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Attorney Ethics: When a Tort Client Owes Past Due Child Support

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Attorneys are entrusted not only with duties regarding the representation of their clients but also with duties relating to the preservation of justice and the integrity of the profession. Although attorneys zealously represent their clients in an effort to get compensation for injuries suffered through no fault of their own, attorneys must also be cognizant of the rights of third parties. Where an innocent person is injured by another's negligence he or she certainly has rights with respect to any compensation which is recovered from the wrongdoer. But, third parties may also have rights with respect to the funds recovered on a tort claim. This article explores the attorney's ethical obligations when the attorney holds funds recovered on a personal injury claim of a client who may also owe child support.

The Virginia Department of Social Services (the "Department"), by and through the Division of Child Support Enforcement (the "DCSE"), can assert and enforce a lien for payment of past due child support. *See* Va. Code § 63.2-1927. Significantly, that lien attaches to all of the

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debtor's assets in the Commonwealth, including "the proceeds or anticipated proceeds of a personal injury or wrongful death award or settlement." Va. Code § 63.2-1929.

Furthermore, the lien can attach to such proceeds while in the hands of the attorney who represents a client who owes child support. Virginia Code § 63.2-1927 provides in this respect:

> Whenever a support lien has been filed and there is in the possession of any person, firm, [or] corporation . . . having notice of such lien, any property which may be subject to the support lien, such property shall not be paid over, released, sold, transferred, encumbered or conveyed . . . unless a written release or waiver signed by the Commissioner has been delivered to such person, firm, [or] corporation . . . or unless a determination has been made in a hearing pursuant to § 63.2-1916 or by a court ordering release of such support lien on the basis that no debt exists or that the debt has been satisfied. [(Emphasis added.)]

And if an attorney having notice of said lien disburses such proceeds to the client in violation of the statute then the attorney could be held directly liable to the Department in the amount of the lien that attached to the disbursed proceeds. *See* Va. Code § 63.2-1930.

Accordingly, it is exceedingly important for the attorney to properly handle such funds. An attorney is a fiduciary to the client and thus generally must allow the client to make certain elections, such as whether to settle the client's personal injury case. And, as any client will be quick to remind his or her attorney, the attorney must promptly tender the net proceeds from the claim owed to the client. Significantly, however, the ethical rules which govern attorney conduct impose obligations upon attorneys not only with respect to the rights of clients but also with respect to the rights of third parties.

The ethical rule

An attorney must "promptly pay or deliver to the client or another as requested by such person the funds . . . in the possession of the lawyer that such person is entitled to receive." Rule[1] 1.15(b)(4) (emphasis added). Furthermore, the attorney must "not disburse funds or use property of a client or third party without their consent or convert [such] funds . . . except as directed by a tribunal." Rule 1.15(b)(5) (emphasis added).

> As explained in the commentary to the rule:
>
> [A] lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person . . . . For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien . . . the lawyer has a duty to secure the funds claimed by the third party. Under the above described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds . . . to the third party or, if a dispute to the third party's claim exists, to safeguard the contested . . . funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds

[1] Unless otherwise noted, all references to "Rule" are to the Virginia Rules of Professional Conduct found in Section II of Part VI of the Rules of the Supreme Court of Virginia.

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> without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.

Rule 1.15, cmt. 4 (emphasis added).

In short:

> The mere assertion of a claim by a third party to funds held by the lawyer does not necessarily entitle the third party to such funds. A lawyer must exercise competence and reasonable diligence to determine whether a substantial basis exists for a claim asserted by a third party. If no such basis exists, or if the third party has failed to take the steps required by law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.
>
> If the lawyer reasonably believes that the third party has an interest in the funds held by the lawyer, the lawyer may not disburse to the client funds claimed by the third party, even if the client so directs.

Va. Legal Ethics Op'n No. 1865 (Nov. 16, 2012) ("LEO 1865") at 8-9, *available at* https://www.vsb.org/common/Uploaded%20files/LEOs/1865.pdf.

Prerequisites for triggering the rule

In order to be bound by the above-stated rule, however, certain requisites must be triggered.

First, the attorney must have "actual knowledge" of the third-party's entitlement to the funds held by the lawyer. *See* LEO 1865 at ⋆9. In this context, actual knowledge may consist of the client informing the lawyer of the lien or the lawyer receiving a copy of a court or administrative order regarding the lien. This factor is relatively simple and easy to satisfy.

Second, the third party must be "entitled" to the "specific" proceeds at issue. *See* LEO 1865 at ⋆3. This is clearly potentially the case with regard to a child support lien and the personal injury proceeds of the child support obligor/debtor. See Va. Code § 63.2-1927 (noting that the lien of the DCSE applies to, among other things, "the proceeds or anticipated proceeds of a personal injury or wrongful death award or settlement"); *accord* Va. Code § 63.2-1929(A) (same regarding an administrative support order for such lien). However,

> there will be occasions when a lawyer may not be able to determine whether a third party is entitled to funds held by the lawyer, for example, when there exists a dispute between the client and the third party over the third party's entitlement. Legal and factual issues may make the third party's claim to entitlement or the amount claimed uncertain. Rule 1.15 (b)(4) and (5) does not require the lawyer to make that determination. When faced with competing demands from the client and third party the lawyer must be careful not to unilaterally arbitrate the dispute by releasing

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> the disputed funds to the client. Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party. When the client and a third party have a dispute over entitlement to the funds, the lawyer should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court.

LEO 1865 at 3 (second emphasis added) (footnotes omitted).

It is also important to consider that just because a child support obligation exists does not automatically make it a "valid" lien for purposes of this ethical rule. A lien for child support must be properly asserted and docketed.

> Ten days after service of the notice containing the proposed administrative support order as provided in § 63.2-1916, or immediately upon receipt by the [DCSE] of a court order or foreign support order, a lien **may** be asserted by the Commissioner upon the real or personal property of the debtor. The claim of the [DCSE] for a support debt, not paid when due, shall be a lien **when docketed** against all property of the debtor in the county or city where docketed with priority of a secured creditor.

Va. Code § 63.2-1927 (emphasis added); *see also* Va. Code § 63.2-1929(A) (similar regarding an administrative child support order).

Note that the statute expressly provides that a properly asserted and docketed lien for child support takes priority over all other debts and creditors except for the lien of the attorney representing the injured person in the personal injury or wrongful death action, a hospital lien created under created under Code § 8.01-66.2, a Commonwealth lien created under Code § 8.01-66.9, and any statutory right of subrogation in favor of a health insurance provider. *See* Va. Code § 63.2-1927.

Only when a child support lien is valid is an attorney ethically bound to respect the lien.

Whenever a support lien has been **filed** and there is in the possession of any person, firm, corporation, association, political subdivision or department of the Commonwealth having notice of such lien, any property which may be subject to the support lien, such property shall not be paid over, released, sold, transferred, encumbered or conveyed, except as provided for by the exemptions contained in § 63.2-1933, unless a written release or waiver signed by

the Commissioner has been delivered . . . or unless a determination has been made in a hearing pursuant to § 63.2-1916 or by a court ordering release of such support lien on the basis that no debt exists or that the debt has been satisfied.

Va. Code § 63.2-1927 (emphasis added); *see also* Va. Code § 63.2-1929(D) (similar regarding "Any person, firm, corporation, [or] association" who is served with an administrative child support order).

Investigation of the validity of the lien

What if the attorney is not clear on the validity of the potential child support lien? For example, the client says "I am not sure but I may be behind on child support payments." Hypothetical One of LEO 1865 addressing an attorney's duty to investigate potential liens presents an analogous scenario where the lawyer is unsure about the validity of the potential lien.

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A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan"). The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law. The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether the Plan is entitled to assert a claim against the client's settlement?

Under the circumstances presented in Hypothetical 1, the Committee believes that the answer is a qualified "yes." . . . A lien or claim has not been asserted and the lawyer has insufficient information to know whether a valid lien or claim even exists. Here, the lawyer would have to affirmatively investigate both the facts and the law to determine whether the Plan has a lien on or entitlement to a portion of the funds held by the lawyer. In so doing, it is likely that the lawyer would have to communicate with the Plan to determine if the Plan is exempt from Virginia's anti-subrogation statute. The lawyer would also have to find out if the Plan has a right of reimbursement and, if so, the amount to which the Plan claims to be entitled. By having these communications with the Plan the lawyer would be disclosing to the Plan's agents that a Plan beneficiary is seeking a recovery or settlement against a third party. Communication with the Plan could remind or encourage the Plan to perfect a lien or claim to the client's settlement of which the Plan was not aware. Depending on the circumstances, such a disclosure could be detrimental to the client and contrary to the client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ." A lawyer faced with the circumstances presented in Hypothetical 1 must first consult with the client about whether to have communications with the Plan, explaining to the client both the risks and benefits of having such communication and obtain the client's informed consent to affirmatively investigate the Plan's possible claim to an interest in the client's settlement. If after warning the client of the possible consequences of not reimbursing the Plan, the client directs the lawyer to not communicate or further investigate the Plan's right of reimbursement, the lawyer should confirm in writing the client's direction and the possible consequences of that course of action. Although the lawyer will not violate Rules 1.15(b)(4) or (b)(5) and is therefore not subject to professional discipline by the bar, the lawyer and/or the client may suffer civil liability under federal law if the Plan seeks reimbursement of medical expenses that have not been paid out of the settlement. Therefore, the lawyer has an ethical duty to advise the client of the potential liability of disbursing the funds without preserving any funds to reimburse the Plan. *See* Rules 1.2 and 1.4.

While a lawyer may not knowingly disregard a lien or third party claim that has been properly asserted against the settlement funds, the question raised in this hypothetical is whether the lawyer has an ethical duty, without

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authorization from the client, to actively investigate a third party's potential claim against the settlement funds. The Committee believes that, under the circumstances presented in the first hypothetical involving ERISA Plan claims, the Rules of Professional Conduct do not impose such a duty on the lawyer unless the client has authorized further communication with the Plan and further investigation of the Plan's unasserted right of reimbursement.

If the lawyer reasonably believes that the third party has an interest in the funds held by the lawyer, the lawyer may not disburse to the client funds claimed by the third party, even if the client so directs. In prior opinions this Committee has held that a lawyer may not disregard the valid claims of a third party, and lawyers have been subject to discipline for disbursing to the client funds to which a third party claimed entitlement. When the client has a non-frivolous dispute over the third party's entitlement to funds, or the lawyer cannot determine, as between the client and the third party, who is entitled to the funds, the lawyer should hold the disputed funds in trust until the dispute is resolved or interplead them into court. A lawyer who chooses to hold or interplead the disputed funds instead of releasing the funds to the client does not violate Rule 1.15(b). A lawyer who acts in good faith and exercises reasonable diligence to determine the validity of a third party's claim or lien is not subject to discipline under Rule 1.15(b).

LEO 1865 at 5-7, 9 (emphasis added) (footnotes omitted).

In short, the attorney must seek the client's consent to speak to DCSE. But if the attorney has reason to believe DCSE may have a valid claim to the personal injury proceeds, and the client has no reasonable basis to dispute the DCSE arrearage, then the attorney cannot disburse the money to the client.

What if the client authorizes the attorney to communicate with a potential lien holder but the potential lien holder does not timely respond? This scenario is addressed in Hypotheticals Two and Three of LEO 1865. *See* LEO 1865 at 7-8. "[T]he lawyer must first consult with the client regarding the course of action to take, informing the client to the fullest extent possible of the risks and benefits of further communication with the [third-party creditor] . . . or . . . disregarding the [third-party]'s claim," after which the lawyer may "disburse the settlement funds to the client without holding back funds to reimburse the [third-party]." *Id.*

Non-Virginia child support orders

What about a client's outstanding child support obligation from another jurisdiction? For example, the client tells the attorney that he owes child support in North Carolina. The short answer is that the attorney is only obligated to withhold the client's proceeds if a foreign order has been registered in Virginia or the DCSE has taken affirmative action to assert the foreign order.

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As noted by the Virginia Court of Appeals:

> "Virginia has adopted the . . . UIFSA [Uniform Interstate Family Support Act] and has codified it, with minor amendments, at Code §§ 20-88.32 to 20-88.82." *Nordstrom v. Nordstrom,* 50 Va. App. 257, 262 [] (2007). "The UIFSA is a model uniform law that has been enacted in all fifty states. . . . It provides a comprehensive statutory scheme to establish and enforce support obligations in proceedings involving two or more states." *Commonwealth ex rel. Gagne v. Chamberlain*, 31 Va. App. 533, 536-37 [] (2000).

Moncrief v. Div. of Child Support Enforcement ex rel. Joyner, 60 Va. App. 721, 733, 732 S.E.2d 714, 720 (2012).

Virginia's version of UIFSA provides two methods of enforcement regarding a foreign support order: (1) administrative enforcement under Article 7 and (2) enforcement after registration under Article 8.

Under Article 8, "[a] foreign support order . . . may be registered in the Commonwealth for enforcement." Va. Code § 20-88.66. "A registered support order issued in another state . . . is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of the Commonwealth." Va. Code § 20-88.68(B) (emphasis added).

In order to register a foreign support order, the following records must be sent to the local "tribunal":[2]

> 1. A letter of transmittal to the tribunal requesting registration and enforcement;
>
> 2. Two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> 3. A sworn statement by the party requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> 4. The name of the obligor and, if known, (i) the obligor's address and social security number, (ii) the name and address of the obligor's employer and any other source of income of the obligor, and (iii) a description and the location of property of the obligor in the Commonwealth not exempt from execution; and
>
> 5. Except as otherwise provided in § 20-88.55, the name and address of the obligee and, if applicable, the support enforcement agency to whom support payments are to be remitted.

Va. Code § 20-88.67(A).

Furthermore, it is significant to note that

> [a] registered foreign order is enforceable **only after it has been confirmed**. *See* Code § 20-88.68. An order is confirmed after the court has issued notice to the non-registering party of the registration and the amount of the alleged arrearages, if any, see Code § 20-88.70(A), and has provided the non-registering party with an opportunity for a hearing to contest the registration and amount of arrearages. See Code §§ 20-88.70(B), 20-88.73.
>
> If the non-registering party does not timely contest the registration, both the registered order and the certified statement of arrearages required to be filed with the order are confirmed by operation of law. *See* Code §§ 20-88.67(A)(3), 20-88.70(B), 20-88.71(B), 20-88.73. If the non-registering party timely contests the registration, the court must either vacate or confirm the registration or grant other appropriate relief. *See* Code §§ 20-88.71, 20-88.72.

Slawski v. Dep't of Soc. Servs., Div. of Child Support Enforcement, 29 Va. App. 721, 723, 514 S.E.2d 773, 774 (1999) (emphasis added).

[2] "Tribunal" is defined as the JDR or circuit court or the DSS (or DCSE). *See* Va. Code § 20-88.33.

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Alternatively, under Article 7, a party seeking to enforce a foreign support order may send certain documents to the DCSE. *See* Va. Code § 20-88.65(A); *see also* Va. Code § 20-88.33(B) (defining DCSE as "the support enforcement agency of the Commonwealth"). Immediately upon receipt of such documents, DCSE may then, "without initially seeking to register the order," utilize any authorized administrative procedure to enforce the support order, *see* Va. Code § 20-88.65(B), including the filing of a lien, see Va. Code § 20-88.48(B)(7); *see also* Va. Code § 63.2-1927 ("[I]mmediately upon receipt by the Department of a . . . foreign support order, a lien may be asserted by the Commissioner upon the real or personal property of the debtor.").

Based on the foregoing, absent anyone taking any action in the matter locally,[3] the non-Virginia child support lien is not enforceable in Virginia but rather is merely a potential lien. In that event, the attorney is not obligated to pay or withhold funds for the foreign child support lien. *See* LEO 1865 at 6-8 (no duty to investigate potential lien when client says not to do so because such action could alert the third party to take action against the client); *id*. at 8-9 ("[I]f the third party has failed to take the steps required by law to perfect its entitlement to the funds, a lawyer may release those funds to the client, after appropriate consultation with the client regarding the consequences of disregarding the third party's claim.").

Limitations of the ethics rules

Significantly, however, "[w]hether the lawyer faces civil liability for failing to protect a third party lien or claim is a legal issue beyond the purview of this Committee." LEO 1865 at 9. So even if it is ethically permissible to disburse the funds to the client that does not necessarily mean that the attorney is not exposed to possible civil liability if the attorney disburses to the client and the third-party claim turns out to be valid. Accordingly, if it is a close call, the safest course of action is to not disburse to the client and file an interpleader action. And as a practical matter, this state of affairs may prompt the client to give the attorney permission to take affirmative action in an effort to resolve the child support arrearage without the time and expense of an interpleader action.

[3] Either the DCSE through Article 7 administrative enforcement or the other jurisdiction's version of DCSE (or other person to whom the child support arrearage is owed) through Article 8 registration and confirmation

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