

## **Ethics Opinion E-09-01: Lawyer’s responsibilities when a client gives a third party a “lien” on settlement proceeds.**

*Amended July 27, 2017<sup>1</sup>*

**Synopsis:** *When a lawyer holds in trust funds in which the client and a third party assert an interest identified by lien, court order, judgment or contract, and a dispute arises over ownership or division of those funds, the lawyer must hold those funds in trust until the dispute is resolved.*

*Whether or not the third party’s interest arises in connection with the matter in which the lawyer represents the client is immaterial to this obligation, but the asserted third party interest must be particular to the funds held in trust – general client indebtedness does not create obligations for the lawyer. The lawyer may not follow a client’s instruction to disburse disputed funds to a client without the consent of the third party, notwithstanding case law which holds that a lawyer may not be sued civilly by a third party under such circumstances. Nor may a lawyer follow a client’s instruction not to notify a third party upon receipt of funds in which the third party has an interest identified by lien, court order, judgment or contract.*

*While a lawyer normally is not obligated to represent a client with respect to a third party asserting such an interest, the lawyer may agree with the client to do so or provide assistance as a courtesy. If the dispute between a client and a third party over ownership of funds held in trust cannot be resolved, the lawyer should file a declaratory action to establish the respective rights of the client and third party.*

**Opinion:**

### **I: Introduction**

The State Bar’s Standing Committee on Professional Ethics (the “Committee”) has been asked to consider the ethical obligations of a lawyer under circumstances where the lawyer’s client has signed a “lien” document for a service provider (typically a chiropractor or other medical provider) but the attorney has not signed the document or otherwise agreed to protect the service provider’s interest in the settlement.<sup>2</sup> The Committee also takes the opportunity in this opinion to consider a lawyer’s obligations more generally when there is a dispute over ownership of funds the lawyer holds in trust. In order to fully address this

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<sup>1</sup> This opinion was amended to reflect changes in Wisconsin’s Rules of Professional Conduct for Attorneys.

<sup>2</sup> The term “doctor’s lien” or “lien” as used in this opinion refers to a document wherein a patient promises to pay the bills of a medical service provider out of the proceeds of an anticipated settlement in return for the service provider’s promise to provide treatment and forego seeking payment until the conclusion of the pending legal matter. Sometimes such liens are also signed or acknowledged by the patient’s lawyer, and are then commonly referred to as “letters of protection.” Courts have recognized such documents as assignments rather than liens.

issue, recent Wisconsin case law must be understood. In a series of three decisions, the Wisconsin Supreme Court and Court of Appeals have addressed a lawyer's civil liability and ethical responsibility when a third party asserts an interest in settlement proceeds, and therefore the Committee turns first to those decisions before analyzing the applicable Rules of Professional Conduct for Attorneys (the "Rules").

It is important to note that two distinct questions are addressed in these cases. The first question is whether, and under what circumstances, a lawyer may be sued civilly by a third party who asserts an interest in settlement funds; i.e. when may a lawyer be personally liable to a creditor of a client? The second question is under what circumstances may a lawyer be subject to disciplinary prosecution for a violation of the Rules based upon a lawyer's failure to protect a third party's interest in funds held in trust. As discussed below, the answers to these two distinct questions are not always identical.

## **II: Relevant Wisconsin Case Law**

The first case that must be discussed is *Riegelman v. Krieg*, 2004 WI App 85, 271 Wis.2d 798, 679 N.W.2d 857, in which the court of appeals held that a lawyer may be civilly liable to a medical provider of a client if the lawyer had agreed to protect the medical provider's "doctor's lien" and the medical provider is not paid out of settlement proceeds. In *Riegelman*, a law firm representing a client in a personal injury matter provided a letter of protection signed by both the client and the firm, promising to pay a chiropractor treating the firm's client for injuries giving rise to the underlying cause of action with proceeds from any trial or settlement. When the matter settled, however, the client disputed the balance owed to the chiropractor. The firm's attempts to settle the dispute on behalf of the client were unsuccessful and the firm eventually disbursed the disputed funds from its trust account to the client. The chiropractor then sued both the client and firm in small claims court. The court found that the letter of protection was a valid contract that conveyed an assignment of the proceeds of the settlement and both the firm and the client were jointly and severally liable for the claimed amount. The court of appeals affirmed both the reasoning and conclusion of the small claims court.

A related issue was addressed by the Wisconsin Supreme Court in *Yorgan v. Durkin*, 2006 WI 60, 290 Wis.2d 671, 715 N.W.2d 160, which addressed a lawyer's civil liability under circumstances wherein the lawyer's client had signed a "lien" promising to pay a chiropractor's bill out of the proceeds of the client's personal injury matter. The client's lawyer was aware of the "lien," but, unlike *Riegelman*, did not promise to protect the chiropractor's purported interest in the settlement. The lawyer disbursed the entire amount to the client pursuant to the client's instructions, and the chiropractor then sued the lawyer after the client failed to pay the chiropractor. The supreme court held that the lawyer was not civilly liable to the chiropractor based upon the policy considerations weighing against holding a lawyer liable to the creditors and assignees of a client.

*Riegelman* and *Yorgan* taken together outline the situations in which a Wisconsin lawyer may be civilly liable to the creditors of a client – when both the client and the lawyer contractually promise to pay the creditor out of proceeds of the settlement, the lawyer may

be liable, but when only the client makes such promises, the lawyer will not be civilly liable. These cases, however, were not disciplinary decisions and neither directly addressed a lawyer's obligations under the Rules in such situations.

Under a now superseded version of SCR 20:1.15 (the trust account Rule) that was in effect at the time both *Riegelman* and *Yorgan* were decided,<sup>3</sup> Wisconsin lawyers had been disciplined for failing to honor letters of protection that the lawyers provided to a client's medical providers.<sup>4</sup> Thus, it was clear that lawyers could be found both civilly liable and ethically responsible for failing to honor the lawyer's own promises to the creditors of a client. However, there was a lack of guidance with respect to a lawyer's obligations under the Rules when the client, but not the lawyer, promised to pay a creditor from anticipated settlement funds but later wanted to disregard the promise to pay.

The Wisconsin Supreme Court addressed this situation in *Disciplinary Proceedings against Barrock 2007 WI 24, 299 Wis.2d 207, 727 N.W.2d 833*, which directly addressed a lawyer's obligations under the Rules when a third party asserts a statutory lien against proceeds of a settlement, but the lawyer made no promises or guarantees with respect to payment.

In *Barrock*, the Respondent lawyer was successor counsel for a client in a personal injury action. The client's first lawyer asserted a lien for attorney's fees, pursuant to Wis. Stats sec. 757.36, based upon the fee agreement with the client, against any settlement or award in the personal injury action. The Respondent lawyer was aware of the lien, but did not make any promises with respect to payment. The Respondent lawyer settled the matter and distributed the proceeds to the client, himself and his partner, and failed to hold any portion of the settlement in trust or honor the lien. The supreme court ruled that this violated the lawyer's obligations under the Rules, specifically the former SCR 20:1.15(d)(3).<sup>5</sup>

Thus, the *Yorgan* decision held that a lawyer may not be sued by a client's chiropractor when only the client promises in writing to pay the chiropractor's bill out of settlement proceeds and the lawyer does not protect the chiropractor's interest, while *Barrock* held that a lawyer who is aware of another lawyer's statutory lien on settlement proceeds is obligated under the Rules to protect the other lawyer's lien. On first blush, this may appear to be contradictory. This was noted by the concurrence and the dissent in *Barrock*, both of which discussed the apparent tension between the Court's decisions in *Barrock* and *Yorgan*.

The dissent in *Barrock* argued that the Respondent lawyer should not be disciplined for violating SCR 20:1.15(d)(3) because the court held in *Yorgan* that public policy dictated

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<sup>3</sup> Wisconsin's Supreme Court adopted new Rules of Professional Conduct for Attorneys, effective July 1, 2007. The sections relevant to this opinion of the prior SCR 20:1.15 were identical to the current version of SCR 20:1.15.

<sup>4</sup> See *OLR Private Reprimand 1996-2* and *OLR Private Reprimand 1998-20*.

<sup>5</sup> The current Rule is SCR 20:1.15(e)(3). The court also found that the Respondent lawyer violated several other Rules, none of which are relevant to this opinion.

that a lawyer should not be civilly liable to creditors of clients. While acknowledging that Barrock was a disciplinary decision, the dissent argued that Yorgan had put a “gloss” on SCR 20:1.15(d)(3):

*While I acknowledge that the focus is different in the two actions, does the concurrence really believe a disciplinary action will lie against Attorney Durkin in the Yorgan matter after we have determined that Attorney Durkin properly ignored Dr. Yorgan's claim to a portion of the trust account funds? The court did conclude that Attorney Durkin's distribution did not violate any rights of Dr. Yorgan and did not violate public policy. Yorgan, 290 Wis. 2d 671, ¶2. Certainly, the Supreme Court Rules contained in SCR ch. 20 are grounded in public policy. To me, the OLR case and the civil action, while having differing focuses, should not result in public policy conclusions that are inconsistent with one another.*

*In summary, in this disciplinary action, it was an attorney who claimed an interest in the funds in an attorney's trust account. In Yorgan, it was a chiropractor who claimed an interest in the funds in an attorney's trust account. In my view before this court's decision in Yorgan, it did not matter whether the interest claimed was grounded in a common law lien, a statutory lien or a contract assigning a portion of the proceeds to another. The terms of SCR 20:1.15(d)(3) covered all such claims if they showed the proceeds were in "dispute." However, in Yorgan, we concluded that the distribution of all of the settlement proceeds to others violated no law and was not contrary to public policy. Id.*

*Therefore, the court's determination in Yorgan put a gloss on what type of claim can be made against trust account proceeds, which gloss affects this case. To explain further, I cannot agree that it is not contrary to public policy to distribute trust account funds to which a chiropractor makes a claim, but it is contrary to public policy to distribute trust account funds to which an attorney makes a claim. Therefore, I conclude Attorney Barrock did not violate SCR 20:1.15(d)(3). Accordingly, I respectfully dissent from that portion of the discipline imposed for a violation of SCR 20:1.15(d)(3), and I would remand the matter to the referee to make a recommendation about discipline that does not include a finding that Attorney Barrock violated SCR 20:1.15(d)(3) under the facts of this case.*

Barrock, 2007 WI 24, ¶¶74-76 (Roggensack, J. dissenting in part).

The concurrence noted that the two decisions dealt with different causes of action; i.e. Yorgan addressed a lawyer's civil liability with respect to a third party to whom the client had given an assignment, whereas Barrock addressed a lawyer's ethical responsibility when a third party has asserted a statutory lien on the proceeds of a settlement:

*Barrock and Yorgan are rooted in different causes of action, have materially different facts, are governed by different laws, and are in different forums that are resolving different issues. The crux of the discipline action in the present case (generally speaking) is that the lawyer has, contrary to the Rules of Professional Conduct, released funds in his or her possession knowing that a lawyer claims a statutory lien upon all or part of the funds. The crux of a civil action against a lawyer who has released funds is (generally speaking) that a court is to determine the rights of the various claimants against the lawyer and others claiming an interest in the funds.*

*Barrock*, 2007 WI 24, ¶41 (Abrahamson, C.J., concurring).

The concurrence further stated:

*The Yorgan court considered the applicability of SCR 20:1.15(d), as did Justice Wilcox's concurrence in that case. Both opinions conclude that SCR 20:1.15(d) of the Rules of Professional Conduct was not determinative of an attorney's civil liability. The Preamble to SCR 20 explicitly states that the Rules of Professional Conduct do not provide an independent basis for civil liability. The Yorgan court addressed civil liability and refrained from addressing the applicability of the Rules of Professional Conduct to the circumstances of the case.*

*Barrock*, 2007 WI 24, ¶55 (Abrahamson, C.J., concurring).

The Committee quotes at length from the concurrence and dissent in *Barrock* to highlight the possibility of confusion about the holdings of *Yorgan* and *Barrock*.<sup>6</sup> A lawyer reading *Yorgan* may assume that the lawyer bears no responsibility with respect to lien documents signed only by clients, which stands in contradiction to the majority opinion in *Barrock*, which held that the Respondent lawyer violated SCR 20:1.15 by failing to recognize and protect the asserted lien on the settlement proceeds. Lawyers thus must understand that their civil liability in these situations may not be the same as their ethical responsibility.

### **III: Discussion**

With that discussion of recent case law as background, we begin our consideration of a lawyer's ethical responsibilities when a third party asserts an ownership interest in trust property in the lawyer's possession. We will structure our discussion as a series of questions and answers, focused on outlining a lawyer's ethical, as opposed to civil, responsibilities when a client has signed a "doctor's lien," but the lawyer has not signed the document or otherwise agreed to protect the medical provider's interest. The following discussion, however, applies to any situation in which a third party asserts an ownership interest identified by lien, court order, judgment or contract in funds held in the lawyer's trust account and a dispute arises over ownership of those funds.

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<sup>6</sup> One possible source of confusion is that the instruments at issue – a contractual assignment in *Yorgan* and a statutory attorney's lien in *Barrock* – are different and thus the cause of the seemingly different results. However, as discussed in this opinion, lawyers have ethical responsibilities whenever a third party interest is identified by lien, court order, judgment or contract and the reasoning of *Barrock* applies whenever the asserted third party interest falls into one of these four categories.

***A) Must a lawyer honor a “doctor’s lien” signed by the client when the lawyer has not signed the document or otherwise agreed to protect the medical provider’s asserted interest and when the client instructs the lawyer to disregard the “doctor’s lien” and distribute the proceeds of settlement to the client?***

A lawyer’s ethical responsibilities with respect to funds held in trust in which a third party asserts an interest are governed by SCR 20:1.15(e), which provides as follows:

**(1) Notice and disbursement.** Upon receiving funds or other property in which a client has an interest, or in which the lawyer has received notice that a 3rd party has an interest identified by a lien, court order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive.

**(2) Accounting.** Upon final distribution of any trust property or upon request by the client or a 3<sup>rd</sup> party having an ownership interest in the property, the lawyer shall promptly render a full written accounting regarding the property.

**(3) Disputes regarding trust property.** When the lawyer and another person or a client and another person claim ownership interest in trust property identified by a lien, court order, judgment, or contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Disputes between the lawyer and a client are subject to the provisions of SCR 20:1.5(h).

The Comment<sup>7</sup> to this Rule states in relevant part:

*Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law, including SCR 20:1.15 (d), to protect such 3rd-party claims against wrongful interference by the client, and accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the 3rd party.*

*If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest in it, the lawyer is free to deliver the property to the person to whom it belongs.*

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<sup>7</sup> Wisconsin’s Rules of Professional Conduct for Attorneys normally have both a Wisconsin Committee Comment and the Comment to the corresponding ABA Model Rule. SCR 20:1.15, however, has only a Wisconsin Committee Comment. The Comments are not officially adopted by the supreme court but are published for guidance.

This Rule thus requires that when a lawyer is notified that a third party has an ownership interest in trust property, such as a personal injury settlement, that falls within one of the four specified categories (lien, court order, judgment or contract), the lawyer has a duty of prompt notice, delivery and accounting. If the client disputes that ownership interest, the lawyer must hold the disputed funds in trust pending resolution of the dispute. Asserted interests that do not fall within one of the four listed categories do not trigger obligations under the Rule. The first task then in addressing a lawyer's ethical obligations is determining whether "doctors' liens" are actually liens, court orders, judgments or contracts.

"Doctor's Liens" obviously are not court orders or judgments, so the question is narrowed to whether these instruments are actually liens or contracts. Both Riegelman and Yorgan provide guidance on this question.

In Riegelman, the court of appeals held as follows:

*Next, we hold that the document at the center of this controversy is a valid contract, which conveys an assignment. The question of how to classify this type of document is an issue that has not yet been fully addressed in Wisconsin. However, our research reveals that the prevailing trend is for courts to hold that this type of document—i.e., the type containing language agreeing to protect a medical provider's right to payment for services from any insurance settlement—is a valid contract which creates an assignment and entitles the medical provider (the assignee) the right of contractual enforcement against both the patient (the assignor) and the patient's lawyer.*

Riegelman, 2004, WI App 84, ¶25. (footnotes omitted)

In Yorgan, the Wisconsin Supreme Court stated "we will assume without deciding that the 'Doctor's Lien and Authorization' is a valid assignment..." Yorgan, 2006 WI 60, ¶13. In light of these two decisions, the Committee must assume that these "doctor's liens" are valid contracts within the meaning of SCR 20:1.15(e)(3). This does not mean that the Committee takes any position with respect to the validity and enforceability of any particular document, but rather that the assertion of an interest through such a document is an assertion of a contractual interest within the meaning of SCR 20:1.15(e)(3).<sup>8</sup>

Assuming that a "lien" signed by the client but not the lawyer creates a valid contractual interest in settlement funds, the lawyer is bound by SCR 20:1.15(e)(3) to protect the third party claim of the doctor or chiropractor. This means that a lawyer may not follow a client's instructions to disregard the lien and disburse all the settlement funds to the client unless the third party explicitly agrees that all the funds be disbursed to the client. If the client is disputing the medical provider's bill and forbidding the lawyer to disburse the disputed funds to the doctor or chiropractor, the lawyer is obligated to hold the funds in trust until the dispute is resolved. A lawyer has similar ethical obligations with

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<sup>8</sup> Other states have likewise found that such instruments trigger lawyer's responsibilities under applicable trust account rules. See *Alaska Ethics Op. 92-3 (1992)*; *Alabama Ethics Op. 90-48 (1990)*; *California Ethics Op. 1988-101 (1988)* and *Ohio Ethics Op. 95-12 (1995)*.

respect to any asserted third party ownership interest which is identified by lien court order, judgment or contract. Any undisputed portions of the funds however, should be promptly disbursed to the owner of such funds.

***B) Do the lawyer’s obligations change if the lawyer notifies the third party that the lawyer does not intend to honor the lien document?***

There is nothing in the language of SCR 20:1.15 or its Comment that permits a lawyer to avoid the obligation to hold disputed funds in trust by telling a third party that the lawyer does not intend to honor the lien document. In *Barrock*, the Respondent lawyer informed the client’s previous lawyer that he “doubted” that the client would be willing to honor the lien, yet was still disciplined for a violation of SCR 20:1.15(d)(3). *Barrock*, 2007 WI 24, ¶15. If a lawyer could avoid obligations under SCR 20:1.15(e)(3) by simply informing the third party that the lawyer does not intend to abide by those obligations, a lawyer could disregard the Rules as long as advance notice is given. This is clearly not a reasonable position and a lawyer may not avoid the responsibilities imposed by SCR 20:1.15 simply by stating that the lawyer chooses to ignore them.

***C) If the lawyer determines that disputed funds must be held in trust, does the lawyer have an obligation to attempt to settle the dispute on behalf of the client?***

The Committee first notes the Comment to SCR 20:1.15(e), which states that a lawyer “should not unilaterally assume to arbitrate a dispute between the client and the 3rd party.” Moreover, a client’s disputes with third party creditors may be beyond the scope of a lawyer’s representation of a client in the underlying matter (*see* SCR 20:1.2). Absent an agreement with the client to the contrary, a lawyer’s representation of a client in one matter does not normally obligate the lawyer to represent the client with respect to ancillary disputes over funds held in trust.<sup>9</sup> Therefore, absent an agreement to the contrary, a lawyer may inform the client and third party that the lawyer will hold the disputed funds in trust, but will not participate in the resolution of the dispute and will await the parties’ agreement as to disposition. The lawyer should encourage the parties to resolve the dispute amicably.<sup>10</sup>

The Committee recognizes, however, that many lawyers routinely provide assistance to clients with respect to bills of medical providers as a courtesy, or may agree that such assistance is within the scope of the original representation. Such practices are entirely appropriate. Lawyers should be clear with clients about the extent of the assistance the lawyer is willing to provide. For example, a lawyer may agree to represent the client with respect to negotiations in an attempt to resolve the dispute, but may not agree to

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<sup>9</sup> The Committee notes language in *Barrock* to the effect that the Respondent attorney had an obligation to represent the client in the dispute with the client’s former lawyer. *Barrock* 2007 WI 24, ¶ 23. However, there is no elaboration on the statement and the Committee believes it is specific to the facts of that case. The Committee does not read *Barrock* as creating an independent obligation to always represent clients with respect to such disputes.

<sup>10</sup> *See Alaska Ethics Op. 92-3 (1992).*



represent the client in any related lawsuit. It is the lawyer's responsibility to clearly inform the client of any limitations on the scope of the representation [see SCR 20:1.2(c)].<sup>11</sup>

***D) Must the lawyer hold the funds indefinitely if the dispute between the client and the third party is not resolved?***

SCR 20:1.15(e)(3) requires a lawyer to hold disputed funds in trust *until the dispute is resolved*. This obligation applies whether the lawyer represents the client in the dispute with the third party creditor or not. Therefore, the situation may arise in which the parties to the dispute cannot agree upon a resolution, yet are unwilling to commence litigation or take other steps to end the dispute. This places the lawyer in the uncomfortable position of holding funds in the lawyer's trust account indefinitely.

Neither the Rule nor its Comment suggests a solution for the lawyer who does not want to hold disputed funds in trust for prolonged periods of time. The court of appeals in *Riegelman*, however, provided this advice to lawyers facing an unresolved dispute over funds held in trust:

*We conclude with this instruction: If an attorney and client have signed an assignment in favor of a medical provider and a dispute arises over whether the amount owing is reasonable and necessary, and if the attorney does not want to hold funds indefinitely, he or she should bring an action for declaratory judgment pursuant to WIS. STAT. § 806.04 and seek guidance from the court as to who is entitled to the disputed funds. Specifically, the attorney should do the following:*

- 1. Commence a declaratory judgment action under WIS. STAT. § 806.04 naming the patient as plaintiff and the medical care provider as defendant.*
- 2. Deposit or file the disputed amount with the Clerk of Courts.*

*We note that the standard language of these assignments authorizes payment of a yet to be determined amount of money (i.e., authorizes the patient's attorney to pay directly to the medical provider such sums as may be due and owing). When an amount is yet to be determined, the trial court has the inherent authority to determine what is reasonable and necessary.*

*Riegleman, 2004 WI App 85 ¶36 (footnotes omitted).*

This guidance applies with equal force to situations in which the lawyer has not agreed to protect the asserted third party interest but is nonetheless obligated by SCR 20:1.15(e)(3) to hold disputed funds in trust. A lawyer is not required by the Rules to file a declaratory action, however, and may use discretion in determining when it is appropriate to file such an action.

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<sup>11</sup> Lawyers also have an obligation, pursuant to SCR 20:1.5(b), to inform clients of the scope of the representation.

***E) If a lawyer files a declaratory action, is the lawyer responsible for filing fees or other attendant costs?***

There is no specific guidance in case law or the Rules with respect to this question. The Committee notes, however, that lawyers generally must bear the costs associated with fulfilling the lawyer's professional responsibilities. For example, a Wisconsin lawyer was disciplined for charging a client the lawyer's hourly rate for time spent in retrieving the file which the client had requested.<sup>12</sup> It has also been held that lawyer's may not bill clients for "administrative" tasks, such as timekeeping.<sup>13</sup> Finally, funds held in a lawyer's trust account are not fungible and may not be converted from one purpose to another without the explicit permission of the owner. For example, a lawyer may not use a client's funds in the lawyer's trust account to pay the lawyer's outstanding fees without the client's permission when the funds are not advanced fees.<sup>14</sup>

The Committee therefore believes that a lawyer may not pay filing fees or other associated expenses from disputed funds held in trust without explicit permission from all parties to the dispute, and a lawyer must normally pay such expenses out of the lawyer's own funds.<sup>15</sup> However, the lawyer may apply to the circuit court hearing the matter for reimbursement of the lawyer's expenses out of the disputed funds. Or if the lawyer has agreed to represent the client in connection with the dispute, the lawyer will normally have an agreement with the client with respect to costs and the lawyer would be entitled to reimbursement as provided in that agreement.

***F) Do these obligations change if the person asserting an interest via a "lien document" does so for an obligation unrelated to the matter in which the lawyer represents the client?***

Neither the language of SCR 20:1.15(e)(3) nor its Comment require a nexus between the subject matter of the representation and an asserted ownership interest, and there is no disciplinary case which requires such a nexus. In *Yorgan*, the supreme court cited a lawyer's potential responsibility for a client/tenant's assignment of settlement proceeds to a landlord as overly expansive and thus grounds for limiting lawyers' civil liability to creditors of the clients. *Yorgan*, 2006 WI 60 ¶ 33. As discussed above, however, *Yorgan* discussed a lawyer's civil liability only, and the Committee does not believe that this language in *Yorgan* creates the requirement of such a nexus in SCR 20:1.15. If such a requirement is to be read into the Rule, it must be done so explicitly by the supreme court. Therefore, the Committee, accepting the plain language of the Rule and Comment, believes that an assertion of an ownership interest that falls within one of the four categories listed in the Rule will trigger the lawyer's responsibilities, regardless of the lack of any connection to the underlying matter.

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<sup>12</sup> See *Disciplinary Proceedings Against Kitchen*, 2004 WI 83 273 Wis.2d 279, 682 N.W.2d 780.

<sup>13</sup> See *Atty. Grievance Commission of Maryland v. Kraemer*, 404 Md. 282, 946 A.2d 500 (2008).

<sup>14</sup> See *Disciplinary Proceedings against Strnad*, 178 Wis.2d 620, 505 N.W.2d 134 (1993).

<sup>15</sup> The Committee notes, however, that *Colorado Ethics Op. 94* (1994) takes the position, without explication, that a lawyer may use the disputed funds to pay such costs.

The provisions of this Rule do not apply, however, unless the third party interest is asserted against the specific property held in trust. This means that the asserted third party interest must clearly and with particularity identify the funds and the matter. General assertions of client indebtedness, even if based upon lien, court order, judgment or contract, do not suffice to trigger a lawyer's obligations under the Rule unless the contract lien, court order or judgment establishes an ownership interest in the specific funds which the lawyer holds in trust.

By way of example, assume a lawyer settles a personal injury matter and places the settlement funds in trust. The lawyer then becomes aware that a creditor of the client, such as a landlord (to continue with the example discussed above), claims that the client is contractually obligated to pay the landlord a certain sum for past due rent. Unless the landlord can establish that the contract specifically gives the landlord an ownership interest in the settlement funds of the specific personal injury matter, the lawyer is not obligated to honor the landlord's asserted interest. If, however, the client, in an effort to stave off eviction, had given the landlord an assignment of the settlement proceeds of the specific personal injury matter, and the lawyer was aware of this assignment, then the lawyer would be obligated to honor the landlord's interest.

The required specificity in the assertion of an ownership interest in funds held in trust must be such that the funds can be readily identifiable – that is to say, they must be particular to a specific matter. For example, boiler plate contractual provisions that purport to give a potential creditor an assignment of the proceeds of any and all future funds which a client may receive in connection with yet to be commenced legal proceedings do not oblige a lawyer to hold funds in trust under SCR 20:1.15(e)(3).

***G) Do lawyers have an ethical obligation to determine if any third parties may have an ownership interest in funds held in trust before disbursing those funds to the client?***

The Rules of Professional Conduct do not impose an obligation on lawyers to seek out such third parties. Such an obligation would in essence require a lawyer to prove a negative – that is to be sure that funds are free from all possible encumbrance before disbursing. This would place an impossible burden on lawyers. SCR 20:1.15(e)(1) imposes responsibilities on a lawyer who has received “notice” of a third party's interest in property held in trust, but it is the responsibility of the third party to provide that notice. Further, as discussed above, the notice provided to the lawyer must be specific to the funds held in trust. Thus a lawyer who is aware that a medical provider has treated a client has no affirmative obligation to determine whether the medical provider has a lien, court order, judgment or contract establishing an interest in settlement funds, even if the lawyer is aware that medical providers would likely expect payment under the circumstances.<sup>16</sup> Further, the lawyer is not required to permit a third party who asserts an interest that is not yet

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<sup>16</sup> The Committee does not believe it is appropriate for lawyers to engage in intentional avoidance of information to avoid notice of third party claims. For example, a lawyer who suggests that clients not tell the lawyer about any medical provider liens may be assisting the client in fraud.

perfected time to obtain a court order, judgment or lien before disbursing the funds to the client.<sup>17</sup>

***H) What if the client instructs the lawyer not to notify third parties who have a potential interest in funds when a matter is settled?***

SCR 20:1.15(e)(1) requires lawyers receiving funds to promptly notify any third party who asserts an interest in the specific funds held in trust. SCR 20:1.15 is silent, however, as to the relationship between that Rule and a lawyer's responsibilities under SCR 20:1.6 (Confidentiality), which requires a lawyer to keep all information relating to the representation of a client confidential. Moreover, SCR 20:1.6 contains no explicit exception regarding a lawyer's duty to notify third parties under SCR 20:1.15. Therefore, the Rules do not directly address the situation in which a lawyer receives funds in which a third party may have an ownership interest identified by lien, court order, judgment or contract, but the client instructs the lawyer not to notify the third party.

The Committee believes that the question is resolved by SCR 20:1.6(c)(5), which allows a lawyer to reveal otherwise confidential information to comply with other law or court order. The Comment to SCR 20:1.15(e) notes that "A lawyer may have a duty under applicable law, including SCR 20:1.15(e) to protect such 3<sup>rd</sup>-party claims from wrongful interference..." (emphasis added). Therefore, the Wisconsin Committee Comment to SCR 20:1.15 considers that Rule to be "law," and the requirement of notification found in SCR 20:1.15(e)(1) is also "law."<sup>18</sup> A lawyer may thus be required to reveal information otherwise protected by SCR 20:1.6 in order to comply with the requirements of SCR 20:1.15(e), even when the client specifically instructs the lawyer not to provide the third party with the required notice.<sup>19</sup>

Moreover, a client's instruction not to notify a third party may be effectively an attempt to defraud a creditor by concealing the receipt of funds in which the creditor has an ownership interest. A lawyer may not assist a client in conduct the lawyer knows to be criminal or fraudulent [SCR 20:1.2(d)], may not make false statements of fact or law to a tribunal (SCR 20:3.3), may not fail to disclose a material fact to a third person when necessary to avoid assisting in a criminal or fraudulent act by the client [SCR 20:4.1(a)(2)] and may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation [SCR 20:8.4(c)]. Further, a lawyer is required to reveal information to the extent reasonably necessary to prevent the client from committing a criminal or fraudulent act that is likely to result in substantial injury to the financial interests of another [SCR 20:1.6(b)]. Whether or not the aforementioned Rules are implicated depends on the facts of a specific situation, but lawyers must remain mindful of these obligations.

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<sup>17</sup> See *Colorado Ethics Op. 94 (1993)* and *California Ethics Op. 1988-101 (1988)*.

<sup>18</sup> The Committee notes that the term "law" is often used in ethics opinions to refer to rules and regulations other than the Rules of Professional Conduct. The Committee finds persuasive, however, the intentional reference to SCR 20:1.15(d) as included in the term "law" in the Wisconsin Comment to SCR 20:1.15, and believes that this specificity overrides the customary use of the term "law."

<sup>19</sup> See also *Colorado Ethics Op. 94 (1993)*.

Finally, we remind lawyers of SCR 20:1.4(a)(5), which provides as follows:

*A lawyer shall 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.*

Therefore, a lawyer has an affirmative duty of consultation with a client who instructs the lawyer not to make third party notifications required by SCR 20:1.15(e).

***I) What if the lawyer believes the client's, or a third party's, objection to disbursement is frivolous or not in made in good faith?***

The language of SCR 20:1.15(e)(3) and its' Comment require a lawyer to hold funds in trust whenever there is a "dispute" as to the division of funds, and there is no explicit requirement that the dispute be non-frivolous or made in good faith. Therefore, at first blush, the Rule seems to only require that a client states that he or she disputes an asserted third party ownership interest identified by lien, court order judgment or contract and thus require the lawyer to hold the disputed funds in trust.

Other secondary sources, however, require more than a mere assertion of a dispute. For example, Comment [4] to ABA Model Rule 1.15 states that "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." Further, §45(2)(d) of the *Restatement (THIRD) of the Law Governing Lawyers* (the "Restatement") notes that a lawyer may retain possession of client or third party funds if "there are substantial grounds for dispute as to the person entitled to the property." Thus, both the ABA Model Rules and the *Restatement*, neither of which is binding authority in Wisconsin, require that there be some discernible merit to the dispute over ownership of the funds.

One interpretation of the lack of any qualifying language with respect to disputes in the Wisconsin Comment, despite the presence of such language in the ABA Model Rule Comment, is that the omission is intentional and that a Wisconsin lawyer is not to determine the respective merits of any position in such a dispute. We believe, however, that this leads to potentially absurd results. Let us illustrate by example:

Suppose a lawyer who represented a client in an appeal from a judgment of divorce receives a check representing the former couples' tax refund. There already exists a court order determining that the opposing party is entitled to 50% of the refund, and the lawyer, on behalf of the client, had already argued the client's position that the client should receive the entire refund, both in the trial court and on appeal. The lawyer's client tells the lawyer that the client disputes the court order simply because the client believes it to be unfair. Does SCR 20:1.15(e)(3) require that the lawyer refuse to obey the valid order of the court and not disburse 50% of the refund to the opposing party, even though the issue had already been decided by to the court?

The Committee does not believe that SCR 20:15(e)(3) leads to such an absurd result, and for the Rule to be reasonable,<sup>20</sup> the Committee believes that there is an implicit requirement that disputes and assertions of an ownership interest be non-frivolous. In essence, a request not to disburse, whether from a client or a third party, without a non-frivolous reason does not amount to a “dispute” within the meaning of SCR 20:1.15(e)(3).<sup>21</sup>

We caution lawyers however, not to take it upon themselves to unilaterally determine the legal validity of a party’s colorable assertion of an ownership interest. For example, there may be a dispute as to whether a statute of limitations had run with respect to an asserted ownership interest and the lawyer should not unilaterally determine that the statute had in fact actually run. A lawyer must not make decisions properly made by a court. Therefore, while patently frivolous positions with respect to disputed funds held in trust should not prohibit the lawyer from delivering the funds to the rightful owner, a colorable dispute triggers the Rule.

***H) A lawyer should refrain from behavior that would induce or mislead a third party into believing that the lawyer will protect his/her interest in funds when the lawyer does not intend to do so.***

A lawyer should also be cautious of conduct, either explicit or implicit, which would reasonably lead a third party to believe that the lawyer and the client intend to honor the third party’s asserted interest when that is not the case. This type of conduct may range from explicit promises to third parties to reliance on third party services coupled with conduct that may lead the third party to assume that payment is forth-coming. For example, a lawyer may request medical records to prove damages in a case, and may receive a request for payment from the medical provider. A mere assertion of indebtedness does not itself obligate the lawyer to withhold funds, but the lawyer should clearly inform the third party that their asserted interest does not require the lawyer to withhold funds from settlement. Ethics committees of other states have considered this issue and we quote from *Colorado Ethics Opinion 94*:

*The Alaska Bar Association Ethics Committee has concluded that it is improper for a lawyer to induce such reliance, and that the lawyer had an affirmative duty to respond in a clear, unequivocal manner to a third party's inquiry. The Alaska Opinion 92-3, supra, noted that "it is inappropriate for the lawyer to remain silent after having received notice of such a potential claim." The Alaska Bar Association Ethics Committee suggested that the lawyer respond to a third party's lien claim by affirmatively stating that (1) the issue is one between the third party and the client, and (2) the lawyer will not assume responsibility for payment of the client's obligations.*

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<sup>20</sup> The Committee notes that the Rules are “Rules of reason.” See SCR Chapter 20, Preamble paragraph [14].

<sup>21</sup> See also *Utah Ethics Op. 00-04 (2000)*, requiring that clients have a good faith basis to dispute the third person’s interest before the lawyer is required to hold the funds in trust; *Connecticut Informal Op. 01-11 (2001)*, requiring lawyer to hold funds in trust when client has “colorable” objection to physician’s claim for payment.

*This Committee agrees that a lawyer may not stand mute in response to a third party's claim to client funds. The lawyer should discuss the third party's claim with the client and decide what response should be made. The third party should then be informed of the client's decision with regard to the claim. Regardless of the client's decision, unless the lawyer intends to be personally responsible, the third party should be informed that the lawyer will not assume responsibility for payment of the client's obligations.*

This Committee agrees with the positions of Alaska and Colorado and believes that a Wisconsin lawyer, when confronted with a third party's asserted interest that the lawyer does not believe falls into one of the four categories listed in SCR 20:1.15(e) and which the client does not intend to honor, should consult with the client and notify the third party.

Lawyer's have affirmative obligations to refrain from assisting clients in fraudulent conduct [SCR 20:1.2(d)], to refrain from making false statements of fact to third parties [SCR 20:4.1(a)] and to avoid conduct involving misrepresentation [SCR 20:8.4(c)]. Of particular importance is the definition of misrepresentation found in SCR 20:1.0(h), as "denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist," because a lawyer may engage in misrepresentation by omission as well as commission. Lawyers must be mindful of these obligations in dealings with all third parties.

### ***Conclusion***

Wisconsin lawyers must be mindful of their obligations with respect to assertions of ownership interest in funds held in trust because the circumstances in which a lawyer by third parties may be civilly liable to the third person differ from those in which a lawyer may be subject to disciplinary prosecution. When a client gives a third party a contractual assignment on settlement proceeds, SCR 20:1.15(e) requires the lawyer to disburse funds to the third party, or, if the client disputes the amount owed or validity of the assignment, hold the disputed portion of the funds in trust. These requirements apply whenever a third party has a valid interest, identified by lien, court order, judgment or contract, in funds held in trust, and has given the lawyer notice of the interest. The ethical obligations are not dependent on the lawyer's agreement to protect the third party's interest.