

TERMINATION OF REPRESENTATION
ETHICAL ISSUES

John Janis

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;**
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**
- (3) the lawyer is discharged.**

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;**
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;**
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;**
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;**
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**
- (7) other good cause for withdrawal exists.**

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Commentary

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and—may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RULE 14.

CHANGE OF ATTORNEY

A. Substitution of Attorney.

The attorney of record for a party may be changed or substituted by notifying the Commission and all parties. Approval by the Commission will not be necessary if both the withdrawing attorney and the new attorney sign the notice. If a new attorney appears in an action, the action shall proceed without delay, unless the Commission finds good cause for delay of the proceedings.

B. Leave to Withdraw.

Except as provided above, or by stipulation between an attorney and his or her client, no attorney may withdraw as an attorney of record without first obtaining approval by the Commission. A request to withdraw shall be made by filing a motion, supported by affidavit, with the Commission and served on all parties to the action, including the client. The Commission may grant leave to withdraw as counsel of record on a showing of a factual basis to establish good cause and on such conditions as will prevent any delay in determination and disposition of the pending action. Notwithstanding this provision, a claimant who intends to terminate the services of his or her attorney of record and to proceed *pro se* may do so by giving written notice to the Commission, the claimant's attorney of record, and all parties that the claimant will no longer be represented by counsel and will represent himself or herself.

C. Notice to Client of Withdrawal.

Following entry of an order permitting withdrawal, the withdrawing attorney shall with due diligence, serve a copy of the order on the attorney's former client and file proof of service of the same with the Commission. Until the order is served on the client, the attorney shall remain counsel of record for the client. The withdrawing attorney shall make such service to the last known address of his or her client. Such service may be made by personal service or by United States mail to the client's last-known address. Service by mail shall be complete on mailing. On entry of an order granting leave to withdraw from an action, no further proceedings can be had in that action which will affect the rights of the client of the withdrawing attorney for a period of 21 days after service or mailing of the order of withdrawal to the parties to the action.

D. Extraordinary Circumstances.

In the event of the death, extended illness, prolonged or unexplained absence, suspension or disbarment from the practice of law of an attorney of record in an action, if such attorney has not associated with another attorney, the Commission may issue an order withdrawing the

attorney of record. In such event, no further proceedings can be had in such action that will affect the rights of the party represented by such attorney for a period of 21 days after the order has been served as provided in this rule.

COMMENTS: Subsection A indicates the preference of the Commission for substituting legal counsel to promote continued representation of parties throughout the litigation process.

Subsection C emphasizes the continuing responsibility of an attorney to represent his/her client until notice of withdrawal is served on the client

Rule 11(a)(3)

final judgment. *Farmers Nat'l Bank v Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

Timeliness.

Where the motion to reconsider was filed after an appeal was issued reversing the final judgment, reversal of the judgment on appeal entirely rescinded that judgment; thus, there was no final judgment when the motion to reconsider was filed and the motion was timely. *Devil Creek Ranch, Inc. v Cedar Creek Reservoir & Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994).

Time for Appeal.

A trial court cannot restart the time for appeal by the mere expedient of entering a second judgment identical to the first. *Spreader Specialists, Inc. v Monroc, Inc.*, 114 Idaho 15, 752 P.2d 617 (Ct. App. 1987), overruled on other grounds, *Walton, Inc. v Jensen*, 132 Idaho 716, 979 P.2d 118 (Ct. App. 1999).

The notice of appeal from the district court's order dismissing the defendant's petition as untimely was filed on February 4, 1992, which was beyond the 42-day time limit within which to file an appeal from a final order. The time for filing the appeal, however, was extended by the filing of defendant's motion to reconsider the dismissal which was timely filed within 14 days of the order to be

Rule 11(a)(3). Withdrawal of files.

No paper, record or file in any action or proceeding shall be removed from the custody of the clerk except that such papers, records and files may be withdrawn for the use of the court. (Amended March 1, 2000, effective July 1, 2000.)

Cited in: *PHH Mortg. Servs. Corp. v Pereira*, — Idaho —, 200 P.3d 1180 (2009)

Rule 11(b)(1). Change of attorneys.

The attorney of record of a party to an action may be changed or a new attorney substituted by notice to the court and to all parties signed by both the withdrawing attorney and the new attorney without first obtaining leave of the court. If a new attorney appears in an action, the action shall proceed in all respects as though the new attorney of record had initially appeared for such party, unless the court finds good cause for delay of the proceedings. (Amended March 31, 1978, effective July 1, 1978.)

STATUTORY NOTES

Cross References. Change of attorney, § 3-203
Written appearances, service of, Rule 5(a)

DECISIONS UNDER PRIOR RULE OR STATUTE

ANALYSIS

Appeal
Notice.**Appeal.**

After final judgment, the party who appeals may employ new counsel or change his attorney without notice. *Lydon v. Piper*, 5 Idaho 541, 51 P. 101 (1897).

Notice.

After withdrawal of answer and appearance of attorney for one of the defendants, plaintiff cannot, without taking action to substitute other counsel or notifying defendant to do so, obtain judgment against such defendant. *Bogue Supply Co. v. Davis*, 36 Idaho 249, 210 P. 577 (1922).

Notice in accordance with statutes is sufficient. *Peters v. Walker*, 37 Idaho 195, 215 P. 845 (1923).

Where adverse party had personal knowl-

edge that appellant's attorney had withdrawn, law requiring the giving of notice of such withdrawal to the adverse party had no application. *Smith-Nieland v. Reed*, 39 Idaho 788, 231 P. 102 (1924).

Where attorneys representing respondent withdrew and appellant caused written notice and demand to be served on such respondent in accordance with the statute requiring that respondent employ counsel to represent her on such appeal, said notice being served and allowing an intervening period of sixteen days until the date set for argument before this court, but respondent failed and refused to comply with such notice, further not showing any excuse for not employing another counsel or appearing in person, notice was held to be sufficient and the respondent was held to have had reasonable time under the circumstances to comply with the notice served. *Application of Paul*, 78 Idaho 370, 304 P.2d 641 (1956).

Rule 11(b)(2). Withdrawal of attorney.

Except as otherwise provided in this Rule 11(b) and its subsections, or by stipulation and order of the court, no attorney may withdraw as an attorney of record for any party to an action without first obtaining leave and order of the court upon a motion filed with the court, and a hearing on the motion after notice to all parties to the action, including the client of the withdrawing attorney. Leave to withdraw as a counsel of record may be granted by the court for good cause and upon such conditions or sanctions as will prevent any delay in determination and disposition of the pending action and the rights of the parties. Provided, that at the time judgment is entered in any action, or at any time thereafter, an attorney who desires to withdraw as attorney of record for a party may give notice thereof in the judgment, or may file a notice of withdrawal at the time of entry of the judgment, or at any time thereafter, but such notice of withdrawal shall not become effective until the time for appeal from the final judgment has expired and there are no proceedings pending. The attorney shall provide the last known address of the client in any notice of withdrawal. (Amended January 8, 1976, effective March 1, 1976; amended March 31, 1978, effective July 1, 1978; amended March 20, 1991, effective July 1, 1991; amended effective September 25, 1995.)

JUDICIAL DECISIONS

Cited in: *Fish Haven Resort, Inc v. Arnold*, 121 Idaho 118, 822 P.2d 1015 (Ct. App. 1991)

Rule 11(b)(3)

If an attorney permits the appointment of another attorney to represent the party within 20 days after the order is entered, due diligence, to the action and the attorney may be certified mail to the client, which order granting proceedings of the withdrawal of the order or an additional newly appointed attorney sufficient grounds for dismissal of the action, which provide the law. (Amended March 1, 1976, effective July 1, 1976.)

Construction.
Default Judgment—Setting Aside.
Failure to Warn.
Failure to Warn.
Mailing Withdrawal Notice.
Presumption From Strict Compliance.

Construction.
In the context of the entry of a default judgment, the rule explicitly states that the notice must be given clearly in the context of this judgment, since the rule under I.R.C.P., Rule 11(b)(2). The explicit notice is required if the rule is amended to require the entry of "default, judgment." *Sherling*, 103 Idaho

Rule 11(b)(3). Leave to withdraw — Notice to client.

If an attorney is granted leave to withdraw, the court shall enter an order permitting the attorney to withdraw and directing the attorney's client to appoint another attorney to appear, or to appear in person by filing a written notice with the court stating how the client will proceed without an attorney, within 20 days from the date of service or mailing of the order to the client. After the order is entered, the withdrawing attorney shall forthwith, with due diligence, serve copies of the same upon the client and all other parties to the action and shall file proof of service with the court. The withdrawing attorney may make such service upon the client by personal service or by certified mail to the last known address most likely to give notice to the client, which service shall be complete upon mailing. Upon the entry of an order granting leave to an attorney to withdraw from an action, no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service or mailing of the order of withdrawal to the party. If such party fails to file and serve an additional written appearance in the action either in person or through a newly appointed attorney within such 20 day period, such failure shall be sufficient ground for entry of default and default judgment against such party or dismissal of the action of such party, with prejudice, without further notice, which shall be stated in the order of the court. The attorney shall provide the last known address of the client in any notice of withdrawal. (Amended March 24, 1982, effective July 1, 1982; amended March 23, 1983, effective July 1, 1983; amended March 30, 1994, effective July 1, 1994.)

JUDICIAL DECISIONS**ANALYSIS**

Construction.
 Default Judgment.
 —Setting Aside
 Failure to Appear
 Failure to Warn of Consequences
 Mailing Withdrawal Order
 Notice
 Presumption From Noncompliance
 Strict Compliance

Construction.

In the context of this particular rule, reference to entry of "default" includes entry of "default judgment" and the fact that this rule explicitly states that no further notice is necessary clearly indicates that "default" in the context of this rule includes "default judgment," since the entry of the default alone, under I.R.C.P., Rule 55(a)(1), requires no notice. The explicit provision in this rule that no further notice is necessary would be superfluous if the rule was intended to apply only to entry of "default," and not to entry of "default judgment." *Sherwood & Roberts, Inc. v. Ripplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

This rule provides a readily identifiable, straightforward requirement for counsel and the courts to satisfy; compliance with the rule obviates any need for judges to weigh conflicting evidence of actual notice or to speculate concerning a litigant's state of mind. An entitlement to relief from a default judgment as a matter of law produces consistent, predictable results, unaffected by the varying philosophies that underlie exercises of discretion by individual judges. *Knight Ins., Inc. v. Knight*, 109 Idaho 56, 704 P.2d 960 (Ct. App. 1985).

Default Judgment.

This rule, unlike its statutory predecessor § 3-206 (repealed), clearly permits the entry of default without the further three-day notice under I.R.C.P., Rule 55(b)(2), as long as the notice so states. *Sherwood & Roberts, Inc. v. Ripplinger*, 103 Idaho 535, 650 P.2d 677 (1982).

Where the court order which granted the defendant's attorney's motion to withdraw as counsel unambiguously apprised the defendant of the consequences of failing to appear,

Compiler's notes. This section was made a rule of court by order of the Supreme Court dated March 19, 1951, which order was rescinded by order of the Supreme Court dated October 24, 1974 and appears to have been abrogated, affected or covered in part by I.R.C.P., Rules 11(b)(1) — 11(b)(4).

Cited in: Smith-Nieland v Reed, 39 Idaho 788, 231 P. 102 (1924).

ANALYSIS

- Appeal from order.
- Change after judgment.
- Change at beginning of trial.
- Payment of compensation
- Ratification.

Appeal from Order.

An application for a change of attorneys to which objection is made by the attorney is a special proceeding, the final judgment made on which is reviewable on appeal to the Supreme Court. Curtis v Richards, 4 Idaho 434, 40 P. 57 (1895).

Change After Judgment.

After final judgment a party who appeals may employ new counsel or change his attorney without notice, and the provisions of this and the following sections do not apply in

3-204. Notice of change. — When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he must recognize the former attorney. [C.C.P. 1881, § 123; R.S., R.C., & C.L., § 4000; C.S., § 6575; I.C.A., § 3-204.]

Compiler's notes. This section was made a rule of court by order of the Supreme Court dated March 19, 1951, which order was rescinded by order of the Supreme Court dated October 24, 1974, and appears to have been abrogated, affected or covered in part by I.R.C.P., Rule 11(b)(1) — 11(b)(4).

ANALYSIS

- Appeal.
- Notice of withdrawal.

3-205. Attorneys' fees — Lien. — The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment. [C.C.P. 1881, § 692; R.S. & R.C., § 4900; am. 1911, ch. 167, p. 563; reen. C.L., § 4000a; C.S., § 6576; I.C.A., § 3-205.]

such cases Lydon v Piper, 5 Idaho 541, 51 P. 101 (1897).

Change at Beginning of Trial.

Withdrawal of attorney's appearance for one of two joint defendants, at beginning of trial, is permissible under this section. Bogue Supply Co v Davis, 36 Idaho 249, 210 P. 577 (1922).

Payment of Compensation.

As a general rule an order changing attorney will not be made unless fees or compensation earned by the attorney are paid or facts are made to appear by the party moving for the change which show that this is impossible in the given case. Curtis v Richards, 4 Idaho 434, 40 P. 57 (1895).

Ratification.

Ratification by the client of the unauthorized act of his attorney can not be inferred in the absence of knowledge of all of the material facts on the part of the client. Storey v. United States Fid. & Guar. Co., 32 Idaho 388, 183 P. 990 (1919).

Collateral References. 7 Am. Jur. 2d, Attorneys-at-Law, § 148.

7 C.J.S., Attorney and Client, §§ 119 — 124.

Appeal.

After final judgment, a party who appeals may employ new counsel or change his attorney without notice. Lydon v Piper, 5 Idaho 541, 51 P. 101 (1897)

Notice of Withdrawal.

In the absence of notice to adverse party latter owes no duty to inform of withdrawal of attorney from cause. Smith-Nieland v Reed, 39 Idaho 788, 231 P. 102 (1924).

C
ney'
M
fees
R:
ney'
W
as c
W
fixir
C:
787
657
Mag
112
Cole
(Ct.
— B

Agre
App
Con
Con
Cov
Disc
Divo
Fili
Fore
Funt
Lien
Mult
Non
Prio
Pur
Reas
Sati

Agre
W
defe
actic
woul
judg
or ac
atto
due
Robe
P.2d

App
U1
Cov
dire
ther
Lum
753

Con
Th
prev
atto
part
cont
it wi

I.R.P.C. 1.3 because the Bar's complaint did not allege neglect. The Court held that the issue of neglect was tried by the implied consent of the parties because the issue of neglect is inherent in any charged violation of the rules relating to lack of diligence, and Tway himself testified at length about his delay in filing a claim on behalf of his client.

[5] In this case, however, we agree that Defendant A was not afforded sufficient notice of the complaint about an alleged false statement in his April 25, 1995, affidavit. Although the record contains evidence relevant to the truthfulness of Defendant A's April 25, 1995, affidavit, this evidence was also relevant to the issue of whether Defendant A had permission to use Krall's money or, in the alternative, had misappropriated the money. It therefore does not appear the parties understood the evidence concerning the April 25, 1995, affidavit was aimed at the specific issue of whether Defendant A made a false statement to a tribunal in that affidavit. We conclude there was not sufficient notice to Defendant A that he should be prepared to respond at the hearing to allegations regarding an entirely different affidavit than the one described in the Bar complaint and, therefore, the Board should not have used that as a basis for recommending disciplinary sanctions against the attorney.

V.

FALSE STATEMENT TO THE
IDAHO STATE BAR

Rule 8.1(a) prohibits a lawyer from knowingly making "a false statement of material fact" in connection with a bar disciplinary matter. Rule 8.4(c) similarly prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation". The Bar alleged that Defendant A had made false statements to it during the course of the investigation. The Board determined that this allegation was not proven. We have reviewed the record and conclude that the Board's determination is not clearly erroneous.

VI.

CONCLUSION

[6] The Board's finding that Defendant A violated I.R.P.C. 1.15(a) by commingling funds is supported by clear and convincing evidence. The Board's finding that Defendant A did not make a false statement to the Idaho State Bar in violation of I.R.P.C. 8.1(a) is also supported by clear and convincing evidence. The Board erred, however, in determining that the issue concerning whether Defendant A made a false statement to a tribunal in his April 25, 1995, affidavit was tried by the implied consent of the parties and that should not be a basis for finding a violation of the Rules of Professional Conduct. Given Defendant A's commingling violation, it is this Court's conclusion that a private reprimand is the appropriate sanction.

Justices SILAK, SCHROEDER,
WALTERS and KIDWELL concur.



2 P.3d 147

DEFENDANT A, Petitioner,

v.

IDAHO STATE BAR, Respondent.

Dennis Goldberg, M.D., Petitioner,

v.

Idaho State Bar, Respondent.

Nos. 25586, 25587.

Supreme Court of Idaho.

May 15, 2000.

Attorney discipline proceeding was brought. The Supreme Court, Trout, C.J., held that: (1) attorney had not violated rule of professional conduct regarding competence; (2) attorney had not violated rule of professional conduct regarding diligence; (3)

attorney
conduct
ney had
duct reg
violated
ing safe
ney had
duct reg
from rep
violated
ing the
tribunal.

Disc

1. Attor

Whe
determin
Board ir
the Supr
review o
evidence

2. Attor

In
and asse
disciplin
must ap
of prof
such act
corded t
of the P

3. Attor

Attu
vorce pr
fessiona
where c
arate pr
property
of Prof.

4. Attor

Att
decree
professi
diligenc
that att
client's
require
Rules o

attorney had not violated rule of professional conduct regarding communication; (4) attorney had not violated rule of professional conduct regarding fees; (5) attorney had not violated rule of professional conduct regarding safekeeping of client property; (6) attorney had not violated rule of professional conduct regarding termination or withdrawal from representation; and (7) attorney had not violated rule of professional conduct prohibiting the making of false representations to a tribunal.

Disciplinary proceeding dismissed.

1. Attorney and Client ⇨57

When the Supreme Court reviews the determination of the Profession Conduct Board in an attorney discipline proceeding, the Supreme Court conducts an independent review of the record and assessment of the evidence.

2. Attorney and Client ⇨57

In conducting its independent review and assessment of the record in an attorney discipline proceeding, the Supreme Court must apply the clear and convincing burden of proof standard historically required in such actions; however, great weight is accorded to the findings and recommendations of the Profession Conduct Board.

3. Attorney and Client ⇨44(1)

Attorney's representation of client in divorce proceeding did not violate rule of professional conduct regarding competence, where client prevailed at trial regarding separate property status of certain items of real property at issue in that proceeding. Rules of Prof.Conduct, Rule 1.1.

4. Attorney and Client ⇨44(1)

Attorney's failure to file client's divorce decree for four months did not violate rule of professional conduct regarding concerning diligence, where court order required only that attorney draft decree and submit it to client's spouse within ten days, and did not require that decree be filed by specific date. Rules of Prof.Conduct, Rule 1.3.

5. Attorney and Client ⇨44(1)

Attorney's representation of client in divorce proceeding did not violate rule of professional conduct regarding communication, where billing records reflected numerous telephone and office conferences between attorney and client. Rules of Prof.Conduct, Rule 1.4.

6. Attorney and Client ⇨44(1)

Attorney's representation of client in divorce proceeding did not violate rule of professional conduct regarding fees, where attorney's fees were set out in detail and fee dispute was referred to arbitration. Rules of Prof.Conduct, Rule 1.5.

7. Attorney and Client ⇨44(1)

Attorney's representation of client in divorce proceeding did not violate rule of professional conduct regarding representation of client under a disability, where there was no indication as to what type of disability client allegedly suffered which would have required special representation. Rules of Prof.Conduct, Rule 1.14.

8. Attorney and Client ⇨44(1)

Attorney's representation of client in divorce proceeding did not violate rule of professional conduct regarding safekeeping of client property, where attorney's application of funds owed to client to client's outstanding bill for attorney fees was clearly reflected on billing statement, and client had failed to object to those payments until he filed grievance against attorney months later. Rules of Prof.Conduct, Rule 1.15.

9. Attorney and Client ⇨44(1)

Attorney's retention of client's file after terminating representation, in order to secure payment of outstanding bill, did not violate rule of professional conduct regarding termination or withdrawal from representation, where attorney offered to allow client's substitute counsel access to client's file and allowed substitute counsel to copy file at his own expense. Rules of Prof.Conduct, Rule 1.16(d).

10. Attorney and Client ⇨177

An attorney has the right to retain a possessory lien in the client's file after termi-

ON
that Defendant A
by commingling
r and convincing
ding that Defen
statement to the
of I.R.P.C. 8.1(a)
and convincing
l, however, in de
ncerning whether
e statement to
1995, affidavit was
nt of the parties
asis for finding a
Professional Con
commingling vio
conclusion that a
appropriate sanc

EDER,
concur.

Petitioner,

Respondent.

Petitioner,

Respondent.

1587.

Idaho.

10.

proceeding was
urt, Trout, C.J.,
not violated rule
egarding compe
t violated rule of
ling diligence; (3)

nating representation, in order to secure payment of the bill.

11. Attorney and Client ⇨171, 192(1)

An attorney's possessory or retaining lien in the client's file is passive and not enforceable by foreclosure and sale.

12. Attorney and Client ⇨42

Even though attorney's statement to magistrate judge that he was seeking leave to withdraw from representation of client "based upon the fact that there has been no payment of attorney fees to the above named law firm by the client and that there has been a breakdown in the client/attorney relationship" was technically false, in that client had made two relatively small fee payments, statement could not reasonably have affected magistrate's decision to permit attorney's withdrawal, and thus statements did not violate rule of professional conduct prohibiting the making of false representations to a tribunal. Rules of Prof. Conduct, Rule 3.3(a).

13. Attorney and Client ⇨42

The test for whether an allegedly false statement by an attorney to a tribunal is material is whether: (1) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (2) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Ramsden & Lyons, Coeur d'Alene, for petitioner Defendant A. Michael E. Ramsden argued.

Michael J. Oths, Idaho State Bar, Boise, for respondent.

TROUT, Chief Justice.

This is a Petition for Review from the decision of the Professional Conduct Board (Board) finding Defendant A had violated the Rules of Professional Conduct with regard to his representation of Dennis Goldberg, M.D. (Goldberg). Both Goldberg and Defendant A have asked this Court to review the Board's

decision. Goldberg argues the Board incorrectly determined Defendant A had violated only two of the professional conduct rules, while Defendant A argues the Board should have determined he had committed no violations at all. Because we find Defendant A committed no ethical violations, we do not follow the findings and recommendations of the Professional Conduct Board and order this disciplinary proceeding dismissed.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Goldberg engaged Defendant A in December of 1995 to handle his divorce proceedings. Defendant A filed a divorce complaint on behalf of Goldberg in 1996. On May 9, 1997, the magistrate judge granted Defendant A an attorney fees lien which documented an attorney fee owed to Defendant A by Goldberg in the amount of \$23,000. Thereafter, on November 3, 1997, Defendant A filed a motion to withdraw. As a basis for the motion, Defendant A stated: "This motion is based on the fact that there has been no payment of attorney fees to the above named law firm by the client and that there has been a breakdown in the client/attorney relationship." On December 9, 1997, the magistrate judge signed the decree of divorce and the order granting the motion for leave to withdraw. After withdrawing as counsel for Goldberg, Defendant A offered to let Goldberg's new attorney copy any and all materials in his file, provided the new attorney paid the copying costs. Defendant A retained the original file.

In January 1998, Goldberg filed a complaint against Defendant A with the Idaho State Bar. After investigation, the assistant bar counsel sent out a letter concluding that she found no ethical violations and dismissing Goldberg's complaint. Goldberg requested a review of that decision and, on March 18, 1999, a hearing committee of the Board heard the appeal at a telephone hearing. On May 3, 1999, the hearing panel entered its decision finding Defendant A had violated IRPC 1.16(d) for failing to turn over Goldberg's file to Goldberg's new attorney,

and IRF
tation to
the Boa
ceive a
probatio
which he
Ethics (
Followir
Defenda

[1, 2]
minatio
the Cou
the rect
Matter
P.2d 33
ducting
ment of
and con
torically
tions."
ed to t
the Bo:

A. *Thu*
ins
mo

[3]
conclud
not exi
had vio
tence,
fees, ar
a revie
evidenc
those I
and cor
ed Ruk
ord rev
regardi
certain
divorce
Goldbe
tent be
request
vide ar

the Board inco-
at A had violated
al conduct rules,
the Board should
mitted no viola-
ind Defendant A
stions, we do not
commendations of
Board and order
dismissed.

PROCEDURAL JND

ndant A in Decem-
orce proceedings.
orce complaint on

On May 9, 1997,
nted Defendant A
ch documented an
Defendant A by
f \$23,000. Thereaf-

Defendant A filed
As a basis for the
ed: "This motion is
here has been no
to the above named
nd that there has
lient/attorney rela-
9, 1997, the magis-
cree of divorce and
notion for leave to
wing as counsel for
A offered to let
copy any and all
ided the new attor-
sts. Defendant A

dberg filed a com-
: A with the Idaho
ration, the assistant
ter concluding that
tions and dismissing
oldberg requested a
and, on March 18,
ttee of the Board
ephone hearing. On
g panel entered its
ant A had violated
ing to turn over
erg's new attorney,

and IRPC 3.3(a) for making a false represen-
tation to a tribunal. Based on these findings,
the Board decided Defendant A should re-
ceive a private reprimand and be placed on
probation for a period of 6 months, during
which he would have to obtain three hours of
Ethics CLE credits approved by the Bar.
Following this decision, both Goldberg and
Defendant A sought review by this Court.

II.

STANDARD OF REVIEW

[1, 2] When this Court reviews the deter-
mination of the Profession Conduct Board,
the Court conducts an independent review of
the record and assessment of the evidence.
Matter of Jenkins, 120 Idaho 379, 384, 816
P.2d 335, 340 (1991). "In addition, in con-
ducting our independent review and assess-
ment of the record we must apply the clear
and convincing burden of proof standard his-
torically required in attorney discipline ac-
tions." *Id.* However, great weight is accord-
ed to the findings and recommendations of
the Board. *Id.* at 383, 816 P.2d at 339.

III.

DISCUSSION A.

A. *The Board did not err in concluding
insufficient evidence existed to support
most of Goldberg's claims.*

[3] Goldberg argues the Board erred in
concluding clear and convincing evidence did
not exist to support a finding Defendant A
had violated the IRPC with regard to compe-
tence, diligence, communication, attorney
fees, and client under a disability. However,
a review of the record reveals little or no
evidence of a violation by Defendant A of
those Rules. Specifically, there is no clear
and convincing evidence Defendant A violat-
ed Rule 1.1 regarding competence. The rec-
ord reveals Defendant A prevailed at trial
regarding the separate property status of
certain items of real property at issue in the
divorce proceedings. Additionally, while
Goldberg argues Defendant A was incompe-
tent because he failed to do certain things
requested by Goldberg, Goldberg fails to pro-
vide any evidence, beyond the basic allega-

tions, that the failure to do those things
constituted incompetent representation.
Therefore, we accept the Board's finding on
the issue of competence.

[4] Second, the Board determined that
while there was no clear and convincing evi-
dence Defendant A violated IRPC 1.3 con-
cerning diligence, there was some evidence
Defendant A had not been as diligent as he
should have been. Specifically, the Board
referenced a letter from Goldberg's bank re-
garding their inability to contact Defendant
A in order to obtain certain documents. Ad-
ditionally, Goldberg argues Defendant A was
not diligent because he failed to file the
divorce decree for four months following a
court order to file it within ten days. While
the letter from Goldberg's bank certainly
supports the Board's finding that Defendant
A could have been more diligent, the filing of
the divorce decree is a different matter. The
record reveals the order referred to by
Goldberg only states the divorce decree was
to be drafted and sent to the defendant
within 10 days, not that the decree had to be
filed within 10 days. Therefore, this does
not support a finding of a lack of diligence.
We accept the Board's finding that while no
ethical violation occurred, Defendant A could
have been more diligent in his representation
of Goldberg.

[5] Third, while Goldberg alleges Defen-
dant A violated Rule 1.4 regarding communi-
cation, he provides little or no argument or
support for this allegation. In fact, the bill-
ing records reflect numerous telephone and
office conferences between Defendant A and
Goldberg. We accept the Board's finding of
no ethical violation regarding Defendant A's
duty to communicate with Goldberg.

[6] Fourth, Goldberg alleges Defendant
A violated Rule 1.5 concerning fees. Accord-
ing to the Board's decision, they noted De-
fendant A's fees were set out in detail and
the matter was referred to fee arbitration.
The Board then assumed the fee arbitration
process took care of the matter. Goldberg
argues the Board inappropriately assumed
the matter was resolved by fee arbitration,
but fails to provide any support for that
argument, other than a general allegation

that sufficient evidence exists to support finding Defendant A violated the Rule regarding fees. Because there is no evidence this matter is not being handled in the fee arbitration process, we accept the Board's finding on this issue.

[7] Fifth, Goldberg argues Defendant A violated IRPC 1.14 regarding a client under a disability. While the Board noted the disability aspect is mentioned repeatedly by Goldberg in his letters to the Bar, the Board also found nothing in the record to substantiate Goldberg's claim of a disability, the extent of any disability, and its effect. There is also no evidence the judge believed there was such a disability as would require special representation. We accept the Board's finding that Defendant A did not violate the rule regarding representation of a client under a disability.

[8] Finally, Goldberg argues Defendant A violated Rule 1.15 regarding Safekeeping of Property by applying funds owed to Goldberg to Goldberg's attorney fees without Goldberg's permission. With regard to this issue, the Board adopted by reference the decision letter issued by Jo-Ann Bowen, the assistant bar counsel. In her letter, Bowen specifically found the payments referred to were clearly reflected in Goldberg's monthly billing statement and there was no evidence Goldberg had complained about those payments prior to the filing of the grievance. Additionally, Bowen noted Defendant A's assistant had submitted an affidavit in which she stated she had been present when Goldberg gave Defendant A permission to apply those funds to the attorney fees bill. Based on these findings, we accept the Board's finding that there is no clear and convincing evidence Defendant A violated the Rule regarding safekeeping of property

B. *The Board erred in finding a violation of IRPC 1.16(d).*

[9] Defendant A argues the Board erred in determining he violated Rule 1.16(d) regarding termination or withdrawal from representation by failing to turn over all parts of Goldberg's file, except that portion constituting work product. Defendant A argues the Board erred because it incorrectly deter-

mined Idaho law required Defendant A to turn over his entire file to the new attorney. According to Defendant A, Idaho law allows an attorney to retain a passive possessory lien in the client's file after terminating representation, in order to secure payment of the bill.

[10, 11] In its decision in this matter, the Board found that keeping the file until payment is made would cause extreme difficulty for the client and would automatically prejudice the client. Therefore, the Board found clear and convincing evidence of a violation of IRPC 1.16(d). The Rule states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. *The lawyer may retain papers relating to the client to the extent permitted by other law.*

IRPC 1.16(d) (emphasis added). The language of the Rule indicates the Rule is not violated if "other law" permits the attorney to retain the file. Idaho has recognized an attorney's right to retain a possessory lien in the client's file. For example, in *Frazer v. Frazer*, 104 Idaho 463, 660 P.2d 928 (1983), the Court stated:

A lien for attorney's fees can be either possessory or a charging lien. The possessory or retaining lien is of common law origin and allows an attorney to keep possession of documents, money or other property obtained in his professional capacity until he receives payment for his professional services. Such a lien is passive and not enforceable by foreclosure and sale.

Id. at 464, 660 P.2d at 929 (citations omitted). Because Idaho law allows an attorney to retain a client's file until the attorney has received payment, the Board incorrectly determined that Defendant A erred in refusing to turn over his file.

The Idaho State Bar recognizes the general rule allowing an attorney to retain a file in

order to i
recognize t
not retain
imminent
"imminent
this case, t
nation of t
record, let
dence, to
A's retenti
prejudice t
initially rel
file withou
ently undi
dant A ex
attorney a
copy the f
While the
caused sor
inconvenie
imminent
lation by
Goldberg's
the outstai

C. *The E
of IRP*

[12] D
in two re
IRPC 3.3(
to a tribu
Board eri
viewed fr
judge was
dant A a
technicall
magistrat
leave to v
lawyer sl
statement
nal."

In his r
dant A s
the fact t
attorney
the client
down in
Despite t
acknowle
made by
payments
Novembe

DEFENDANT A v. IDAHO STATE BAR

Cite as 134 Idaho 338

343

order to insure payment, but urges us to recognize the exception that an attorney may not retain the file if doing so will result in imminent prejudice to the client. Even if the "imminent prejudice" exception is applied in this case, the Board still erred in its determination of this issue. There is nothing in the record, let alone clear and convincing evidence, to support a finding that Defendant A's retention of the file resulted in imminent prejudice to Goldberg. While Defendant A initially refused to allow access to Goldberg's file without payment of the bill, it is apparently undisputed by the parties that Defendant A eventually offered Goldberg's new attorney access to the file and allowed him to copy the file at the new attorney's expense. While the retention of the file may have caused some inconvenience to Goldberg, the inconvenience did not rise to the level of imminent prejudice. We find no ethical violation by Defendant A in retaining Goldberg's file in order to insure payment of the outstanding attorney fees.

C. *The Board erred in finding a violation of IRPC 3.3(a).*

[12] Defendant A argues the Board erred in two respects in finding he had violated IRPC 3.3(a) by making a false representation to a tribunal. First, Defendant A argues the Board erred because the statement, when viewed from the position of the magistrate judge was true, not false. Secondly, Defendant A argues even if the statement was technically false, it was not material to the magistrate's decision to grant the motion for leave to withdraw. IRPC 3.3(a) provides "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."

In his motion for leave to withdraw, Defendant A stated: "This motion is based upon the fact that there has been no payment of attorney fees to the above named law firm by the client and that there has been a breakdown in the client/attorney relationship." Despite this statement, Defendant A freely acknowledges that two payments had been made by Goldberg to Defendant A. These payments were in the amount of \$586.60 in November 1996 and \$4,085.96 in May of 1997.

Defendant A argues, however, the statement was not false when viewed from the position of the magistrate judge. Defendant A points out that after the above payments were made, Goldberg still owed \$23,000 to Defendant A and this was the amount set forth in the attorney's lien granted by Judge Luster. No further payments had been made on the account prior to the time of the filing of the motion to withdraw and Judge Luster knew no further payments had been made because the amount set forth in the divorce decree was also \$23,000. Thus, Defendant A asserts the magistrate judge knew Goldberg owed \$23,000 and the statement made in the motion, viewed from the perspective of the magistrate was true, not false.

There is a major flaw in this argument. The language used in the motion to withdraw is "no payment." The motion does not say no payment has been made since the filing of the attorney's lien. The record does not contain the order granting the attorney's lien; therefore, we can't determine whether the magistrate judge knew, when considering the motion to withdraw, that he was only to consider the time since the lien was entered. Consequently, Defendant A's argument on this point is not persuasive.

[13] Secondly, Defendant A argues the statement was not material because, in order to be material, the statement must have been of consequence to the judge's decision to grant the motion to withdraw. According to this Court's prior cases, the test for materiality is whether

- (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
- (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Watts v. Krebs, 131 Idaho 616, 620, 962 P.2d 387, 391 (1998) (quoting *Edmark Motors, Inc. v. Twin Cities Toyota*, 111 Idaho 846, 848, 727 P.2d 1274, 1276 (Ct.App.1986) (citing RESTATEMENT (SECOND) OF TORTS § 538(2) (1977))). Defendant A alleges his statement

was not material because the magistrate based his decision on the breakdown of the attorney/client relationship, not on the statement concerning the lack of payment of fees. While the order granting the motion to withdraw does not state the grounds for granting the motion, it is undisputed the magistrate judge was aware no payment had been made on the outstanding \$23,000 bill. It is difficult to see how the knowledge that two relatively small payments had been made prior to filing the attorney's lien could have reasonably affected the judge's decision to grant the motion to withdraw. Consequently, the statement, while technically false, was not material to the magistrate's decision. Therefore, we find Defendant A committed no ethical violation in his affidavit in support of this motion to withdraw.

IV.

CONCLUSION

Based on the foregoing discussion, we find Defendant A committed no ethical violations in his representation of Goldberg. Because we find no ethical violations, we impose no sanctions and order the grievance dismissed.

Justices SILAK, SCHROEDER,
WALTERS and KIDWELL concur.



2 P.3d 153

STATE of Idaho, Plaintiff-Respondent,

v.

Judy DEVORE, Defendant-Appellant.

No. 25227.

Court of Appeals of Idaho.

April 12, 2000.

Defendant was convicted in the District Court, Kootenai County, Gary M. Haman, J., on her plea of guilty to possession of a controlled substance with intent to deliver, and

sentenced to three years' probation on suspended sentence of ten years with three years fixed. Defendant appealed. The Court of Appeals, Schwartzman, J., held that: (1) search of defendant's residence was reasonable, and (2) sentencing court did not abuse its discretion in sentencing defendant to three years' probation.

Affirmed.

1. Criminal Law \S 1139, 1158(4)

When a decision on a motion to suppress evidence is challenged, Court of Appeals accepts the trial court's findings of fact that are supported by substantial evidence, but it freely reviews the application of constitutional principles to the facts as found.

2. Criminal Law \S 394.6(4)

Substantial competent evidence supported district court's finding, in denying motion to suppress evidence obtained in search of defendant's residence for felony probationer, that probationer was residing with defendant; probationer had lived with defendant in past and repeatedly returned after being told to stay away, probation officer supervising probationer had checked where probationer was supposedly living and found that he had not been living there, and probationer's relatives had indicated that he was again living with defendant. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures \S 171

Although a warrantless entry or search of a residence is generally illegal and violative of the Fourth Amendment, such an entry or search may be rendered reasonable by an individual's consent. U.S.C.A. Const. Amend. 4.

4. Pardon and Parole \S 68Sentencing and Punishment \S 1993

Searches conducted pursuant to the supervision of probationers and parolees are an exception to the warrant requirement of the federal and state constitutions. U.S.C.A. Const. Amend. 4; Const. Art. 1, \S 17.

5. St

tion

Ame

6. P:

St

less

but :

quire

cer l

the p

tion,

ed t

viola

Art.

7. P:

St

for v

role

of th

paro

warr

Ame

8. S

fend

then

then

er's

subj

ble

offic

war

Con

stiti:

risk

who

sear

Art.

9. C

st

tenc

Cou

revi

nat

offe

FORMAL OPINION NO. 101*

An inquiry has been submitted to the Idaho State Bar and referred to the Committee on the question:

Is a lawyer under a duty to return to the client all of the client's files when the attorney-client relationship ceases because the client has changed attorneys and has paid all fees and disbursements?

The lawyer is obligated under the Code of Professional Responsibility to return the documents furnished by the client since these documents were furnished by the client and belong to the client. DR 2-110(A)(2) requires the attorney on withdrawal from a case to deliver all papers and property to which the client is entitled. There is no material difference in the case of a withdrawal or in a situation where the client changes attorneys.

It is further the attorney's duty to turn over to the client all assets. If the documents in the file are assets of the client then DR 9-102(B)(4) imposes the duty on the attorney to deliver such documents to the client.

As to documents that do not fall within the above categories, it is the opinion of the committee that the lawyer is not under a duty to turn over these documents and as such, the failure to turn over such documents is not a violation of the Code of Professional Responsibility.

*This is an undated opinion.

Ways in Which an “Interest” in Client Monies Arise:

1. Private Contract
 - Assignments
 - *The *Bonanza* case
 - Health insurance (subrogation provisions)
 - *The *Wensman* case/issues
 - Lawyer’s words or conduct
2. Public Law - Typically a statutory lien
 - Hospital or medical liens
 - Medicare
 - Others (child support, indigency fund)
3. Hybrid of the two
 - ERISA subrogation claims

Bonanza v. Wejob

- Fortunate is the lawyer who has never become ensnared in the obligations of a client
- Notice of an assignment puts the obligor on guard
- The obligor is liable to the assignee if funds assigned are paid to assignor
- Once assigned, assignor cannot cancel, modify or release the assignment

Bonanza v. Webbo

- Lawyer who had notice of an assignment by the client, but who disbursed settlement proceeds in disregard of the assignment, even if asked to by the client, is liable to the assignee!
- The law firm is not ethically bound to give the client more than the sum to which he is entitled to receive. Law firm is liable to the creditor for funds relinquished to the client

hearing. We affirm the district court's order revoking probation.

WALTERS, C.J., and BURNETT, J., concur.



657 P.2d 1102

BONANZA MOTORS, INC.,
Plaintiff-Respondent,

v.

Lloyd J. WEBB, individually; and Lloyd J. Webb, J. Riley Burton, Monte B. Carlson, Kenneth L. Pedersen and Robert C. Paine, a partnership, Defendants-Appellants,

and

Robert C. Nora, Defendant.
No. 13828.

Court of Appeals of Idaho.
Feb. 3, 1983.

Petition for Review Denied
March 29, 1983.

Creditor brought action against debtor's law firm to recover on debtor's assignment to creditor of portion of settlement of prior lawsuit. The District Court, Fifth Judicial District, Twin Falls County, Sherman J. Bellwood, J., affirmed the magistrate division's grant of summary judgment for the creditor, and the law firm appealed. The Court of Appeals, Burnett, J., held that: (1) debtor's interest in settlement was assignable; (2) debtor's request of law firm to endorse settlement draft did not relieve law firm of its duty under the assignment; and (3) disciplinary rule requiring attorney to promptly pay client funds in possession of attorney which client is entitled to receive did not shield law firm from responsibility for failing to pay on assignment.

Affirmed.

1. Attorney and Client ⇌ 116

Attorney-client relationship generally imposes upon law firm a contractual obligation, analogous to that of agent or trustee, to account for funds received in course of

legal representation and to pay client any sums to which he may be entitled.

2. Assignments ⇌ 24(1)

Client's interest in proceeds of settlement of prior action was assignable to creditor to whom client owed money on delinquent promissory note.

3. Assignments ⇌ 1

Assignment properly may relate to conditional right which is adequately identified.

4. Assignments ⇌ 93

Obligor is liable to assignee if funds assigned are subsequently paid to assignor in violation of assignment.

5. Assignments ⇌ 91, 92

Once valid assignment has been made, assignor cannot cancel or modify assignment by unilateral action without assent of assignee, nor may he defeat rights of assignee.

6. Assignments ⇌ 92

After notice of assignment has been given to obligor, assignor has no remaining power of release.

7. Attorney and Client ⇌ 26

Client's requesting law firm to endorse draft given in settlement of prior action did not absolve law firm of its contractual duty to honor client's previous assignment of portion of proceeds to creditor to whom client was obligated on delinquent promissory note. I.C. § 55-402.

8. Attorney and Client ⇌ 26

Disciplinary rule requiring attorney to promptly pay client funds in possession of attorney which client is entitled to receive did not shield law firm from responsibility for failing to transmit to client's creditor portion of settlement which client had assigned to creditor and which law firm had obligated itself to pay. Code of Prof. Resp., DR9-102(B)(4).

9. Attorney and Client ⇌ 26

Statute providing for discipline of attorney who fails to pay over money belonging to his client received in settlement of any claim did not require law firm to pay client all of proceeds of settlement where client had assigned portion of proceeds to

creditor and law firm had obligated itself to pay creditor the assigned funds. I.C. § 3-301, subd. 5.

10. Costs ⇐173(1)

Statute providing for award of attorney fees to prevailing party in civil action brought to recover on open account or contract relating to purchase and sale of goods did not apply to creditor's action against debtor's law firm to recover proceeds of debtor's settlement of prior action which debtor had assigned to creditor. I.C. § 12-120(2).

11. Costs ⇐252

Award of attorney fees on appeal is appropriate only if appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation. I.C. § 12-121.

12. Costs ⇐260(5)

Creditor was not entitled to award of attorney fees from debtor's law firm for the law firm's failure to pay creditor funds assigned to it by debtor from debtor's settlement of prior action under statute permitting award of attorney fees on appeal where appeal generated issues of first impression and authorities from other jurisdictions were relied upon to reach decision. I.C. § 12-121.

Marvin M. Smith, Webb, Burton, Carlson, Pedersen & Paine, Twin Falls, for defendants-appellants. Lloyd J. Webb, of the firm, on oral argument.

Jack S. Gjording, Elam, Burke, Evans, Boyd & Koontz, Boise, for plaintiff-respondent. Randall A. Peterman, of the firm, on oral argument.

BURNETT, Judge.

Fortunate is the lawyer who has never become ensnared in the obligations of a client. The law firm of Webb, Burton, Carlson, Pedersen & Paine was not so fortunate in its representation of a client named Robert C. Nora.

The firm obtained a favorable judgment for the client in a lawsuit against an insurance company. The client owed money to a creditor, Bonanza Motors, Inc., on a delinquent promissory note. To obtain forebear-

ance against judgment on the note, the client gave the creditor a partial assignment of his interest in funds to be received from the action against the insurance company. The assignment instrument directed the law firm to pay the creditor directly when funds were received. A copy of the instrument was furnished to, and accepted by, the law firm. The funds later arrived in the form of a draft payable jointly to the client and the firm. The client paid the firm its fee for legal services and requested the firm to endorse the draft. The firm did so without restriction and relinquished the draft—either disregarding or overlooking the assignment. The client then negotiated the draft without paying the creditor. The creditor sued on the assignment and obtained summary judgment against the law firm in the magistrate division of the district court. On appeal, the judgment was affirmed by the district court.

In this further appeal, the law firm raises three issues: (1) Did the firm owe the client an obligation which gave rise to an assignable right? (2) Did the assignment remain binding upon the firm after the client paid the firm its fee and requested endorsement of the draft? (3) Could the law firm ethically have declined to comply with the client's request? Because we answer each question in the affirmative, the judgment in favor of the creditor is upheld.

In an appeal from summary judgment, our function is to determine whether there are genuine issues of material fact, and whether the prevailing party was entitled to judgment as a matter of law. I.R.C.P. 56(c). The record in this case discloses no disputed facts. Accordingly, we focus on whether the creditor was entitled, as a matter of law, to judgment against the law firm.

[1] First we consider the question of whether the client had an assignable right. The assignment actually embraced two elements—the client's underlying right to recover from the insurance company, and the client's right to disbursement of funds by the law firm when proceeds of the action were received. Regarding the first right, it is settled in Idaho that a cause of action, or

"thing in action," may be assigned. I.C. § 55-402. See *Whitehead v. Van Leuven*, 347 F.Supp. 505 (D.Idaho 1972); *Casady v. Scott*, 40 Idaho 137, 237 P. 415 (1924). Regarding the second right, it appears to be well established that an attorney-client relationship generally imposes upon the law firm a contractual obligation, analogous to that of an agent or trustee, to account for funds received in the course of legal representation and to pay the client any sums to which he may be entitled. See cases cited in 7A C.J.S. *Attorney and Client* § 247 (1980). Nothing in the record negates the existence of this general obligation in the present case.

[2] In its ably written briefs, the law firm has contended that the obligation to disburse funds did not give rise to an assignable right, because the firm owed the client no "debt" when notice of the assignment was given. However, whether the law firm's obligation to its client constituted a "debt" is not the dispositive question. Subject to restrictions not asserted here, modern contract law recognizes the assignment of rights to performance of obligations other than "debts." See generally *J. Calamari & J. Perillo, the Law of Contracts* §§ 18-7 et seq. (1977). The firm also cites numerous authorities for the proposition that an assignment fails if the purported obligor is not, in fact, obligated to the assignor. The proposition is correct but inapposite to this case. From the outset of the attorney-client relationship, the law firm was obliged to disburse, and the client had a right to receive, any funds to which he was entitled.

[3] The fact that performance of this obligation occurred later, when proceeds of the lawsuit arrived, does not defeat the assignment. With exceptions not applicable in this case, a right to future performance of an obligation may be assigned. See Restatement (Second) of Contracts § 321(1) (1979); 3 S. Williston, *A Treatise on the Law of Contracts* § 413 (W. Jaeger 3d ed. 1960). Neither is the assignment defeated by the fact that the client's right to receive money necessarily was conditioned upon the availability of proceeds from the action against the insurance company. An assign-

ment properly may relate to a conditional right which is adequately identified. See Restatement, *supra*, § 320; 4 A. Corbin, *Corbin on Contracts* § 874 (1951).

The law firm has argued that the insurance company was the true obligor in this case. It may be freely conceded that the insurance company owed a debt; but we are not persuaded that this altered the status of the law firm as an obligor to its client, with respect to funds received. We conclude that the law firm owed the client an obligation which gave rise to an assignable right.

[4-6] We turn next to the question of whether the client's actions, in paying the law firm its fees and requesting endorsement of the draft, relieved the law firm of its duty to the creditor-assignee under the assignment. Notice of an assignment puts the obligor on guard. The obligor is liable to the assignee if the funds assigned are subsequently paid to the assignor in violation of the assignment. *E.g., Chapman v. Tyler Bank & Trust Co.*, 396 S.W.2d 143 (Tex.Civ.App.1965); see generally 4 A. Corbin, *supra*, § 890. Once a valid assignment has been made, the assignor cannot cancel or modify the assignment by unilateral action without the assent of the assignee; nor may he defeat the rights of the assignee. *E.g., Wymer v. Wymer*, 16 B.R. 497 (Bkrcty. 9th Cir.1980); *Shore v. Shore*, 71 Cal.App.3d 290, 139 Cal.Rptr. 349 (1977). After notice of the assignment has been given to the obligor, the assignor has no remaining power of release. 4 A. Corbin, *supra*, at 577.

[7] In the present case, the client acted unilaterally in requesting that the draft be endorsed and delivered to him. The record discloses no contention that the creditor had consented to such treatment of the funds assigned. Accordingly, we hold that the client's request did not absolve the obligor law firm of its contractual duty to honor the assignment.

[8] Finally, we consider whether the law firm ethically was required to acquiesce in the client's request. Ethical standards for Idaho lawyers and law firms are established by the Code of Professional Responsibility adopted by the Idaho Supreme Court. The

law
to e
the
This
to "
requ
sion
tled
our
firm
mit
signe
funds
ment
funds

[9]
301(5
client
discip
over

claim
this
ing
Resp
firm
not e
mone

Ou
Brini
N.Y.:
case
lawy
the
proce
was
this
guist
contr
here
paya
a dif
conce
hono
draft
doing
firm
unles
tion
acco
ethic
the
concl

law firm contends that it was constrained to endorse and to relinquish the draft, upon the client's request, under DR 9-102(B)(4). This disciplinary rule requires an attorney to "[p]romptly pay [to the client] ... as requested ... the funds ... in the possession of the lawyer which the client is entitled to receive." (Emphasis supplied.) In our view, the rule does not shield the law firm from responsibility for failing to transmit the assigned funds to the creditor-assignee. The client had dealt with those funds by a valid and enforceable assignment. He was not "entitled to receive" the funds assigned.

[9] The firm also argues that I.C. § 3-301(5) required it to pay all funds to the client. However, this statute provides for discipline of an attorney who fails "to pay over ... money ... belonging to his client ... received in ... settlement of any claim." Assuming, without deciding, that this statute remains in force notwithstanding adoption of the Code of Professional Responsibility, it still does not require a law firm to pay a client money to which he is not entitled. It simply requires payment of money "belonging" to the client.

Our view is parallel to that expressed in *Brinkman v. Moskowitz*, 38 Misc.2d 950, 238 N.Y.S.2d 876 (N.Y.App.Term 1962). In that case a New York appellate court held that a lawyer who had notice of an assignment by the client, but who disbursed settlement proceeds in disregard of the assignment, was liable to the assignee. The law firm in this case argues that *Brinkman* is distinguishable because the lawyer there had full control of the funds, while the law firm here was one of the parties to a jointly payable draft. This is a distinction without a difference as far as the assignment is concerned. The firm still was required to honor the assignment. The jointly payable draft simply altered the available means of doing so. Among other alternatives, the firm could have withheld its endorsement unless the client agreed to proper distribution of funds through the firm's trust account. In any event, the firm was not ethically bound to give the client more than the sum to which he was entitled. We conclude that the law firm is liable to the

creditor for funds relinquished to the client in violation of the assignment.

[10] The creditor has requested an award of attorney fees on appeal under I.C. § 12-120(2) or § 12-121. Section 12-120(2) provides, in part, for the award of attorney fees to the prevailing party in a civil action brought to recover on an open account or contract relating to the purchase and sale of goods. The creditor's cause of action against the client in this case may have related to a purchase and sale of goods; but the cause of action against the law firm did not. That cause of action was founded solely upon assignment of proceeds from a lawsuit. Such an action is not covered by § 12-120(2). Accordingly, we decline to award attorney fees under this section.

[11, 12] With respect to § 12-121, an award of attorney fees on appeal is appropriate only if the appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979); I.R.C.P. 54(e)(1). We have held that such an award will not be made where a decision is based upon legal authorities from other jurisdictions, and the appeal has helped to develop Idaho case law on the subject. *Shelton v. Boydstun Beach Ass'n*, 103 Idaho 818, 641 P.2d 1005 (Ct.App. 1982). This case has been characterized by an interface of assignment law with the legal and ethical duties created by the attorney-client relationship. It has generated issues of first impression in Idaho. We have relied largely upon authorities from other jurisdictions to reach, and to support, our decision. Consequently, we award no attorney fees on appeal.

The order of the district court, upholding the judgment in the magistrate division, is affirmed. Costs to respondent, Bonanza Motors, Inc.

WALTERS, C.J., and SWANSTROM, J., concur.



RULE 1.15: SAFEKEEPING PROPERTY

- (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. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
- (b) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- (c) 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.
- (d) 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 distribute all portions of the property as to which the interests are not in dispute.
- (e) Nothing in these Rules shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a Court-approved Interest on Lawyer Trust Accounts (IOLTA) program.
- see comment*
4

- *f) Unless an election not to do so is submitted in accordance with the procedure set forth in subsection (j) of this Rule, a lawyer or law firm with which the lawyer is associated who receives client funds shall maintain a pooled interest-bearing depository account for disposition of client funds that are nominal in amount or expected to be held for a short period of time. Such an account shall comply with the following provisions:**
- (1) The account shall include all clients' funds which are nominal in amount or are expected to be held for a short period of time.

(2) No interest from such an account shall be made available to a lawyer or law firm.

(3) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each lawyer or law firm.

(4) Notification to clients whose funds are nominal in amount or to be held for a short period of time is not required.

**(Section (f) amended 6-5-06)*

(g) An interest-bearing trust account established pursuant to subsection (a) of this Rule shall be established in accordance with I.B.C.R. 302(a)(2).

(h) Lawyers or law firms depositing clients' funds which are nominal in amount or to be held for a short period of time in an interest-bearing depository account under subsection (f) of this Rule shall direct the depository institution:

(1) to remit interest or dividends, net of reasonable service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice for other depositors, at least quarterly, to the Idaho Law Foundation;

(2) to transmit with each remittance to the Idaho Law Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the average account balance of the period for which the report is made; and

(3) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

(i) Interest transmitted to the Idaho Law Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Idaho Law Foundation for operation of the IOLTA program, shall be distributed by that entity in proportions it deems appropriate, for the following purposes:

(1) to provide legal aid to the poor;

(2) to provide law related education programs for the public;

- (3) to provide scholarships and student loans;**
- (4) to improve the administration of justice; and**
- (5) for such other programs for the benefit of the public as are specifically approved from time to time by the Supreme Court of Idaho.**

***(j) A lawyer or law firm that elects to decline to maintain accounts described in subsection (e) of this Rule shall submit a Notice of Declination in writing to the Executive Director of the Idaho State Bar or designee by February 1 of the year to which the Notice of Declination will apply.**

(1) Notwithstanding the foregoing, any lawyer or law firm may petition the Court at any time and for good cause shown may be granted leave to file a Notice of Declination at a time other than those specified above. An election to decline participation may be revoked at any time by filing a request for enrollment in the program.

(2) A lawyer or law firm that does not file with the Executive Director of the Idaho State Bar a Notice of Declination in accordance with the provisions of this Rule shall be required to maintain account in accordance with subsection (f) of this Rule.

****(Section (j) amended 6-5-06)***

(k) Each active member of the Idaho State Bar shall certify, each year, upon making application for licensure the following year that he or she has and intends to keep in force, in the state of Idaho, a separate bank account or accounts for the purpose of keeping money in trust for his or her clients, which account conforms to the requirements of this disciplinary rule, or that because of the nature of his or her practice no client funds are received. Certification shall be upon a form to be provided by the Idaho State Bar and shall include the following:

- (1) The name and address of the lawyer or law firm filing the certification;**
- (2) The name and address of each financial institution in which the account or accounts are maintained;**
- (3) The number of each account maintained pursuant to this rule;**
- (4) The dates covered by the certification; and**

(5) The signature, under penalty of perjury, of the lawyer making the certification.

Commentary

[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 that is the property of clients or third persons, including prospective clients, must 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. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While some jurisdictions permit lawyer so keep a minimal balance in the trust account to cover bank service charges, Idaho does not permit this practice.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (d) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] 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 only 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 and is not governed by this Rule.

[6] The Client Assistance Fund (Section VI of the Idaho Bar Commission Rules) refers to the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

[7] Paragraphs (e) through (j) of this Rule set forth the provisions of Idaho's Interest on Lawyer Trust Accounts (IOLTA) rule.

[8] Paragraph (k) notes the requirement in the Idaho Bar Commission Rules that lawyers certify compliance with trust account practices on the annual license form.

Beware the ERISA health plan lien

You've negotiated a good settlement for your client. But now the client's health plan wants to be reimbursed for the medical benefits it paid. Can the plan's lien be defeated—or negotiated down?

PETER H. WAYNE IV AND MARK R. TAYLOR

Once largely ignored, ERISA liens have become formidable obstacles to settlement and client satisfaction.¹ Plaintiff attorneys cannot afford to overlook their impact. They can lay claim to most or even all of the proceeds from settlement of, for example, a personal injury case involving an auto accident where the plaintiff received benefits from an ERISA health plan.

To make matters worse, many states' ethical opinions and rules of professional conduct can now be read to impose a duty to hold disputed funds (such as lien amounts) in the attorney's trust account and even to notify the ERISA lien holder of settlement.² These developments present an alarming challenge to the traditional view that an attorney owes no duties to the lien holder. The prevalence and size of a potential ERISA lien must now be considered when determining whether to even take a case.

What caused this change? In 2006, the

Supreme Court's decision in *Sereboff v. Mid-Atlantic Medical Services, Inc.*, gave ERISA liens some very large teeth by holding that ERISA plans can enforce complete reimbursement of their liens.³ The case originated in California, where Marlene Sereboff and her husband, Joel, received health insurance under her employer-sponsored plan. Mid-Atlantic Services administered the plan, which was covered by ERISA.

The plan's "acts of third parties" provision stated that if the Sereboffs received benefits for an injury or illness and later recovered damages related to a tort claim against a third party for that injury or illness, the Sereboffs would have to reimburse Mid-Atlantic Services for the benefits they had received. The provision also stated that Mid-Atlantic's share of the recovery would not be reduced if the Sereboffs did not receive the full damages claimed.

The Sereboffs were injured in a car accident, and the plan paid about \$75,000

of the couple's medical expenses. They sued several third parties, seeking damages for their injuries. Shortly thereafter, Mid-Atlantic notified the Sereboffs that it was asserting a lien on any recovery they received. The Sereboffs settled the lawsuit for \$750,000 but did not pay anything to Mid-Atlantic.

Mid-Atlantic sued to enforce the lien under §502(a)(3) of ERISA, claiming that it was entitled to reimbursement as a matter of equity. That section of the statute permits a lawsuit to enjoin any act or practice that violates the terms of a plan, or to obtain "other appropriate equitable relief" to enforce the terms of

PETER H. WAYNE IV of Louisville, Kentucky, and MARK R. TAYLOR of Salt Lake City are both directors of the Garretson Law Firm and of regional offices of the Garretson Firm Lien Resolution Center. They can be reached at phw@garretsonfirm.com and mtaylor@garretsonfirm.com.

the plan. The trial court found in the company's favor and the Sereboffs appealed, arguing that Mid Atlantic's claim was actually for breach of contract, not equitable relief—the only type of relief granted under §502(a)(3). The Fourth Circuit affirmed, ruling that Mid Atlantic's suit was one seeking equitable relief, and a unanimous Supreme Court agreed.

Sereboff has emboldened ERISA plan administrators everywhere and led to sobering interpretations by federal courts.¹ In light of the decision, courts have ruled that ERISA liens can trump a catastrophically injured plaintiff's need for lifetime care,² consume a special-needs trust,³ and lay claim to an entire settlement—including attorney fees.⁴ One recent decision that looked like a solid win for plaintiff counsel—holding that an ERISA lien cannot be recovered from a minor's special-needs trust—depended more on procedural technicalities than substantive ERISA law and should not be given widespread chance.⁵

ERISA subrogation has thus become a minefield for plaintiff attorneys. If a valid lien is not adequately satisfied, you risk a lawsuit against your client or yourself. Although a plaintiff attorney is generally not considered a plan fiduciary,⁶ you may still be sued by a plan administrator.⁷ You may also be liable for the amount of your attorney fees if your client has signed a reimbursement agreement, even though you yourself were not a party to it.⁸ Moreover, if you counsel for assist your client in subverting a valid ERISA claim through deceit or dishonesty, you can also be liable to the plan.⁹

Thus, even though an attorney is not a party to the ERISA plan, he or she may still be held liable in a number of ways. Conversely, if you mistakenly pay an invalid lien, you have committed malpractice against your client. If you disburse the settlement before the lien is resolved, you risk ethical sanctions as well.

Throughout, you must advise and counsel your client that the lien might consume a large portion (and possibly all) of any potential settlement. These dangers are not what the average plaintiff attorney bargains for when taking a

case, and it is crucial that ERISA liens be dealt with properly.¹¹

Getting started

The first thing you will probably want to know is whether you owe any obligation to ERISA lien holders. Must you notify ERISA plans of third-party claims? Can you simply disburse the settlement funds to clients and leave them to work out liens on their own?

The answers to these questions are changing in light of the *Sereboff* decision and developing state ethical rules. These

ERISA governs virtually all private employee health plans, so that when your client's plan asserts a lien on settlement funds, it is likely to be an ERISA lien.

sources indicate an emerging duty to ERISA lien holders. State ethics opinions are imposing a duty to hold disputed funds (here, the lien amount) in the attorney's trust account until the lien is resolved.¹⁴

Therefore, the release of settlement proceeds to your client in the face of a potential ERISA lien could give rise to two separate complaints against you: an ethical complaint based on an alleged violation of a state's rules of professional conduct,¹⁵ and another complaint seeking the remedies prescribed by 29 U.S.C. §1132(a)(3).¹⁶ You should be aware of these possibilities and act accordingly.

ERISA governs virtually all private employee health plans.¹⁷ When your client's employee health plan asserts a lien on the settlement funds, it is likely to be an ERISA lien. However, there are some exceptions to this rule, such as government employee plans (federal, state, and local) and church employee plans.¹⁸

The summary plan description (SPD) is the plain-language summary of the plan that the administrator is obligated to furnish to each participant.¹⁹ It is the roadmap to the lien's validity and vulnerability to defenses. Obtaining a copy early is crucial.

The SPD is intended to be a summary

of the plan, rather than a full recitation of its terms. For this reason, it is impossible that the SPD "anticipate every possible idiosyncratic contingency that might affect a particular participant's" eligibility for benefits.²⁰

Because the SPD cannot capture every detail of the entire health benefit plan, there is sometimes a conflict between what is contained in the plan and what is contained in the SPD. If the SPD does not contain specific subrogation language, it is important to understand what courts in the applicable jurisdic-

tion have said about which document—the full plan document or the SPD—controls the plan's lien rights.²¹

In most cases, it is reasonable to treat the SPD as though it is the controlling document; however, on more difficult liens it is wise to demand and review a copy of the entire plan as well.²² As soon as you receive notice of a potential lien, you should make a written request for the SPD and other necessary documents as discussed below.

Ascertaining enforceability

There are two basic types of ERISA health plans: insured and self-funded. An insured plan is a health plan where the employer has purchased a group insurance policy for its employees from a health insurance carrier. A self-funded ERISA plan is one in which the employer completely funds the plan and pays for employee health care with its own assets. These two types of plans and their liens are treated differently under ERISA, due to somewhat confusing rules as to when that federal body of law preempts state insurance law and when it works in tandem with state law.

The general rule is that ERISA preempts state law in the governance of cur-

NEGOTIATION AND SETTLEMENT

employee health plans.²¹ However, the exception is found in ERISA's "saving clause," under which state laws regulating insurance are saved from the sweep of federal preemption.²² This clause greatly narrows the scope of ERISA preemption where health insurance carriers are concerned.

The saving clause provides that health insurance carriers—and the group health insurance policies they sell to employers—are subject to state law. Thus, claims based on an employee health plan purchased through a health insurance carrier are governed by both state law and ERISA.

However, the "deemer clause," which immediately follows the saving clause, provides that a self-funded employee benefit plan is not to be considered (or "deemed") an insurance company.²³ Application of this somewhat circular statutory language creates the result that self-funded ERISA plans are not subject to state law but health insurance carriers and insured ERISA plans are.²⁴ Because of this distinction, determining whether an ERISA plan is self-funded or insured is of great importance.

Self-funded ERISA plans are exempt from state law regulation. Because self-funded plans are not connected to an insurance company, they benefit from ERISA preemption. As the Supreme Court said in *FMC Corp. v. Holliday*, "State laws that directly regulate insurance ... do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws."²⁵

Insured ERISA plans are subject to state law regulation. When an insured plan asserts a lien against a personal injury settlement, it is the insurer—not the plan—that is attempting to recoup its expenses. *Holliday* again: "An insurance company that insures a plan remains an insurer for purposes of state laws purporting to regulate insurance after application of the deemer clause."²⁶

Of course, the insurance company is not relieved from state insurance regulation. This was confirmed in *Holliday*, where the Supreme Court interpreted

the deemer clause to mean that "if a plan is insured, a state may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the state may not regulate it."²⁷

Given the distinction between insured and self-funded plans, the question arises of how to treat a plan that is self-funded but has also purchased excess or "stop-loss" insurance to cover large, unexpected claims. Does the purchase of this type of insurance make an otherwise self-funded plan "insured" for

self-funded status when their plans are, in fact, insured. The SPD should not be relied on as the final word on this crucial matter.

Another resource to check is the plan's Form 5500, which must be filed each year with the DOL and must declare the appropriate funding status. Many (but not all) of these documents may be found online at the site www.ficcerisa.com by searching the Form 5500 filings by employer name. If the Form 5500 cannot be located in this way, it can always be requested from the plan administrator un-

ERISA lien requirements can vary from one circuit court to another: An ERISA lien might be fully enforceable in one circuit and completely unrecoverable in another.

the purposes of ERISA preemption?

In a word, no. The U.S. Department of Labor (DOL) has taken the position that merely obtaining a stop-loss insurance policy will not cause a plan to lose its self-funded status for ERISA preemption purposes.²⁸ Although the Supreme Court has not addressed the issue, the DOL's view appears to be uniformly adopted throughout the federal circuits, meaning that the terms of ERISA and the provisions of the plan will still preempt state law despite the presence of stop-loss insurance.²⁹

Determining whether the ERISA plan is insured or self-funded will tell you what rules you're playing by: federal law exclusively or state law as well. This is crucial to evaluating the strength of a lien. State insurance statutes and common law will often offer equitable defenses against the lien that are not available under the purely federal law of ERISA. Thus, it is critical to determine whether the ERISA plan is insured and to be familiar with state subrogation law.

The SPD is required to disclose the funding arrangement of the plan.³⁰ However, not all plan administrators comply with this rule. Some fail to disclose at all, while others—innocently or otherwise—have been known to claim

der 29 U.S.C. §1021(b)(4).

Also, if the plan administrator acknowledges that an insurance company is connected to the plan but asserts that the insurer plays merely an administrative role, request a copy of the administrative service contract between the employer and the insurer. Take the time to thoroughly investigate the funding status of the plan—it could make a considerable difference in the plan's right of recovery when it tries to go after your client's settlement proceeds.

ERISA plans often try to enforce their lien against a plan beneficiary's third-party recovery assets with the argument that, because federal law applies, your client must satisfy the lien in full. This argument is often merely a scare tactic.

ERISA carries requirements of its own that a lien must satisfy to be enforceable. Some of these requirements are applied universally; however, others are interpreted with dramatically different results among the federal circuits. An ERISA lien might be fully enforceable in one circuit and completely unrecoverable in another.

For example, the Sixth Circuit has adopted the "make-whole" doctrine as the default rule, effectively barring recovery of an ERISA lien unless the plan

NEGOTIATION AND SETTLEMENT

has specifically rejected the make-whole rule in the plan contract.³¹ However, the Fourth Circuit has taken the opposite position that the doctrine never applies, making the same lien fully enforceable.³²

As noted above, if the ERISA plan is insured, state defenses may also affect the plan's ability to recover its lien and should be understood. Again, these laws vary widely from state to state.

For example, an insured plan in Kentucky could still enforce its lien in full. However, that same plan in Virginia would be unable to enforce its subroga-

The reason for this lies in the type of lien-related relief allowed by ERISA. The statute provides that a plan may seek only "equitable relief" to enforce its terms.³³ The equitability of the relief sought stands as the basis for the Court's decision in *Sereboff* and the previously controlling decision of *Great-West Life & Annuity Insurance Co. v. Knudson*.³⁴ In both cases, the Court attempted to decipher what Congress meant by "equitable relief."

In *Great-West*, the ERISA lien was held unenforceable because the third-party

had paid for injury-related care), the plan had created a "constructive trust" on that portion of the settlement. In essence, the *Sereboff* Court concluded that that portion of the settlement rightfully belonged to the plan, and its recovery was therefore equitable.³⁵

When analyzing the language of an ERISA plan that is asserting a lien against a client, examine the third-party recovery provision closely. If the language does not identify a specific fund to which it is entitled—namely, the settlement proceeds—or does not limit the plan's recovery to the amount it has paid for injury-related care and is thus rightfully entitled to, then under *Sereboff* the lien is unenforceable.

The make-whole doctrine. This doctrine is, by and large, a common law rule that limits an insurer's right of subrogation. The Fourth Circuit has explained it this way:

Generally, under the doctrine, an insurer is entitled to subrogation of an insured's recovery against a third party only to the extent that the combination of the proceeds the insurer has already paid to the insured and the insured's recovery from the third party exceed the insured's actual damages. In other words, the insured must be made whole before the insurer can exercise his right of subrogation.³⁶

There currently exists a circuit split as to whether the make-whole doctrine should be applied as the default rule in ERISA subrogation. The Fourth Circuit recently rejected the doctrine as the default rule, reasoning that "such a rule would frustrate the purposes of ERISA by requiring plan drafters to inject legalese into plans rather than use clear, ordinary language explaining the plan's provisions."³⁷ Other circuits taking a similar position include the First, Third, and Eighth.³⁸

However, some circuits do apply the make-whole doctrine to ERISA liens. The Ninth Circuit clearly adopted the doctrine as the default rule, stating that "in the absence of a clear contract provision to the contrary, an insured must be made whole before an insurer can enforce its right to subrogation."³⁹ Other federal courts of appeals using the doctrine as the default rule include the

Examine an ERISA plan's third-party recovery provision closely. If it does not identify settlement proceeds to which it is entitled, then under Sereboff its lien is unenforceable.

tion right due to that state's anti-subrogation statute, allowing you to disregard the lien altogether.⁴⁰ Thus, a state or circuit boundary can make a significant difference in the right of reimbursement.

Defining defenses

Once you've obtained a copy of the SPD and understand your jurisdiction's stance on the issues, you can develop a strategy for addressing the lien. This strategy should be based on the defenses that are available given the language of the SPD and the applicable law. A few defenses are universal; others depend on the jurisdiction. The following are the most common defenses.

The specific-fund doctrine. In *Sereboff*, the Court held that an ERISA carrier is able to enforce its plan's third-party recovery provision under federal law as long as the plan "specifically identify[ed] a particular fund, distinct from [the plan beneficiaries'] general assets [namely, the settlement proceeds themselves] ... and a particular share of that fund to which [the plan] was entitled [meaning up to the amount the plan paid for injury-related care]."⁴¹ This language is critical to all ERISA plans, and it will make or break an ERISA lien right from the start.

recovery provision of the plan at issue did not specify a particular fund from which to recover the lien. Rather, it sought legal restitution from the client's general assets.⁴² The Court held that such relief was "legal" rather than "equitable," and not permissible under ERISA.

Echoing the ruling in *Great-West*, the *Sereboff* Court found that one feature of equitable restitution is the imposition of a "constructive trust" or "equitable lien" on "particular funds or property in the [client's] possession."⁴³ However, *Sereboff* was distinguished from *Great-West* in two ways. First, the settlement funds had been set aside pending the resolution of the case and were still in the *Sereboffs'* possession and control.⁴⁴ Second, the Court found that the plan language justified equitable restitution for two reasons: The plan specifically identified the settlement proceeds—apart from the *Sereboffs'* general assets—as being subject to its lien; and the plan limited its right of recovery to only the amount it had paid for injury-related care, as opposed to the settlement as a whole.⁴⁵

By identifying a specific fund from which it would claim reimbursement (the settlement), and limiting that reimbursement to the amount to which it was equitably entitled (the amount it

NEGOTIATION AND SETTLEMENT

Sixth, Seventh, and Eleventh Circuits.⁴⁶ Many states also apply the doctrine against insured plans.⁴⁷

In jurisdictions supporting the make-whole doctrine, it is generally considered only a default rule that can be abrogated by specific plan language. "If a plan sets out the extent of the subrogation right or states that the participant's right to be made whole is superseded by the plan's subrogation right, no silence or ambiguity exists," the Sixth Circuit has said.⁴⁸ The policy language abrogating the doctrine must be conspicu-

ously drafted subrogation provisions in many cases. Also, you might find yourself in an unfavorable jurisdiction.

If the plan language is solid, and all possible defenses are either unavailable or have been abrogated by the plan's terms, the plan can legally demand full payment of the lien. In this event, there are many negotiation tactics to be tried, and others to be avoided.

The wrong approach is to belligerently refuse to cooperate. Before *Scarbiff*, this tactic might have proven successful; however, given *Scarbiff*'s clarity on the rights of enforceability, such an approach invites trouble. Refusal to satisfy a valid lien can endanger the client's future benefits and risk litigation by the lien holder. If this approach damages your client's interests, it also raises issues of professional liability against you.

majority of federal circuits have ruled that an ERISA plan need not contribute to attorney fees where its own plain language gives it an unqualified right to reimbursement.⁴⁹

Even if the plan is ambiguous or silent on the matter of attorney fees, the question of whether the plan must contribute to the fees is still unsettled. As the Eighth Circuit has put it, silence on the issue of fees may mean two things: that the plan is always entitled to all of its claims for reimbursement regardless of the results such a rule could

produce, or that the plan will pay reasonable fees and expenses providing some support and incentive to the plan's beneficiaries to move forward with their claims, to which the plan will be partially subrogated.⁵⁰

Even though a plan might not explicitly highlight its exemption from attorney fees, various circuits are finding that plan language can be clear enough to put plan participants on notice of that exemption. The Third Circuit, for example, has stated that "it would be inequitable to permit [the participants] to partake of the benefits of the plan and then, after they had received a substantial settlement, invoke common law principles to establish a legal justification for their refusal to satisfy their end of the bargain."⁵¹ Thus, even if a self-funded plan is silent on the matter, the ERISA lien may not have to be reduced for attorney fees.

Above all, keep your client informed of the possible outcomes to encourage realistic expectations. If an ERISA lien is large enough to lay claim to most or all of the settlement, your client should be informed immediately, as this will affect his or her incentive to pursue the case. This can also be used as leverage against the ERISA lien, because if your client doesn't recover anything, neither does the lien holder.

The legal and ethical ramifications of the *Scarbiff* decision loom large over plaintiff attorneys at a time when that decision has also made ERISA liens substantially more difficult. With a strong knowledge of the law and a calculated approach, many ERISA liens can be resolved beneficially; others, however, may prove to be legally unassailable.

Nonetheless, all ERISA liens must be treated with respect, and they may require nearly as much attention as the underlying liability claim if you want to protect yourself against legal and ethical liability. Failing to give these liens ade-

Although a plan might not explicitly highlight its exemption from attorney fees, various circuits are finding that plan language can be clear enough to put participants on notice of that exemption.

quate, plain, and clear so that it is understood by the beneficiary.⁵² Otherwise, the doctrine will apply. Once again, close inspection of the plan language is essential.

If the make-whole doctrine does not apply or has been properly abrogated by the plan, a well-crafted ERISA plan could be entitled to most or even all of the client's settlement proceeds if the settlement amount isn't large enough to satisfy the lien. In these cases, you must rely on your negotiating skills, as the law may not offer your client a defense against the lien. You should also notify your client of this possibility, as it will likely affect the client's incentive to pursue the claim.

The "common fund" or "common-benefit" doctrine. This doctrine demands that the lien holder contribute to attorney fees. According to the Seventh Circuit, the underlying theory is that to "allow [the insurer] to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich [it] unjustly at the plaintiff's expense."⁵³ Reductions for attorney fees are virtually routine with respect to other liens, which is why many attorneys expect the same of ERISA liens. However, the ma-

produce, or that the plan will pay reasonable fees and expenses providing some support and incentive to the plan's beneficiaries to move forward with their claims, to which the plan will be partially subrogated.⁵⁴

Even though a plan might not explicitly highlight its exemption from attorney fees, various circuits are finding that plan language can be clear enough to put plan participants on notice of that exemption. The Third Circuit, for example, has stated that "it would be inequitable to permit [the participants] to partake of the benefits of the plan and then, after they had received a substantial settlement, invoke common law principles to establish a legal justification for their refusal to satisfy their end of the bargain."⁵⁵ Thus, even if a self-funded plan is silent on the matter, the ERISA lien may not have to be reduced for attorney fees.

Negotiating the perfect lien

It is entirely possible for an ERISA plan to have a fully enforceable lien in place. Savvy plan counsel are likely to ensure that the magic subrogation words are contained in the plan documents, so you should not expect to rely on poor-

quite attention may expose you to such liability and could have serious ramifications for your client.

Notes

1. The Employee Retirement Income Security Act of 1971, 29 U.S.C. §§1001-1461 (2000), governs many employer health and welfare plans in addition to retirement plans.
2. ABA Model R 1.15 (D) (2002); see also *W.R. Prof. Conduct* 32-1.15 (2005).
3. 126 S. Ct. 1860 (2006).
4. See e.g. *Admin. Comm. of Wal-Mart Stores, Inc. v. Shank*, 2007 WL 2437664 (8th Cir. Aug. 31, 2007); *Admin. Comm. for Wal-Mart Stores, Inc. v. Shank*, 2007 WL 2409513 (D. Ariz. Aug. 20, 2007); *Benson v. Assoc. Health & Welfare Plan*, 2007 WL 2350923 (W.D. Ark. Aug. 15, 2007).
5. See *Sullivan*, 2007 WL 2409513.
6. See *Shank*, 2007 WL 2437664.
7. See *Benson*, 2007 WL 2350923.
8. *Malk v. London Grove Township*, 2007 WL 2065985 (E.D. Pa. July 19, 2007). The court was asked to approve the personal injury settlement of a minor where the net proceeds were to be placed into a special-needs trust but were also subject to an outstanding ERISA lien. The court found the lien unenforceable because the ERISA plan's right to recover the lien from the minor's parents, while the settlement proceeds would directly pass into the trust. However, in the opinion of these authors, if the plan had simply waited until the funds were placed in the trust, and then filed an action against it, the lien would likely have been recoverable as allowed by numerous other courts. Several other procedural technicalities, rather than substantive law, also informed the district court's decision. Thus, an attorney relying on this case alone as a defense to an ERISA lien takes a precarious legal position.
9. See *Chapman v. Klemick*, 3 F.3d 1508, 1510-11 (11th Cir. 1993).
10. See *Great West Life & Annuity Ins. Co. v. Smith*, 188 F. Supp. 2d 1311 (M.D. Fla. 2002).
11. See *Trustees of Teamsters Local Union No. 117 v. Pappas*, 485 F. Supp. 2d 67, 71 (D. Conn. 2007).
12. *Greenwood Mills, Inc. v. Burns*, 130 F. Supp. 2d 919, 957-61 (M.D. Tenn. 2001).
13. ERISA is, as the Supreme Court describes it, an "exceedingly complex and detailed" statute. *See Hagler Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999). An article of this length cannot provide all the background necessary to properly evaluate the merits of an ERISA plan's asserted lien, but can only provide a primer to assist a plaintiff attorney in identifying the issues and possible pitfalls that may be involved. More research, and possibly even consultation with an ERISA lawyer, is apt to be needed.
14. See e.g. Va. Legal Ethics Op. 1747 (2000). Remarkably, this opinion interprets Rule 1.15 of Virginia's Rules of Professional Conduct as imposing a legal obligation on an attorney to not disburse disputed settlement funds to a client when a third party has a valid statutory lien, contract, or court order that grants an interest in the funds.

However, the opinion invites broader interpretation of the rule to include agreements or laws (such as ERISA) creating a legal obligation to deliver those funds to another.

15. Controversy exists over whether an ethical violation can arise under this scenario, but the authors thought it important to bring it to the readers' attention. See *Webster v. Powell*, 391 S.E.2d 204 (N.C. App. 1990); *Shapiro v. McNeill*, 699 N.E.2d 407 (N.Y. 1998) (holding that a breach of a provision of the Code of Professional Responsibility is not "in and of itself" a basis for civil liability—though it may be a contributing factor); Va. Legal Ethics Op. 1747 (2000).
16. See *Greenwood Mills, Inc.*, 130 F. Supp. 2d at 957-61; *Great-West Life & Annuity Ins. Co.*, 180 F.

- (6th Cir. 2000).
31. *In re Paris*, 211 F.3d 1205 (table), 2000 WL 394036 at *3 (4th Cir. 2000).
35. Va. Code Ann. §38.2-3-105 (2006).
36. *Senshoff*, 126 S. Ct. at 1875.
37. 29 U.S.C. §1132(a)(3).
38. 534 U.S. 204 (2002).
39. The settlement funds in *Great-West* had been placed in a special-needs trust before the lien was asserted and were no longer in the beneficiary's control. *Id.* at 207-08.
40. *Senshoff*, 126 S. Ct. at 1874 (emphasis added).
41. *Id.* at 1872.
42. *Id.* at 1875.
43. The *Senshoff* Court invoked "the familiar

Keep your client informed to encourage realistic expectations. If an ERISA lien is large enough to lay claim to most of the settlement, this will affect your client's incentive to pursue the case.

- Supp. 2d at 1313.
17. 29 U.S.C. §1003 (2000).
18. *Id.*
19. 29 U.S.C. §1022. The information that must be contained in the SPD is set forth in the statute at §1022(a)-(b), §102L.
20. *Tobler v. Philip Morris Cos.*, 470 F.3d 481, 488 (2d Cir. 2006).
21. See *Burke v. Karish Ret. Income Plan*, 336 F.3d 103, 113-14 (2d Cir. 2003) (SPD controlled); *Athen v. Policy Mgmt. Sys. Corp.*, 13 F.3d 188, 141 (4th Cir. 1993) (SPD controlled); *Brutch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) (plan controlled); *Edwards v. State Farm*, 851 F.2d 134, 137 (6th Cir. 1988) (SPD controlled).
22. 29 U.S.C. §1024(b)(4). A plan beneficiary can request a copy of the SPD and other plan-related documents from the plan administrator at any time. The administrator must provide these documents within 30 days on written request or risk a \$100-per-day penalty. See 29 U.S.C. §1132(c)(1).
23. 29 U.S.C. §1141(a).
24. 29 U.S.C. §1141(b)(2)(A).
25. 29 U.S.C. §1141(b)(2)(B).
26. See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 746-47 (1985).
27. 403 U.S. 52, 61 (1970).
28. *Id.* (internal quotations omitted).
29. *Id.* at 64.
30. Dept. of Labor Op. Ltr., No. 91-05A (Jan. 14, 1991).
31. See e.g. *Lincoln Mut. Cas. Co. v. Ictron Prods.*, 970 F.2d 206, 210 (6th Cir. 1992); *United Food Health & Welfare Trust v. Paeyga*, 801 F.2d 1157, 1161-62 (9th Cir. 1986).
32. 29 U.S.C. §1022(b).
33. *Copeland Oaks v. Haupt*, 200 F.3d 811, 813

- rule of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets title to the thing." *Id.*
41. *In re Paris*, 2000 WL 381036 at *1, n. 1.
45. *Id.* at *3.
46. *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 280-81 (1st Cir. 2000); *Hill Gray Enters., Inc., Employee Health & Welfare Plan v. Courley*, 248 F.3d 206, 220 (3d Cir. 2001); *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 140 (8th Cir. 1997).
47. *Barnes v. Ind. Auto Dealers Benefit Plan*, 64 F.3d 1399, 1595 (9th Cir. 1995).
48. *Copeland Oaks*, 200 F.3d at 813; *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1297-98 (7th Cir. 1993); *Cappi v. Brauer*, 112 F.3d 1510, 1521 (11th Cir. 1997).
49. See e.g. *California (Plut v. Fireman's Fund Ins. Co.)*, 102 Cal. Rptr. 2d 36, 40 (Cal. App. 2000); *Georgia (Ga. Code §§3-24-56 1)* (2000); *New Jersey (O'Brien v. Two West Hanover Co.)*, 795 A.2d 907, 914 (N.J. Super. App. Div. 2002).
50. *Copeland Oaks*, 200 F.3d at 813.
51. See *Saltarelli v. Rob. Daher Group Med. Trust*, 95 F.3d 382, 386 (9th Cir. 1994).
52. *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 406-07 (7th Cir. 2006).
53. *Krets v. Food Employers Labor Relations Assn.*, 291 F.3d 563, 569 (4th Cir. 2001); *Harris*, 208 F.3d at 279; *Waller v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5th Cir. 1998); *Ryan v. Federal Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996).
54. *Waller*, 120 F.3d at 141. The court went on to decide that the plan's subrogation recovery should be reduced by a reasonable amount of attorney fees.
55. *Ryan*, 78 F.3d at 127-28.

Thursday, April 19, 2007

Medicare Secondary Payer Program and some Frequently Asked Questions You Might Want to Know - Thanks to Matt Garretson with the Garretson Firm Resolution Center

Thanks go out to Matt Garretson, The Garretson Law Firm, 9545 Kenwood Road, Suite 304 Cincinnati, OH 45242 513-794-0400 [www.garretsonfirm.com www.lienresolution.com] for the following timely input in the midst of changes in the Medicare Secondary Payer Program and which should be beneficial to those attorneys handling personal injury claims in which Medicare possesses a lien for medical payments.

Here is the information and FAQ that Matt prepared and who was gracious enough to permit me to post it for our readers' benefit. "Below the fold" are the frequently asked questions:

As you likely know, last October Medicare switched its Medicare Secondary Payer (MSP) recovery contract to a single entity and away from the dozen or so contractors that were handling the MSP recovery effort prior to 10/2/2006. Since that time, our staff has been asked many questions about how to deal with Medicare reimbursement claims in the "new environment".

As a backdrop to the FAQ's below, our firm recently completed a survey with other law firms. We found that, for the average law firm, 50% of cash flow routinely is held up by liens related to the settlement of larger, more complex cases. Further, we found that these larger, more complex cases represent only about 15% of the total number of cases settled by the average personal injury firm each year (so, 50% of cash flow is tied up by 15% of the firm's cases). Certainly the evaluation and resolution of Medicare and Medicaid interests is more complex in the 15% of significant injury cases (with confounding factors such as comparative fault, pre-existing injuries, policy limits). My hope, however, is that you and your staff will find the FAQ's below useful for taking a more efficient "rifle shot" approach to dealing with the Medicare liens that impact the higher volume of smaller cases (the other 85% of the average personal injury firms' case inventory) that need to - and perhaps can - move more quickly.

While the FAQ's below will assist with the higher volume of less complex cases, on the more serious injury cases The Garretson Firm can navigate the changing regulations, process and contractors to ensure these reimbursement claims are resolved in your client's best interest. For assistance on those complex cases, please feel free to contact Jason Wolf in our firm's Charlotte, NC office. Jason (our firm's Director of Operations) spearheads our practice of evaluating and resolving Medicare and Medicaid reimbursement claims and liens for the plaintiff bar in mass tort, personal injury and asbestos claims. The Garretson Firm Resolution Center is very proud to have evaluated and resolved Medicare and Medicaid's interest in over 25,000 cases last year. Jason can be reached at 704-366-8996. See also www.lienresolution.com.

FREQUENTLY ASKED QUESTIONS

1. Whom should the attorney contact to notify Medicare of a reimbursement situation?

When a Medicare beneficiary retains an attorney to represent him/her in a liability case, it is the attorney's responsibility to notify the Medicare Coordination of Benefits (COB) contractor:

Medicare (COB)
P.O. Box 660
New York, NY 10274-0660
(800) 999-1118

2. What information should the attorney provide COB?

client's name, Address, DOB, Client's Social Security number and Medicare number, Date of Incident, Injury Description (be specific as possible & provide ICD-9 diagnosis code, if possible), Name, address, and other information pertinent to other insurance

3. In a liability case involving several Medicare contractors, which contractor should the attorney specifically deal with?

After the attorney has contacted the Medicare Coordination of Benefits Contractor regarding the representation of a Medicare beneficiary in a liability case, the COB will assign the case to the MSP Recovery Contractor (MSPRC) and forward the attorney and beneficiary notification providing all contact information for the MSPRC. All written and telephone communication should be with the MSPRC once assignment has been made.

4. Where do I send my request for a conditional payment listing?

Once you have been notified by COB that the case has been assigned send all correspondence to:

MSPRC Liability
PO Box 33828
Detroit, MI 48232-3828
Tel: 866-677-7220
Fax: 734-957-0998

5. Why is a signed Medical Record Authorization Release Form required before Medicare can release information to an attorney?

The Privacy Act of 1974 prohibits Medicare contractors from releasing a beneficiary's Health Insurance Claim Number (HICN), claims data, diagnoses, etc., without written authorization from the beneficiary.

6. What role does the provider play in obtaining accident information from a Medicare patient?

Providers are required to ask Medicare patients, or their representatives, at admission or start of care, if the services are for treatment of an injury or which resulted from an automobile or non-automobile accident for which he/she holds another party responsible. Normally, the provider would bill the alleged responsible party's insurance as the primary payer.

7. Is the provider required to bill no fault insurance?

If a provider learns that an automobile, medical, or no fault insurance company may pay for covered services, it is expected to bill the insurance company as the primary payer.

8. Does Medicare pay claims and seek reimbursement or deny claims and require the primary insurance to pay?

If the other payer does not pay promptly, Medicare may make a conditional payment.

9. How is Medicare made aware of liability, no-fault, workers compensation situations?

Beneficiaries and their attorneys are obligated to notify Medicare when they make a claim against a liability, no-fault, workers compensation insurer. Medicare may also learn of such situations from providers, suppliers, insurers, and other parties.

10. If the attorney representing a Medicare beneficiary was not notified of a Medicare payment of a claim(s) prior to the settlement, can Medicare still collect reimbursement?

Yes. Medicare may recover for all payments made for items and services that were included in a beneficiary's claim against the alleged tortfeasor and/or liability, no-fault, workers compensation insurance.

11. If a case involves auto/liability, is the client's personal automobile insurance considered a third party payer?

A client's personal insurance is considered primary to Medicare. Both underinsured motorist and uninsured motorist are included in the definition of liability insurance for Medicare reimbursement purposes. Personal Injury Protection (PIP) and medical payments are considered no-fault insurance.

12. What if the settlement proceeds have been disbursed prior to Medicare being aware of a reimbursement situation?

Medicare may still recover from the beneficiary or any other entity that received any portion of the proceeds of a settlement judgment or award.

13. Should Medicare be expected to accept less than its full recovery amount when other claim holders exist?

According to the Social Security Act, 42 USC 1395y (b)(2), Medicare has priority in a liability case when Medicare has made payments on behalf of the beneficiary. Therefore Medicare must be paid first.

14. How much will Medicare seek to recover if the settlement amount is less than the Medicare amount?

If Medicare payments equal or exceed the amount of the liability insurance payment, Medicare may recover up to the total judgment or settlement minus the total procurement costs, 42 CFR 411.37 (d).

15. Is Medicare allowed to obtain recovery from a claim, settlement, or judgment based on a survivor's recovery for wrongful death?

If a wrongful death statute does not permit the recovering medical damages, Medicare has no claim to the wrongful death payments.

16. Does Medicare enter into pre-settlement negotiations regarding the compromise of the recovery amount?

In those limited situations where a beneficiary has received a firm binding settlement offer, Medicare may enter into pre-settlement discussions regarding compromise of Medicare's claim against that firm binding settlement offer. A beneficiary has no further appeal rights if CMS and the beneficiary agree to a compromise.

17. Can the Medicare recovery amount be waived in favor of the beneficiary?

Medicare may grant a full or partial waiver of its recovery amount with respect to the beneficiary. The criteria for a waiver a)requires the beneficiary be without fault and the recovery b)would effect financial hardship or be against equity and good conscience, Section 1870 (c) of the Social Security Act. The attorney representing the beneficiary may request a waiver by completing CMS/SSA Form SSA-632-BK and returning the form to the lead contractor. The Medicare contractor is required to make a waiver decision within 120 days from the date the waiver request is received at the contractor site.

18. Once a settlement has been reached, what information is the attorney required to send to the lead contractor (MSPRC)?

Information needed by the lead contractor after a settlement has been reached should include the date of the settlement, the settlement amount, attorney's fee, itemized list of expenses and signed settlement release. This information is needed to calculate Medicare's recovery amount. Medicare will share the costs associated with recovery and reduce its amount proportionately.

19. Does Medicare share proportionately in the costs associated with medical payments benefits?

Medical payments benefits are considered no-fault benefits. No-fault benefits should be paid to Medicare up to the full amount as stated in the policy or up to the recovery amount. Procurement costs are not a factor with no-fault benefits.

20. When should an attorney send payment to Medicare for the amount due?

When the lead contractor is informed of the settlement, judgment, or award, it will determine the amount of Medicare's recovery claim and send a recovery demand letter. Upon receipt of the demand letter, the attorney should repay Medicare. NOTE: MEDICARE MUST RECEIVE REPAYMENT 60 DAYS FROM THE ISSUE DATE OF THE FINAL DEMAND LETTER OR INTEREST WILL ACCRUE.

21. Will Medicare pursue recovery from the estate of a deceased beneficiary?

A beneficiary's death does not materially change Medicare's interest in recovery payments made on behalf of the beneficiary while alive. The executor of the estate has the responsibility of concluding all business and financial matters remaining open at the time of the beneficiary's death. If a Medicare

recovery claim was waiting on the outcome of a third party liability suit, Medicare would continue its claim against the estate.

22. Following a third party liability settlement, award, judgment, or recovery, when can Medicare begin to assess interest on the unpaid balance of Medicare's recovery amount?

Medicare requires that a beneficiary or other entity repay Medicare within 60 days of receipt of a demand letter. If it is not received within that timeframe, interest is due. Consistent with the Federal Claims Collection Act (FCCA), if Medicare does not receive a full refund within 60 days of the beneficiary and/or representative being notified by demand letter of Medicare's claim, interest will be assessed against the unpaid balance. Interest will be calculated retroactive to the date of the mailing of the demand letter.

© 2007 The Garretson Law Firm. All Rights Reserved. I hope you find his information helpful.

Kindest regards,

Matthew Garretson
The Garretson Law Firm
9545 Kenwood Road, Suite 304
Cincinnati, OH 45242
513-794-0400
www.garretsonfirm.com
www.lienresolution.com

Posted on Thursday, April 19, 2007 at 05:06 AM in [Civil - Torts, Ins. & Procedure etc.](#), [Federal](#) | [Permalink](#)