OPINION 87-3

THE BAR ASSOCIATION OF GREATER CLEVELAND
PROFESSIONAL ETHICS COMMITTEE

HEADNOTE
An attorney is ordinarily bound by a client’s instructions to pay to the client funds collected by the attorney for the client even though the funds are subject to an assignment or claim in favor of a third party. However, the attorney is not so bound where it is reasonably clear that the client is not entitled to the funds, such as in situations where representation costs and payment of other obligations have been agreed to by the client under an agreement with the attorney, or where a court has ordered other disposition of the funds, or to establish a reserve for an attorney’s lien, or to avoid participating in fraudulent behavior by the client.

STATEMENT OF FACTS
Three inquiries which present similar ethical issues will be addressed together:

1) Attorney A represents Client in a Workers’ Compensation case. Client took out a loan with Creditor and used the anticipated proceeds of the Workers’ Compensation case as collateral. There is a written and signed assignment of the proceeds from Client to Creditor.

Now that Attorney A has collected the proceeds, Client wants to give Attorney A a signed letter rescinding the assignment.

2) Attorney A represents Client in a matter which will result in a settlement in the Client’s favor. Attorney B, who previously represented Client in an unrelated matter, notified Attorney A that Client owes Attorney B for past services. Client does not dispute the debt or the amount owed. Either Client made an oral assignment of a portion of the settlement to Attorney B or Attorney B obtained a lien on the settlement.

Now that the settlement is collected, Client rescinds the oral assignment and demands the settlement money.

3) Client hired Attorney A to handle an injury case. Pursuant to Client’s instructions, Attorney A sent a letter to the Client’s doctors indicating that payment for their services would be made out of an anticipated settlement.

Once the settlement is collected, Client withdraws his authorization for medical payments out of the settlement proceeds. Client instructs Attorney A to turn over all of the proceeds less attorney’s fees, indicating that Client will pay the doctors.
**QUESTION PRESENTED**

Is Attorney A ethically bound to turn over the proceeds to the Client immediately on the Client’s request?

**CONCLUSIONS**

In each inquiry, the Client instructs Attorney A to disregard a claim of a third party to proceeds collected by Attorney A on the Client’s behalf. Attorney A should advise the Client as to the consequences of disregarding the third party’s claims. If the Client still insists on disregarding the third party’s claim, Attorney A should ordinarily release the proceeds to the Client on demand. If, on the other hand, the third party’s claim is an expense incurred in the course of the representation which claim is the subject of an agreement or for which Attorney A may reserve an attorney’s lien, Attorney A may dispose of or retain the funds as the law permits. Furthermore, Attorney A should comply with a valid court order requiring a disposition of the funds. Of course, Attorney A may not release funds to the client where to do so would knowingly assist in a fraud.

**DISCUSSION**

Common to each inquiry is an instruction from the Client to Attorney A to disregard the claim of a third party, either by an assignment, a lien or a statement from Attorney A authorized by the Client, to a fund collected by Attorney A on the Client’s behalf. When the Client suggests to Attorney A that the Client wishes to disregard the third party’s claim, Attorney A should advise the Client of the possible risks or consequences of disregarding the claim, applying not only his legal expertise but “the fullness of his experience as well as his objective viewpoint.” EC 7-7. If the Client persists in demanding release of the proceeds to himself, however, Attorney A must ordinarily follow the Client’s instructions.

“There are few ethical breaches which impact more negatively on the integrity of the legal profession than the misuse of a client’s funds.” Office of Disciplinary Counsel v. Morton, 5 Ohio St. 3d 206, 208, 450 N.E.2d 275, 277 (1983).

A lawyer’s obligations with respect to money collected for a client are set out in DR 9-102. DR 9-102 (B)(4) requires a lawyer to “promptly pay or deliver to the client as requested by a client the funds, securities and other properties in the possession of the lawyer which the client is entitled to receive.” Ordinarily, the Client is “entitled to
receive” funds collected by Attorney A on the Client’s behalf, and Attorney A is ordinarily bound by the Client’s instructions to release the proceeds.¹

Similarly, EC 7-7 states that “the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.” Thus, ordinarily, if the Client instructs Attorney A to turn the proceeds over to the Client, Attorney A is bound by the instructions. Ohio State Bar Association, Committee on Legal Ethics and Professional Conduct, Informal Op. 84-1.

As indicated by the words “which the client is entitled to receive” at the end of DR 9-102 (B)(4), Attorney A’s duty to release the funds is clearer when the third party’s claim is weak. On the other hand, when the third party’s claim is stronger, the duty is less clear, and a court reviewing Attorney A’s actions may be tempted to consider other factors. See In re Cassidy, 89 Ill.2d 145, 432 N.E.2d 274 (1982) (attorney permitted to withhold funds from client because client had clearly assigned funds and attorney believed that assignees would settle if delayed). Attorney A cannot rely on how a future court will view the strength of the third party’s claim or the surrounding circumstances, however, and should release the proceeds to the Client unless Attorney A himself has an understanding with the Client waiving the Client’s right to order Attorney A to pay the proceeds to the Client or the third party has obtained a court order requiring Attorney A to retain the proceeds or pay the third party.

One exception to the ordinary rule appears in DR 9-102(A)(2), which states that:

“funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.”

Attorney A may advance or guarantee for the Client the costs connected with obtaining proceeds through the resolution of a legal controversy. DR 5-103 (B). Once the funds are collected, fairness suggests that Attorney A be permitted to use a portion of the fund to

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¹ Other committees and commentators construing both the Canons and the Model Code have concluded that a client’s demand for money which the client previously assigned is fraudulent and that the attorney should withhold the money from the client in order to avoid knowingly assisting a fraud. E.g., South Carolina Bar Ethics Advisory Op. 81-14 (1981) (Model Code); New York County Lawyers’ Association, Comm. on Professional Ethics, Op. 321 (1933) (Canons), cited with approval in H. Drinker, Legal Ethics 57 (1953); R. Wise, Legal Ethics 187 (1966) (Canons). If, however, the client assigned the money in good faith, a subsequent decision to breach the assignment would not necessarily be fraudulent. Tibbs v. National Homes Construction Corp., 52 Ohio App.2d 281, 286-87, 369 N.E.2d 1218, 1222-23 (Warren Co. 1977). Unless the attorney knows or learns that the client had no intention of performing the assignment at the time the assignment was purportedly made, the attorney need not retain the money in order to avoid knowingly assisting a client’s fraud. See Illinois State Bar Association, Committee on Professional Ethics, Op. No. 728 (1981).
satisfy the costs he incurred in creating the fund. Cf. *Cohen v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923) (syllabus, para. 1) (discussing the reasons for permitting attorney’s liens). If the Client disputes Attorney A’s right to apply the funds to pay off the costs, however, Attorney A cannot apply the funds until his dispute with the Client is “finally resolved,” either by compromise, arbitration or court judgment.

An attorney could avoid the problem by reaching a clear agreement with his client beforehand providing for:

1. the right of the attorney to look to the client for payment or reimbursement of incurred costs;
2. the amount which the attorney may apply to the costs; and
3. the time at which the attorney may withdraw the portion from the fund to make payment.

In *Matter of Disciplinary Proceedings Against Marine*, 82 Wis. 2d 602, 610, 264 N.W.2d 285, 288-89 (1978). Absent an agreement with the client, the attorney cannot apply any of the collected funds to pay the incurred costs until the attorney contacts the client and obtains the client’s permission. Id.

If the attorney and client did not reach a definitive agreement and the client disputes the attorney’s right to pay an expense, DR 9-102 (A)(2) permits the attorney to withhold from the client a portion of the fund sufficient to cover the costs which the attorney honestly believes the client should pay. Such withholding is consistent with the substantive law of attorney’s liens, to which the attorney should look for further guidance.²

Alternatively, if the third party obtains a court order requiring Attorney A to retain the funds or pay them to the third party, Attorney A may ethically comply with the order. Prior to the reduction of the third party’s claim to judgment, Attorney A should resolve

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² In the first inquiry, the Client wishes to rescind an assignment of Workers’ Compensation benefits. The facts do not reveal that Attorney A entered a definitive agreement with the Client. If he did not, and assuming that no attorney’s lien may be held on Workers’ Compensation proceeds, see *Terry v. Claypool*, 77 Ohio App. 87, 91, 65 N.E. 2d 890, 891 (Hancock Co. 1945), Attorney A should release the proceeds to the Client on demand.

In the third inquiry, Attorney A sent a letter per the Client’s instructions to the Client’s doctors indicating that the doctors would be paid from the proceeds of a lawsuit. Once the proceeds were collected, the Client demanded that the proceeds be released directly to him. The facts as presented to us are not clear as to whether Attorney A and the Client entered into a definitive agreement, though the Client’s instructions, if sufficiently detailed or receipt by the client, without subsequent client protest, of a copy of the letter to the doctors, may constitute such an agreement. Though failure to pay the doctors may damage Attorney A’s reputation or subject Attorney A to personal liability, absent an agreement with the client as to the doctors’ fee, he cannot pay the doctor over the Client’s objections. He may withhold the disputed amount from the Client if permitted by the law of attorney’s liens.
all doubts as to the third party’s claim in the Client’s favor in order to protect the Client’s interest in the funds. See EC 7-3. Once the third party’s claim is reduced to judgment and a court order is issued to Attorney A, however, Attorney A can no longer maintain that the funds are money “which the client is entitled to receive” or that the Client’s instructions are made “within the framework of the law.” DR 9-102 (B)(4) and EC 7-7 no longer bind Attorney A to follow the Client’s instructions, and Attorney A should retain the funds or pay them as ordered.3

Attorney A is not bound to reveal the Client’s instructions unless necessary to avoid a fraud as discussed supra note 1. If not privileged, the Client’s instructions would certainly be a “secret” under DR 4-101 (B). See ABA Comm. on Professional Ethics and Grievances, Formal Op. 163 (1936). But cf. Zengerle v. Weiss, 48 Misc. 2d 271, 274, 264 N.Y.S.2d 747, 750-51 (1st Dep’t 1965) (attorney impliedly undertook duty to notify third party).

3 In the second inquiry, the Client asks Attorney A to turn over funds subject either to an oral assignment or a lien. There does not appear to be any Ohio law on the issue of whether a client’s funds in the hands of an attorney can be garnished, and this Committee expresses no opinion as to whether such an order could issue. Assuming that Attorney A believes that the third party’s lien is enforceable, Attorney A may comply with the terms of the lien.