

PROFESSIONAL ETHICS COMMISSION
OF THE
BOARD OF OVERSEERS OF THE BAR

QUESTION #1

The Grievance Commission of the Board of Overseers of the Bar has requested an Advisory Opinion based upon the following facts. H and W are divorced. H was represented by Attorney L, and W was represented by Attorney M. H has commenced an action against a party who had previously bought a business from him in which there is a potential recovery of \$9,000 in damages. L represents H in that action also.

The divorce decree states "Husband hereby agrees to pay Wife Fifty Per Cent (50%) of any sum recovered in said action, after making a deduction for reasonable costs of such action, and further deducting \$800 owed to X Company for a debt relating to said business."

Later, after H had failed to comply with the divorce decree with respect to child support and payment of certain debts of the marriage, W, now represented by Attorney N, sought to have him held in contempt of court. As a result a mediation was held, and an amended settlement agreement was signed by the parties. In the amended agreement H agreed to pay off the debt to X Company and satisfy the arrearage in child support payments out of his share of proceeds of the pending civil action referred to above. H received a judgment by default in that action.

W, when advised of offers of settlement that H received on the judgment, although not a party to the action, indicated she did not "approve" them. Nevertheless, H finally settled the matter for \$2500. After deducting \$400 for his legal fee incurred in collecting the judgment, and without notifying Attorney N, Attorney L at the instruction of his client and having no knowledge that H intended to violate the terms of the agreement above, gave the balance of the cash to his client. When W complained, H gave her \$1250.

QUESTION #2

Assume the same facts as above except that Attorney L reasonably believes that H does not intend to comply with the terms of the agreement because H so indicates to him.

QUESTION #3

Assume the same facts as Question #1 except that Attorney L promised Attorney N he would hold the funds when collected and disburse them in accordance with the agreement, but H in fact did not authorize L to make that promise; and when funds arrive, H tells Attorney L to give the funds to him.

QUESTION #4

Assume the same facts as Question #3 except that the promise of Attorney L had been authorized by his client; but shortly before the funds arrive, he instructs Attorney L to turn the proceeds over to him when they are collected.

OPINION

As to Question #1 the actions of Attorney L do not violate any Bar Rules. Nothing in the hypothetical decree imposed any obligations upon the attorney, only the clients. Client H owned the cause of action against X Company. Under Bar Rule 3.6(f)(2), L not only is permitted but is obligated to turn the funds over to his client: "A lawyer shall...(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive." While this Commission has no authority to interpret court decrees, it is obvious that the decree did nothing to alter the ownership of the cause of action. It only created an obligation on the part of H to pay a sum of money to W that was to be based upon the net amount H recovered from the claim. Assuming, as we do, that Attorney L reminded his client of his obligations under the decree, nothing more is required from L. He has no obligation to inform Attorney N under these facts of what has transpired. Bar Rule 3.6(e) is inapplicable because the lawyer has not counseled or assisted his client in the violation of any law, rule, or order of a tribunal. The turning over of the funds to the client does not constitute "assistance" within the meaning of the rule in that the order necessarily requires that the client receive the money before he has any obligation to W, and the order also did not attempt to modify the obligations of Attorney L to his client.

As to Question #2, the answer is the same for the reasons stated above. Certainly the client would consider the communication that he did not intend to pay W as a confidential communication, and under Bar Rule 3.6(1) a lawyer "shall not, without the informed written consent of the client, knowingly reveal a confidence or secret of his client." The exceptions to the rule which permit disclosure when a client intends "to commit a crime... or to avoid subjecting others to risk of harm" are not applicable in this case. No crime is being committed, and the risk of harm" exception cannot be extended to include every activity that would have some negative economic impact upon a third person. To do so would reduce one of the jealously protected expectations of a client to an illusion. Rule 3.6(e) is no more involved in this situation than in Question #1 even if Attorney L was advised by his client of his intention to disregard the order. The mere act of carrying out his obligation to his client with respect to his client's property is not in itself a violation of an order of the tribunal. As long as the attorney advises the client of his obligations and counsels compliance, that is all he can do in the circumstances. cf. Opinion #60.

Question #3 must be answered no differently from Question #2. Indeed, the analysis is no different from Question #2 since the property remained that of Attorney L's client. No comment, of course, is being made as to the

attorney's civil liability to third parties as a result of his ill considered promises.

As to Question #4 Attorney L has assumed a different role as between the parties; and Bar Rule 3.6(f)(2) does not necessarily govern the result. The property may no longer belong only to the client (cf. Model Rule 1.15 where the obligations of lawyers dealing with client funds are extended to funds held for third persons.) As Opinion 27 has previously pointed out, the lawyer's position vis a vis the parties is a legal question of agency and contract law that is beyond this Commission's jurisdiction. Indeed the lawyer may be obligated to carry out what he has promised since the client authorized the disbursement, and the third party relied upon that authorization. If the lawyer is in doubt as to his obligations in this matter, he can seek judicial guidance under Rule 24, Maine Rules of Civil Procedure. Whatever his legal obligations in this instance, the Commission concludes that the lawyer, if he is unable to persuade his client to change his mind, must notify the other party of the change in instructions, for under Rule 3.6(c) a failure to do so would constitute a fraud upon the other person.