MPT – February 2013 – Selected Answer 1

Mrs. Martel,

When does a discharged attorney have a claim in the recovery from a contingent fee agreement of a previous client? Although the discharged attorney does not have a cause of action on the original contingent fee agreement, the attorney has a claim in quantum meruit for the reasonable value of services rendered.

The first issue is whether or not Rebecca Blair has a claim or interest in the $600,000 recovery in the Panelli sexual harassment case. The general rule is that a client has an absolute right to discharge an attorney. Clements v. Summerfield. Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Clements. Without a right to fees, there is no cause of action for the attorney to recover under. Clements. Therefore, under the facts of Panelli's situation, although Panelli and Blair had a contingency agreement, and Blair even filed a notice of lien on the any recovery, Blair no longer has a cause of action under the Contingency agreement. Blair does have a claim in equity for the value of reasonable services rendered during the representation under a theory of Quantum Meruit. Therefore, as a third party, Blair does have a claim or interest in the recovery.

What should an attorney do if there is a claim by a third party against the client's recovery if the client insists on not notifying the third party? The attorney has a duty under the Franklin Rules of professional conduct to promptly notify the client and/or a third party with an interest in the recovery upon receiving the funds. The issue raised here is that Panelli has instructed you (Martel) to not notify Blair of the status of the recovery from the sexual harassment settlement. Under the Franklin rules of professional conduct, you have a duty to promptly notify the client and any third parties with an interest in the recovery that the funds have been received. FRPC 1.15(d). In the State Bar of Franklin Ethic Opinion No. 2003-101, the bar states that an attorney may have a duty to protect a third party claim against wrongful interference by the client. The bar advises that a fiduciary duty may arise under operation of law with regard to third parties with an interest in the recovery when the attorney has knowledge of the interest. EO 2003-101. Here, you took this case with the knowledge that Panelli had hired Blair to originally represent him, and in your interview you noted that she had done a good job working up the case for litigation. Therefore, a fiduciary duty with regards to Blair interest has arisen under operation of law. This means you have the duty to deal with Blair with the utmost good faith and fairness and to disclose to Blair material facts relating to Blair's interest in the funds. Cf. Johnson v. State Bar.

What should the attorney tell the client about the third parties interest and any duties imposed by law on the attorney? The attorney is required to consult with the client about relevant limitations when the attorney knows that the client expects assistance not permitted by the rules of professional conduct. The issue raised is how to go about explaining to the client the attorney's duty imposed by law with regards to the third party's interest in the recovery. The rules of professional conduct require a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by [these rules] or other law". FRPC 1.4(a)(5). Therefore, you have a duty to explain that Blair has an interest in recovering the value of the services rendered during her representation even though the contingency agreement is no longer valid. You must explain to Panelli that because you took the case with the knowledge that Blair had previously worked on the case, then the law imposes a fiduciary duty on you to deal with Blair in utmost good faith and fairness

and disclose to Blair the material facts relating to Blair's interest in the funds. Johnson. Explain that if you violate this fiduciary duty, then it put you at risk of potential compensatory and even punitive damages.

How should the attorney disburse the funds from the settlement when there is a claim from a discharged attorney in Quantum Meruit? The attorney should disburse to the client any and all of the undisputed recovery the client is entitled to without delay. The claim by the discharged attorney comes from the portion of the recovery allocated under the contingency agreement and should be held in trust until the dispute is resolved. The issue raised is how to disburse the recovery funds when there is a claim by a discharged attorney for the reasonable value for services rendered during representation. The attorney must promptly disburse to the client any funds that the attorney hold in trust for the client that he client is entitled to receive, but the attorney may nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of the funds which the attorney has a claim in conflict with the client. Greenbaum. Here, you have obligated yourself to pay any claim Blair might have, and indemnifying opposing counsel and their client for any claim against them by Blair. Therefore, you are able to withhold any funds that Blair could have a claim to in quantum meruit. The court in Clements noted that when there is a claim for quantum meruit by a discharged attorney, the recovery should come out of the representing attorney's fee. Clements. Therefore, since Panelli's portion of the recovery has no dispute to it, you should disburse it as soon as possible (the $400,000). The remaining $200,000 should be held in trust until the claim for quantum meruit has been settled.

Should the attorney arbitrate the dispute between the client and the previous attorney? No, the attorney should not arbitrate the dispute between the client and the previous attorney, but should have the client and the third party try to resolve the issue and seek guidance from the courts if they are unable. The issue is whether or not you should try to resolve the dispute on the claim against between Blair and Panelli. The Ethics opinion 2003-101 states that the disagreement should be attempted to be resolved by the third party and the client, and that you should notify them both that you cannot represent them in the dispute. You should hold the funds in trust until the dispute is resolved. If they are unable to resolve their dispute, you should seek guidance from the court and inform the client and the third party. EO 2003-101. Therefore, you should notify Blair and Panelli that you cannot represent them in the dispute on the claim between them, and that the funds are being held in trust until the dispute is resolved. They should try to work it out between them but if they cannot, then you will seek the courts guidance on resolving the dispute.

MPT – February 2013 – Selected Answer 2

February 26, 2008

Ms. Martel:

Thank you for allowing us the opportunity to work with you. We understand the delicacy of the situation you are in, and hope that this letter will provide you with the answers that you are seeking. From what you have told us, you have received a $600,000 check in settlement of Dr. Panelli's case. This amount is subject to a lien by his former attorney, Rebecca Blair, with whom Dr. Panelli had a contingency agreement for one-third of whatever recovery was gained in the suit against Dr. Kern. Dr. Panelli subsequently fired Ms. Blair and hired you. When you notified Dr. Panelli regarding your receipt of the settlement check he specifically instructed you not to notify Ms. Blair regarding the settlement, or to

pay her anything. You came to us to advise you on how to proceed-- specifically what duties might you have and what should you do with the settlement funds.

In short, you must contact both Ms. Blair and Dr. Panelli, stating the existence and details of the dispute. You must advise them that you are unable to represent either of them in this dispute, but that you are holding the amount due for attorney's fees--$200,000--in trust until the dispute is resolved, seeking guidance from the court in that respect. The remaining $400,000 should be dispersed to Dr. Panelli.

There are several issues at play here: (1) What, if any, duty does an attorney have to notify a third party claiming an interest in funds that such funds are available? (2) What if the duty to the client is contrary to the duty with the third party? (3) What help may an attorney seek in finding a remedy without breaching attorney/client privilege? (4) How should the funds be distributed, should any amount be held in trust pending resolution of the third-party claim, and from what portion should that trust amount be held? (5) Who should determine the amount to be paid to the third party and how should the amount be determined? Allow me to address each issue in turn:

1. Duty to third-party: The State Bar of Franklin, in Ethics Opinion 2003-101, stated that where an attorney has knowledge of the existence of a third-party's interest in funds being held by the attorney; the third-party and the attorney have, by operation of law, entered into a fiduciary relationship, and the attorney has the duty to deal with the third-party with "utmost good faith and fairness," disclosing to the third party material facts relating to his interest. During your representation of Dr. Panelli you became aware Ms. Blair had filed a statutory lien against any potential settlement in Dr. Panelli's case against Dr. Kern in order to perfect her security interest. As a result, by operation of law, you entered into a fiduciary relationship with Ms. Blair, and have the duty to notify her regarding the receipt of a settlement check. In its Ethics Opinion, the State Bar commented that, by that fiduciary relationship, you--as the attorney--have a duty to protect Ms. Blair's third-party claim against wrongful interference by Dr. Panelli, retaining the funds as necessary to ensure the claim is resolved, which, if necessary, means filing an action to have a court resolve the dispute.

2. Conflict of duties: Rule 1.2 of the Rules states that "a lawyer shall abide by a client's decisions" concerning the representation, and may counsel or assist the client in making a good faith application of the law. Rule 1.15 of the Franklin Rules of Professional Conduct requires that where a third-party has an interest in funds held in trust by an attorney, and the client refuses to allow disbursal to the third-party, the attorney must "refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client. Disbursement of the funds to either party would, under Cf. Johnson, make the attorney liable for compensatory and perhaps even punitive damages. Rule 1.4(a)(5) then requires that the lawyer consult with the client regarding the limitations on the lawyer's conduct when the lawyer has reason to know that the client expects something not permitted under the law or the rules of professional conduct. In his email to you, Dr. Panelli made it clear, that contrary to your duties to Ms. Blair, the Rules of Professional Conduct, and case law, he expects you not to notify or pay Ms. Blair according to her claim. The holding in Greenbaum supplies that your disbursement of funds to Ms. Blair, in direct contradiction to the instructions of Dr. Panelli would violate your duties to your client, but the decision in Cf Johnson provides that failing to abide by your duty to Ms. Blair is also improper. The State Bar, in its Ethics decision, makes it clear that you must consult with Dr. Panelli, advise him of your conflicting duties, and that you must proceed under the law and rules of your profession, seeking a ruling by the court if necessary.

3. Assistance to the attorney: Rule 1.6(b) of the Rules of Professional Conduct states that: A lawyer may reveal information relating to the representation of the client to the extent reasonably necessary (4) to secure legal advice about the lawyer's compliance with these Rules. It is not a violation of attorney/client privilege to do so.

4. Distribution/Holding in Trust: An attorney must disburse to a client such funds as the attorney holds in trust for the client to which the client is entitled. (SBED 2003-101) In Clements, the Court stated that under a contingent fee arrangement, an attorney does not have a right to fees unless and until the contingency--a settlement-- has occurred; this contingency may occur after the representation has been terminated and another attorney has taken his place. In such a case, the discharged attorney's right to, and cause of action for, fees is limited to quantum meriut--the reasonable value of services rendered during the representation. Clements specifies that this is "paid as a share of the total fees payable to the successor attorney--not as something in addition to those fees. To require payment in addition to the successor attorney would unduly burden the client in subjecting him to double fees in exercising his absolute right to discharge his counsel. The court explained that the value provided is determined on a case-by-case basis and will depend on the "facts of the individual case as seen through the lens of equity." It may be nothing, or it may be the recovery in full. By example, the Clements court provided that a one-third contingency agreement on a $300,000 recovery would equate to $100,000, with the predecessor attorney entitled to receive "whatever share, if any ...the court determined to be the reasonable value of his services.... Here, a total of $600,000 was received in settlement. Ms. Blair had a one-third contingency, as did you. This equates to a total payment of $200,000 in attorney's fees, as Ms. Blair's share must, under Clements, be taken out of yours. The remaining $400,000 undisputedly belongs to Dr. Panelli. This amount should be sent to him forthwith. The remaining $200,000 must, in its entirety, be held in trust until an agreement is reached regarding payment to Ms. Blair under Rule 1.15--Safekeeping of Property.

5. Determination of amount due Ms. Blair: Under the decision in Clements, you should file an action with the court to determine the value--quantum meruit--of the services provided by Ms. Blair to Dr. Panelli. Although typically, the client and third-party could reach a decision, here you should request the court to determine the amount, as any amount given to Ms. Blair will be deducted from the $200,000 due you under the contingency agreement. This means that you will be unable to realize any profit on the case until the court reaches its determination on payment to Ms. Blair.

I hope I was able to address all of your questions and the issues surrounding them. If you have any further questions, or would like additional clarification, please feel free to call or email me. Again, I appreciate the opportunity to serve you.

Sincerely,

Applicant

MPT – February 2013 – Selected Answer 3

Question
What are a successor attorney's duties and obligations, as to the client and the predecessor attorney, when the client directs him to withhold the existence of a settlement and fees from the predecessor attorney on the same case?

Answer

Martel should disburse to Panelli the portion of the settlement over which there is no dispute. In this instance, the one-third contingent fee arrangement provides that $400,000 should be disbursed. However, Martel must inform Blair of the settlement, and hold in trust the portion of the fee that is disputed, even over the client's objection. In this case the $200,000 contingency fee is disputed as between Martel and Blair. Finally, Martel should inform Panelli that she has to inform Blair of the settlement and hold the fees in trust, and that she cannot represent him in any action over the fees with Blair.

Analysis

1. Disclosure of the existence of a settlement

The facts show that Panelli first retained Rebecca Blair to represent him in a sexual harassment action under a one-third contingency fee arrangement. Panelli discharged Blair on grounds of a personality conflict during the representation, then hired our client, Wendy Martel to represent him. Martel obtained a $600,000 recovery and was directed by Panelli not to inform Blair of the settlement and not to pay Blair any portion of the contingency fee. Despite Panelli's directive, Martel must inform Blair that the litigation has been settled. The basis for this conclusion is in Ethics Opinion 2003-101. This opinion concerns an attorney's relationship with other parties assisting in the representation of the client. In particular, the opinion states that "knowledge of the existence of . . . an interest" in the funds in question subjects the attorney to a "fiduciary relationship" with the party claiming an interest in the funds and requires the attorney to act in "utmost good faith and fairness and to disclose material facts." This conclusion is reiterated in Johnson v. State Bar. Furthermore, Rule 4.1, regarding truthfulness to others prohibits an attorney from "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a . . . fraudulent act by a client." Finally, Rule 1.15 regarding safekeeping of property requires an attorney to "notify the . . . third person" upon receipt of funds in which the third person "has an interest." Applied to the instant case, Martel must act in utmost good faith and fairness toward Blair and must inform her of any material facts, per 2003-101. Because Blair has an interest in the funds, Rule 1.15 requires Martel to notify her that funds have been received. Clearly the fact that a settlement has been reached and an award paid out is a material fact of which Blair would need to be informed, since she has a right to some portion of the award for the services she has rendered.

However, per Rule 1.6 regarding confidentiality of information, Martel must not disclose any confidential information concerning the representation. Moreover, the client has directed Martel not to tell Blair anything about the settlement. However, Rule 1.6(b) allows limited disclosure of confidential information to "prevent, mitigate or rectify" substantial injury to the financial interest of property of another which may result from the client's commission of . . . fraud." Arguably, this exception permits Martel to disclose the existence of the settlement, because to withhold the information from Blair may result in Blair being defrauded, since Blair rendered services during the representation and has an entitlement to some compensation for her efforts. Martel's withholding of the existence of the settlement would damage Blair's financial interests substantially. Thus, Rule 1.6 permits a limited disclosure of confidential information. Martel should be careful not to disclose anything other than what is necessary. Per Opinion 2003-101 and Rules 1.6(b), 1.15 and 4.1, Martel should disclose to Blair the existence of the settlement.

2. Disbursement of funds to which the client is entitled

The next issue is whether Martel can distribute any portion of the settlement, given that there are conflicting interests in the contingency fee award as between Martel and Blair and the client's instruction not to pay Blair anything. The pertinent facts here concern the size of the award and the

contingency fee arrangement. Per the interview, Panelli's agreement with Blair provided for a one- third contingency fee out of any settlement obtained. This is identical to the agreement Panelli executed with Martel. The February 22, 2013 email shows that Martel obtained a $600,000 settlement of the litigation.

On this point, Opinion 2003-101 states that "an attorney must disburse to a client such funds as the attorneys in trust for the client to which the client is entitled." Opinion 2003-101 is relevant since it concerns an attorney's duties toward a physician that assisted in the representation and the proper disposition of disputed and undisputed funds. In the opinion, the state bar reasoned that the client had an entitlement to the $200,000 of the $300,000 award that was not in dispute. Even if there was a dispute over a portion of the settlement, this means the attorney could not withhold the entire award. Clements v. Summerfield also states that to the extent two attorneys have competing claims to a contingency fee, that fee is to be shared between the attorneys, rather than the discharged attorney being awarded something in excess of the agreed-upon fee.

Applied to our facts, Opinion 2003-101 requires that Martel distribute the portion of the award which is not in dispute. The documents and interview establish that Panelli is entitled to two-thirds of the total award. Here, that would be $400,000. There is no dispute over the $400,000 because Panelli executed identical contingency fee agreements with Martel and Blair and because any dispute concerns the division of the contingency fee. The only issue is how to divide the $200,000 contingency fee. Thus, per Opinion 2003-101, Martel should pay out the $400,000 to which Panelli is entitled.

3. Withholding in trust of disputed funds

A related issue is what to do with the remaining $200,000 that is in dispute. Opinion 2003-101 is straightforward as to this point. To the extent there are competing claims on a portion of the settlement, an attorney must retain the disputed amount in trust until the dispute is resolved, as long as the third party agrees. Here, there is a dispute as to what portion, if any, of the $200,000 fee should be paid to Blair. Per Clements v. Summerfield, Blair may be entitled any range of the potential fee, from nothing to the whole award. Thus, the $200,000 fee should be held in trust by Martel until the dispute is resolved, assuming Blair consents. If she does not, then Martel should seek court guidance.

4. Payment to which Blair is entitled

The next issue concerns what portion of the $200,000 fee to which Blair may be entitled. The case of Clements v. Summerfield examined a similar situation. In that decision, the Supreme Court considered whether a discharged attorney was entitled to any portion of a later recovery by a successor attorney. The Supreme Court concluded that the discharged attorney's action for fees "is limited to quantum meruit, that is the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney--not as something in addition to those fees."

Applied to our facts, Blair would be entitled to the reasonable value of the services she rendered during her portion of the representation. Here, Blair filed the original complaint, and filed a statutory lien in addition to initiating discovery. Martel completed discovery, filed a motion for summary judgment and negotiated a settlement. Thus, Blair would be entitled to the reasonable value of her services in filing the complaint and the lien, and starting discovery. What amount this may be is unclear but would be determined by a court. In any event, Martel should hold in trust the entire $200,000 fee.

5. Resolution of the dispute

The final issue is whether Martel can represent Panelli in his dispute with Blair and what Martel must tell Panelli. Opinion 2003-101 is also clear as to the continued representation. Where the client has a dispute with a third party over fees or a settlement and as to how those fees should be paid between the attorney and the third party, the attorney cannot represent the client or the third party in the dispute. As to the disclosure to Panelli, Rule 1.4(a)(5), governing communication, requires that an attorney "consult" with a client when the client expects assistance that cannot be provided under the Rules of Professional Conduct.

Applied to our facts, Martel cannot represent Panelli in a dispute over fees with Blair. This is barred by Opinion 2003-101. Also, because Panelli expects Martel to engage in conduct not permitted by the Rules of Professional Conduct (as explained above), Martel should consult with Panelli and inform him that the Rules do not permit him to withhold the existence of the settlement or to unilaterally keep fees to which Blair may be entitled. Martel should also inform Panelli he cannot represent him or Blair in any action concerning the disputed fees.

Conclusion

Martel should inform Blair of the settlement, disburse the funds to Panelli over which there is no dispute, withhold the disputed fees in trust, inform Panelli of his ethical duties to do the preceding actions, and inform Panelli she cannot represent him in any dispute over the fees with Blair.