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When Does A Demand For Reimbursement Of ERISA Benefits Constitute A Claim Of An Interest Under Rule 1.15(f)?

We have been asked when does a lawyer have a Rule 1.15(f) obligation to hold clients' funds over a client's objection until a claim of an ERISA lien is resolved? As explained below, in our opinion in order to trigger a lawyer's Rule 1.15(f) obligation, a demand for reimbursement of ERISA benefits must be based on a claim of a valid ERISA lien enforceable under law and must be verifiable on a preliminary basis to the same extent as the other types of interests covered by Rule 1.15(f).

Rule 1.15(f) provides: "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." Given all the duties a lawyer owes a client under the Rules of Professional Conduct, it would undermine the foundation of the attorney-client relationship and in all likelihood be unconstitutional to conclude that a lawyer has a duty to hold client funds whenever any person makes any claim of any interest in them. Therefore, it is

necessary to interpret the Rule. A logical place to turn for guidance is the commentary which provides:

The word “interests” as used in subsection (f) includes, but is not limited to, the following: a valid judgment concerning disposition of the property; a valid statutory or judgment lien, or other lien recognized by law, against the property; a letter of protection or similar obligation that is both (a) directly related to the property held by the lawyer, and (b) an obligation specifically entered into to aid the lawyer in obtaining the property; or a written assignment, signed by the client, conveying an interest in the funds or other property to another person or entity.

To qualify as a “Rule 1.15(f) interest” under the guidance provided by the commentary an interest must be a valid interest recognized by law and it must pertain directly to the property, the property being the client’s funds. Each of the examples given in the commentary is verifiable on a preliminary basis. A valid judgment must be in writing and of record. A statutory lien can be verified on a preliminary basis by studying the statute. A valid judgment lien must also be in writing and available for inspection. Any “other lien recognized by law” can be verified on a preliminary basis by reviewing the law claimed to be applicable, such as an order or opinion of a court or administrative agency. A letter of representation or written assignment signed by the client is verifiable on a preliminary basis by demanding a copy. In none of the examples given is the lawyer required merely to “take a person’s word for it” that the person has a valid interest in the client’s funds. In each example there is something in writing, something created by a court or legislature, or a writing signed by the client, something independent of the person claiming the interest, something that enables the lawyer on a preliminary basis to distinguish between interests of the type illustrated in the commentary and those that do not have those basic characteristics.

Payment of ERISA benefits may give rise to a valid ERISA lien (also referred to as an equitable lien). Sereboff v. Mid-Atlantic Medical Services, 547 U.S. 356 (2006). A lawyer needs to receive sufficient information to make a preliminary determination whether the claim is of a valid ERISA lien. What constitutes sufficient information is outside the scope of this opinion. Suffice it to say for now that the lawyer is not entitled to demand proof positive, but the lawyer surely needs some sort of documentation with respect to ERISA liens in order to trigger the obligations of Rule 1.15(f).

The lawyer should (a) counsel the client about ERISA liens on a timely basis so that the client may make an informed decision and then (b) follow the client's instructions except when Rule 1.15(f) applies. During the course of representation the lawyer has a duty to her client to competently and diligently advise her client about the client's exposure on planned disbursements of the client's money. See Rules 1.1 and 1.3.

Lastly, when a lawyer has actual knowledge of a valid and enforceable ERISA lien under law, she has a 1.15(f) obligation.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
Wick R. Chambers, Chair