Connecticut Bar Association

Professional Ethics Committee

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INFORMAL OPINION 2012 - 01

Duty to Protect Hospital Liens under Section 43-72, of the General Statutes

You have requested this committee's opinion how to handle a conflict between a client and hospital concerning payment of a statutory lien against settlement proceeds asserted under §43-72, of the general statutes. In representing personal clients you regularly face situations in which a tortfeasor carries liability coverage "inadequate" to pay the full amount of hospital or other medical bills incurred in treatment of the client's injuries and also (it is implied) compensate your client for the injuries sustained because you find "the hospitals are frequently unwilling to significantly compromise their fees." In framing the issues, you ask whether a *pro rata* allocation of the "net" settlement (among the plaintiff and all the medical providers after payment of attorney's fees) would be fair,[1] noting that in a specific matter on which you are presently engaged, your client has "insisted that the hospital not be paid or be paid less than its claimed statutory Connecticut General Statute §49-73 lien because the hospital will not compromise its charges in an amount satisfactory to [your] client." In this specific instance, both you and the tortfeasor's carrier have received formal notice of the hospital's statutory lien.

Your question(s) implicate certain legal as well as ethical and practical considerations. Ordinarily, this Committee does not opine on questions of law, and we decline to do so here, but direct your attention to the concurring opinion in *Silver v. Statewide Grievance Committee*, 242 Conn. 186, 699 A.2d 151 (1997) (which sets out relevant statutory analysis pertinent to the discussion

[1] An answer to this question is outside the scope of this Committee's review.

at hand), and Informal Opinion 2010-01.

Answers to the ethical question(s) presented begin with an analysis of the nature of the hospital's interest in disputed funds, and the intersection between Rule 1.15(f) of the Rules of Professional Conduct and §49-73, of the general statutes.

Rule 1.15(f) provides in relevant part:

> When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which interests are not in dispute.

"Rule 1.15 does not create third party interests, but, rather requires an attorney to safeguard only those interests that otherwise exist at law." *Silver v. Statewide Grievance Committee,* 42 Conn. App. 229, 237 679 A.2d 392 (1996), appeal dismissed, 242 Conn. 186, 699 A.2d 151 (1997). The word "interests" as used in subsection (f) includes, but is not limited to ". . . a valid statutory or judgment lien, or other lien recognized by law, against the property . . . ." Commentary on Rule 1.15 of the Rules of Professional Conduct.

In determining whether an ethical obligation exists under Rule 1.15(f), Connecticut courts have focused upon whether the interest exists at the time that the property is in the lawyer's possession. For example, in *Silver v. Statewide Grievance Committee,* supra, 242 Conn. 197-199, Justice Berdon in a concurring opinion, concluded the lawyer did not have a duty to an insurer to safeguard settlement proceeds because the statute at issue specifically provided that the insurer's lien "shall not attach until such time as the proceeds of such recovery are in the possession and control of such claimant." Because the lien did not attach until the proceeds were distributed to the plaintiff, the attorney did not have any obligation to the insurer under Rule 1-15(f). *Id.* In coming to this conclusion, Justice Berdon distinguished the Supreme Court's holding in *Shelby Mutual Ins. Co. v. Della Ghelfa,* 200 Conn. 630, 513 A.2d 52 (1986), in which that Court held that a lawyer did have a duty to an insurer to safeguard settlement proceeds where the statute simply provided that the insurer "shall have a lien on the claimant's recovery." *Silver v. Statewide Grievance Committee,* supra, 242 Conn. 197-199.

Thus, whether you have an obligation under Rule 1.15(f), is dependent upon whether Conn. Gen. Stat. § 49-73 grants (hospital) an interest in the settlement proceeds prior to delivery. Conn. Gen. Stat. § 49-73, provides in pertinent part:

> (a) Any hospital which is exempt from taxation. . .has a lien on the proceeds of any accident and liability insurance policy issued by any company authorized to do business in this state, which proceeds may be due such patient...to the extent of the actual cost of such service and materials, provided such hospital...after the commencement of rendering of such service or providing of such materials *and before payment by the insurance company, serves written notice upon the insurance company by registered or certified mail...*
>
> *(b)...the insurance company shall pay directly to the hospital...the amount due it, provided the amount shall be agreed upon by all of the parties interested.*
>
> (c) If the interested parties do not agree concerning the amount due, the hospital ... may bring an action of interpleader in the judicial district."

(Emphasis added.)

Since Rule 1.15(f) obligates lawyers to segregate only those funds in which there are competing claims of interest that are actually in the lawyer's possession, Rule 1.15(f) is unlikely to be implicated on the facts here: It is difficult to conceive a situation in which a liability carrier on proper notice of a Section 49-73, lien would release settlement funds to the client (or to counsel) absent advance agreement concerning satisfaction of the hospital's lien. However, if the carrier disburses settlement funds to the plaintiff without first satisfying, or reaching agreement concerning satisfaction of the hospital's lien, the lawyer also on notice of the hospital's lien has an obligation under Rule 1.15(f) to segregate that portion of the funds to which disputed claims are made until the dispute is resolved.

By operation of Section 49-73, a qualifying hospital has no obligation to compromise its charges. Unlike the third party's interest in the proceeds at issue in *Silver*—which attached to the funds only after these were delivered to the plaintiff—here, on proper compliance with Section 49-73(a), the hospital has an inchoate "interest" in the "funds" before they are disbursed to the plaintiff by reason of the statutory obligation on the liability insurer to satisfy the hospital's lien out of proceeds earmarked for settlement of the claimant's liability claim.

Since the lien does not here attach to the settlement proceeds after delivery to the plaintiff (or to counsel) but before disbursement by the liability carrier which must satisfy the hospital's lien—

unless the hospital's charges are successfully challenged under Conn. Gen. Stat. § 49-73(a)—, the client cannot otherwise direct that the liability carrier withhold payments in satisfaction of the lien upon settlement of the client's case, and no ethical violation under Rules 1.6 or 1.15(e), follows from your inability to effectuate the client's instructions to direct the carrier not to pay the hospital. Indeed, as pointed out in Informal Opinion 2010-01, "when a lawyer has actual knowledge of a valid and enforceable . . . lien under law, she has a 1.15(f) obligation." Thus, under the facts you have presented, you would have an obligation to safeguard the settlement proceeds until the parties have come to an agreement on the amount of the hospital's lien.

You also have obligations under Rules 1.1 and 1.3 to timely advise your client both of the existence and reach of the statutory hospital lien, to determine that the lien amount represents the actual cost of the services and materials supplied in treatment of the client and for which the hospital seeks payment of its lien in compliance with Conn. Gen. Stat. § 49-73(b) and, in those instances in which you judge there to be inadequate funds available to satisfy the hospital's lien, the bills of other medical providers and also fully compensate the client, the further obligation to make a good faith attempt to negotiate a reduction of the hospital lien with a view to satisfying both the hospital and your client, understanding that the hospital has no obligation to accept less than its full lien amount.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
John R. Logan, Chair