February 2013 MPT

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MPT-1: *In re Wendy Martel*

EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

. . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4 Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

. . . or

(6) to comply with other law or a court order.

Comment

* * *

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. . . . Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the

client but also to all information relating to the representation. A lawyer may not disclose such information except as required or permitted by the Rules of Professional Conduct or other law.

* * *

[16] . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish one of the purposes specified in Rule 1.6(b).

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.

. . .

(d) 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.

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

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

STATE BAR OF FRANKLIN
ETHICS OPINION NO. 2003-101

Issue:

Client retains Attorney for representation in a personal injury action under a contingent fee agreement entitling Attorney to one-third of any recovery he obtains during his representation. Client obtains medical care from Physician, agreeing that Physician will be paid $10,000 out of the proceeds of any recovery. Attorney and Client both have knowledge of Physician's interest in the recovery. After Attorney obtains a recovery for Client in the amount of $300,000 and places the resulting funds in a trust account, Client instructs Attorney to disburse $100,000 to himself for his fees, to disburse the remaining $200,000 to Client, and not to disburse the $10,000 to Physician. What should Attorney do in this situation?

Digest:

Attorney should contact Client and Physician, describing the existence and details of the dispute and stating (1) that Attorney cannot represent either Client or Physician in the dispute; (2) that if Client and Physician agree, Attorney will retain the disputed $10,000 in trust until they resolve the dispute; but (3) that in the absence of such an agreement, Attorney will seek guidance from the court. Attorney should also disburse to Client that portion of the funds that is undisputed.

Discussion:

In *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), the Franklin Supreme Court held that an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. *Greenbaum* qualified its holding by stating that the attorney may nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a claim in conflict with the client. *Greenbaum*, however, did not address the situation in which a third party has such a conflicting claim. The Franklin Rules of Professional Conduct address this issue briefly in the comment to Rule 1.15:

> Third parties may have lawful claims against funds held in trust by an attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third-party claim against

> wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party. In such cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client. An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Under the facts stated, Attorney must act as follows to remain within the parameters established by our Rules of Professional Conduct:

1. An attorney must disburse to a client such funds as the attorney holds in trust for the client *to which the client is entitled*. Under the facts stated, in representing Client, Attorney had knowledge of the existence of Physician's interest in the funds in question. As a result, Attorney entered into a fiduciary relationship with Physician by operation of law and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to Physician's interest in the funds. *Cf. Johnson v. State Bar* (Fr. Sup. Ct. 2000) (by representing client with knowledge of chiropractor's lien, attorney entered into fiduciary relationship and subjected herself to fiduciary duties to deal with chiropractor with utmost good faith and fairness and to disclose material facts, that is, those facts that are "significant or essential to the issue or matter at hand"). Under such circumstances, Attorney's disbursement of the disputed $10,000 to Client would violate Attorney's fiduciary duties to Physician and would make Attorney liable for compensatory and perhaps even punitive damages. Attorney's disbursement would also make Client liable for breach of contract. Franklin Rule of Professional Conduct 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by [these rules] or other law." For this reason, Attorney's disbursement of the disputed funds to Client would be fraught with difficulties.

2. Attorney's disbursement of the disputed $10,000 to Physician contrary to Client's instructions would violate Attorney's duties under *Greenbaum*. *Greenbaum* requires Attorney to disburse to

Client all such funds as Client is entitled to receive. It is risky for Attorney unilaterally to determine Client's "entitlement." The reasons for Client's demand that Attorney not disburse the $10,000 to Physician are unstated and may or may not be legitimate. For example, Client may have an evil motive, or Client may be misinformed about something and that misinformation has led to his instruction to Attorney. Whatever his reasons, they are not clear from the facts before us and may not be clear to Attorney. There are, in addition, fiduciary duties burdening Attorney in favor of Physician. For those reasons, Attorney would be ill-advised to prejudge the merits of such a dispute and act in favor of either Client or Physician.

3. If Client and Physician are unable to resolve their dispute, Attorney should seek guidance from the court and so inform Client and Physician.

This opinion is issued by the State Bar of Franklin pursuant to authority delegated to it by the Franklin Supreme Court. It is intended to guide attorneys who practice in the State of Franklin but does not purport to bind any court or other tribunal.

Clements v. Summerfield

Franklin Supreme Court (1992)

Plaintiff Ralph Clements, an attorney, was retained by defendant Marian Summerfield to bring an action for personal injury. Clements and Summerfield entered into a contingent fee agreement, under which Summerfield agreed to pay Clements one-third of any recovery he obtained during his representation. Some time thereafter, but before any recovery had been obtained, Summerfield discharged Clements and retained another attorney.

Clements then filed the present action against Summerfield, alleging that Summerfield breached the contingent fee agreement by discharging him without cause and by refusing to pay him his fees. Clements sought a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Summerfield moved to dismiss the action on the ground that Clements did not and could not state a claim for relief. The district court granted the motion and dismissed the action. The Court of Appeal affirmed. We granted review.

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Without a right to fees, the attorney does not have a cause of action against the client for breach arising from failure to pay. The contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place. In that case, the discharged attorney's right to, and cause of action for, fees is limited to *quantum meruit*, that is, the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney—not as something in addition to those fees. Otherwise, the client's right to discharge the discharged attorney, which is absolute, might be unduly burdened by the prospect of paying the original attorney's full fees plus fees to the successor attorney as well.

We find no injustice in limiting the fees of the discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the discharged attorney. We also preserve the discharged attorney's right to fees that are fair. Of course, what fees are fair for the discharged attorney depends on the facts of the individual case as seen through the lens of equity, and may range from nothing out of the total fees payable to the successor attorney to the total fees in their entirety. We

expect that in all but the rarest case, a fair fee for the discharged attorney will fall somewhere between those extremes. We trust that trial courts will be able to strike an appropriate balance.[1]

In light of the foregoing, Clements' action is premature. Since Summerfield has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. As a result, Clements does not yet have any right to fees from Summerfield, and hence does not yet have a cause of action against her for fees.

Affirmed.

[1]By way of illustration, if a discharged attorney obtained no recovery during his representation, he would be entitled to nothing under his contingent fee agreement. If a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified—for example, if she had a one-third contingent fee agreement and obtained a $300,000 recovery, she would be entitled to receive $100,000. The discharged attorney would then be entitled to receive whatever share, if any, of the $100,000 fee received by the successor attorney that the court determined to be the reasonable value of his services under the circumstances.