §1.468B-1), the defendant is not entitled to a tax deduction for its payment. The problem with being taxed as either a Designated Settlement Fund or Qualified Settlement Fund is that the trust will be taxed on its income at the highest corporate income tax rate, and the trust's deductions are very limited. If instead the trust is taxed as a grantor trust (see discussion above) then a lower tax will generally result since the beneficiary's tax rate will likely be lower than the highest corporate tax rate and the beneficiary can also deduct itemized deductions, including medical expenses, against trust income. To avoid the harsh tax treatment under IRC §468B one should have the defendant's payment made to the client and deposited in the plaintiff's attorney's trust account. Then upon either direction from the client or the court, as applicable, the plaintiff's attorney would make disbursement from their law firm trust account to the Settlement Trust, after having paid expenses and attorneys fees. By this method, the defendant has not made a payment to a trust.

(d) Annuity Owned By A Settlement Trust.

Where it is determined that an annuity is an appropriate investment choice as either representing the entire settlement benefit to the client, or in part also with a lump sum cash payment, the trust can own and be the beneficiary of the annuity payments and still enjoy the tax free nature of the payments under IRC §104 and 130 (assuming that the trust is a grantor trust as described above). If the Settlement Trust is also designed as a Medicaid exempt Supplemental Needs Trust, then by

having the annuity owned by the trust, rather than the client, the present value of the annuity will not be counted as a resource and the annuity benefits when paid to the trust will not be treated as income to the trust beneficiary. Further, if the annuity payments are in excess of the client's immediate needs, then the trustee may retain the excess payments in trust for future needs.

(e) Clause Allowing The Removal Of A Professional/Corporate Trustee.

Where a professional or corporate trustee is named, one should consider including in the trust agreement the power to remove and replace the trustee with an equally qualified trustee. This allows the client some flexibility to change professional trustees if they desire such a change. If there are concerns over the client's ability to properly exercise this discretion, an advisory committee or "trust protector" can be named in the trust agreement to serve in this role. Typical members of this committee would be the client, the attorney, and a trusted friend of the client or family member. By including this removal power, the beneficiary may become more comfortable with the use of a trust knowing that if the trustee fails to provide good service then the trustee can be replaced.

CONCLUSION

The use of a trust to receive settlement proceeds can provide many benefits to a client, including protecting Medicaid and SSI benefits, avoiding guardianship for minors or adult wards, and providing financial management for the long-term needs of the client. Whether all of these benefits are relevant is dependent on the client's situation; however, by advising the client of their options, the plaintiff's lawyer provides a better service to the client.

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Make It Your Courtroom

By: Steve Clements



Steve Clements trains attorneys to maximize their oral presentation skills in the courtroom and before the media. To learn more about his 35 years in television broadcast, academic, and consulting experience, visit his website at www.c4communicationsinc.com.

Do you go on auto-pilot when you enter the courtroom? Or are you just starting out and looking for your voice during trials? Whichever the scenario, you must be best positioned to capture the attention of the jury, judge, observers in the gallery and even the press to accomplish your goals.

Without question, the courtroom is a stage and the lawyers, judges and witnesses the actors in the play. Yes, the courtroom must be given its due reverence. It is the site wherein accused after accused is given the right to a fair hearing based on all the issues. However, no two trial attorneys or even expert witnesses bring an equal amount of "fair" to hearings. The difference lies in quality of court performance.

The reality is few people have the theatrical voice, gesture, and movement of a Belli, Darrow, or Bailey. Therefore, it is up to each trial attorney to examine (and re-examine) what works in court, and, for those who have been doing this for years, what *used* to work in court. Just like an actor who has played one particular role on Broadway for years, ennui sets in, and the performance can become a poor facsimile of the original.

This comparing of the fiction of a Broadway role with the search for truth in a court of law is not intended to cast aspersion on the courtroom. Nevertheless, the truth remains. If two trial lawyers were to use the same questions of the same witnesses, and make the same statements in front of

the same jury, the outcome of the case would vary each time. Why? Your audience, the jury, judge, client, and other courtroom players are influenced by "packaging" and stage presence. So how do you ensure your packaging is intact, in concert with your style, and effective?

Self-Review

Examine your approach to the courtroom. Has it become rote? As a result, is your track record as great as it was five years ago? Have you sought new ways to utilize your growing maturity to create ways to make your court performance reflective of the person you are today, rather than the person you were when you began your career? Re-evaluation is needed for everyone who has performed the same role in life hundreds, even thousands of times.

Or are you just starting out, and seeking that persona that maximizes the opportunity for victory for your clients? Then it's time for evaluation. (Even when you discover that basic persona, there are still variations within you that will be more effective depending on client, jury profile, the nature of the case, and/or the disposition of the judge.)

Take a moment and consider:

- ▶ Are you examining the body language of every essential player in the courtroom, so that you can respond to restlessness, tension, hostility, and compassion?

Begin to “learn the room.” Increase your awareness of how you and the situation are being perceived. When examining a witness, include everyone in the courtroom through both your eye contact and body language. Demand they participate, they listen, that they gain a feeling of interaction directly with you. Start with your next court case. Make a commitment to meet the eyes of each member of the jury, and not to look away until that connection has registered on the jury member. Perfect that, then add the judge, the opposing counsel, etc. Work each courtroom until you “read” the thoughts coming back to you.

- ▶ *Are you receiving the visceral reaction you seek from the key trial participants?*

Your energy in the courtroom should equate with that of an on-stage performer. A competent but low-key trial attorney will not command the attention of a competent attorney whose stage presence dominates the room. It may be time to “freshen” your performance. Try different levels of energy for each of two or three trials and find your personality again.

Remember, your personality is a combination of personas. Aren't you a variation of yourself for your family, your colleagues, your clients, and others, each an *aspect* of you? Listen to yourself when you interact with others in your life. What personality traits might give you a new edge in the courtroom? For example, if quiet intensity has become a new aspect of your conversational style in recent years, it can be adapted successfully into your courtroom performances.

- ▶ *Are your questions, statements, and speeches registering maximum advantage? Do you sense a thud rather than a bolt of electricity going through the courtroom?*

Don't allow your examinations to

drift. It bores the judge, jury, and audience, and minimizes your impact. Make your questioning incremental, each adding to the final goal. Otherwise you risk negative feedback for you and your client.

Keep updating summaries for those who have missed a point, or might have tuned out for a period of time. That also leads all involved to the conclusions you are trying to convince them to reach.

Above all, be articulate. This is the strongest advice I give my clients and the area of greatest emphasis during training. Hesitations, misstatements, long pauses, or the inability to find the correct word or question reduce confidence. Practice out of court in order to strengthen the message itself and the way in which you deliver that message. If possible, utilize an oral communications expert to videotape simulated appearances in the courtroom, and analyze whether or not you are who you envision as you deliver opening statements, cross-examinations, and summations.

Staging

Just as an actor turns in a specific way on just the right line, the same must be true for the trial lawyer especially in what can be static court proceedings. Use space with strong, positive movement in order to introduce dramatic action into the situation. This goes beyond the perfect and absolutely incorrect time to turn towards or away from the jury, or judge, or defendant, or prosecuting attorney, or court witnesses. The right move can solidify a judgment, while the wrong move can destroy the intent.

Check your volume level by studying the facial reactions of the receivers of your oral arguments and speak loudly enough so that your presence fills the room and is heard by all. Make sure your hand gestures, walk, attitude towards the witness, etc. demonstrate your total

control of the situation. Keep in mind, control and arrogance can be easily confused. People like those who take charge, but resent and are prejudiced against anyone who has assumed the role of “bully.”

If you have a hostile witness and have won a point, don't gloat or become self-satisfied. It could cause the opposite reaction than you expected. Instead, show compassion, which creates positive feelings.

Expert Witnesses

Speaking of witnesses, while it may seem that this performance awakening challenge is directed solely to the trial attorney, it is equally important for expert witnesses. Even if your witness is highly accredited in his field, but speaks in terminology that is foreign to nearly everyone in the court, especially in a field that can easily intimidate, frustration can turn support to the other side. As trial attorney, you must work with these expert witnesses to guarantee terminology expressed will be understood and appreciated by all.

Then take that training another step. Every sport has its hand signals that are crucial to the communication on the field. Similarly, attorneys should use verbal and physical cues with their witnesses. One physical gesture from the attorney can alert a witness that the answer is taking too long; another can cue the key point that will guarantee victory. To maximize the impact of an expert witness, the communication between that witness and the attorney should be “choreographed” (yes, court as theatre), so that nearly every eventuality, including an unrelenting judge, is handled without flustering the witness.

Clients

The same attention should be given to training a client. Typically, trial lawyers prepare a client for testimony, placing proper emphasis

on eliciting expected answers to particular questions. But the answer alone will not convince judge and jury. It is the client's body language, the eye contact, the confidence of the voice, and the seeming desire to state the truth that increases credibility, and thereby influences opinions.

Train your clients on how to finesse the delivery of the message as well as its content. If you don't have the time, utilize someone from your marketing department or a communications expert to polish that client's performance. This extra step, particularly for high profile clients, could be the very edge that guarantees success. After all, why leave any possible advantage to luck and chance? Your client deserves your commitment to take control of every variable, thereby reducing risk and improving odds.

Media

High profile cases – and media savvy attorneys – attract media attention. Are you ready for dozens of television and/or radio microphones to be pushed in front of your face as you proceed down the steps? Can you easily respond to the

barrage of often inane questions from throngs of reporters? Are there any right answers to these questions? Not really, except the least information possible is always preferable. However, there are many *wrong* answers—answers that reveal more than is necessary, as well as attitudes that are dismissive or condescending. Rest assured, viewers and media will form opinions based upon the trial attorney's impromptu interview skills. Therefore, the trial attorney must handle these assaults with the aplomb formerly reserved for the courtroom.

In a world where courtroom proceedings have become an essential ingredient of the news, trial attorneys must also be trained to give an effective studio interview. From wearing the right tie that does not "burn" the lens to appearing confident and yet likable, attorneys must now perfect skills never taught in law school. No one can refute that those five-minute interviews on news and interview channels can make or break your case – or your practice. Spend time perfecting your media skills. Find a trainer who can help you to excel in this arena. Then work

with your marketing department to expand your visibility. A trial attorney who is a desirable news/talk show guest not only becomes invaluable to his/her clients, but also gains viability, respect, and, thereby fees, due to recognition.

Summary

It takes courage, self-motivation, and dedication to challenge the techniques that have fit like a glove for years. However, self-evaluation, determination, training, and the willingness to detect and admit even subtle changes could propel you to a higher level of performance.

Focus on yourself as though you were critically evaluating a competitor, create approaches that breathe new life into your performances, and constantly re-evaluate and strengthen. Remember, there is not just one peak in a career, but many, based upon changes in courtroom style, and changes in you as the person delivering the arguments.

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