L.E.I. 82-5 (L.E.C. 80-22)

(October 8, 1982)

DUTIES OF LAWYER CONCERNING "PROTECTION" OF DOCTOR'S FEES OUT OF CLIENT'S RECOVERY

The essential facts in this case are undisputed. Dr. S, the complainant, is an orthopedic surgeon. He treated N for injuries sustained by him in an automobile accident. N retained the respondent attorney to represent him in his attempt to recover damages for his injuries. The evidence shows that the respondent and N agreed upon a contingent fee of one-third of any amount recovered, with N to pay costs and expenses.

During the course of his representation of N, the respondent wrote to Dr. S for a report of his diagnosis, treatment and prognosis of N. The doctor's office replied that such a report would be forthcoming upon receipt of $50.00 to cover the costs of preparing the report and a statement signed by N agreeing to pay the doctor's fees out of any recovery.

The respondent sent a check for $50.00 to Dr. S but did not send the requested statement or mention the same in his letter enclosing the check. The doctor wrote acknowledging receipt of the $50.00 and again requested a statement that his fees would be paid out of any recovery or settlement.

The respondent wrote to Dr. S that he would "protect" the doctor's fees out of any recovery. The narrative medical report was then sent to the respondent.

In May, 1979, the respondent settled N's case for $10,000.00. On June 15, 1979, the respondent made settlement with N and gave to N a settlement sheet approved by N, which provided for the payment of the doctor's fees in the amount of $1,500.00.

The respondent stated that he advised N at that time that he was going to charge Dr. S a fee of $250.00 for collecting his bill. N was not sure that this statement was made to him at the time of the settlement. He testified he thought it was made at a later date. An affidavit of N, prepared by the respondent after this complaint was made, indicates that the respondent told N he would charge Dr. S a fee for collecting his bill at the time of settlement.

Dr. S would not agree to pay the respondent a fee of $250.00 to be deducted from the $1,500.00 which the respondent had withheld from the settlement for the purpose of paying his fees.

In March, 1980, the respondent called N to his office and advised him that he could not get the doctor to pay him $250.00. On April 2, 1980, N went to the respondent's office and the respondent paid to him $1,521.20, being the amount of the doctor's fees which he had withheld. N, although advised by the respondent to pay Dr. S, did not do so. Dr. S has never been paid for the services which he rendered to N.

It is clear from the evidence that the $1,521.20 which was held by the respondent from June 15, 1979, until April 2, 1980, was not placed in any client or trustee's account but was deposited in the respondent's account from which he paid personal and office

expenses. Likewise, the $10,000.00 which was received in settlement of N's claim was also deposited in the respondent's general office account.

The respondent contends that he was Dr. S's agent or attorney for the collection of his fees from N. The doctor denies any such agency or representation.

There is no provision of the Code of Professional Responsibility which would preclude a lawyer from permitting his client to execute an authorization empowering and directing him to withhold from any settlement or recovery all sums necessary to pay the accrued bills of the treating doctor. In this case, it appears that the client, N, agreed to the withholding of his doctor's accrued fees for services rendered to him.

Obviously, an attorney must always keep in mind that his responsibility is to represent the interests of the client and not the physician. He must be careful where necessary to preserve the right of the client to object to any unreasonable and unnecessary charges or otherwise to raise any defenses which he might have in any conventional action brought by the doctor to recover for his services. In this case, the client does not object to the amount of the doctor's fees.

The respondent's claim that he has a right to a fee for collecting Dr. S's fees is without merit. There was no agreement by Dr. S to employ the respondent or pay him a fee, and the respondent has no right to such a fee. Furthermore, without the consent of N and Dr. S, it would be improper for the respondent to represent both of them in the same matter.

We agree with the respondent that it would be unethical for a lawyer to agree to pay his client's medical expenses without an agreement for reimbursement. Such is not the case here. The respondent was authorized to withhold from the settlement the doctor's fees and to pay them. The respondent agreed to "protect" the doctor's fees out of any recovery or settlement.

In his treatise on legal ethics, Henry S. Drinker states:

> A lawyer who, in an accident case, made, with the client's approval, an agreement with the examining doctor witness, that he be paid a specified amount in the event of recovery, is professionally reprehensible in making settlement without providing for the doctor's fee.

This Committee is of the opinion that under the present Code of Professional Responsibility it is not proper for a lawyer to pay the costs and expenses of [sic] to be reimbursed therefor by his client. A lawyer may advance costs of litigation, subject to reimbursement. As indicated above, there is likewise no provision of the Code of Professional Responsibility which precludes a lawyer from withholding from a settlement or recovery the accrued charges of the attending physician, if the client consents or authorizes such action. Likewise, there is no provision of the Code of Professional Responsibility which precludes a lawyer from permitting his client to execute an authorization to withhold from a settlement or recovery and to pay to an attending physician his accrued fee. Before permitting his client to sign such an authorization, the lawyer should be careful to preserve the right of his client to object to any unreasonable or unnecessary charges

or to raise any defenses he might have to an action brought by the doctor to recover such fees.

DR 9-102(A) of the Code of Professional Responsibility provides:

> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
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> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
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> (2) 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.

The respondent has violated this provision of the Code of Professional Responsibility. The funds belonging to his client were deposited and commingled with his own funds.

The Committee is of the opinion that the action of the respondent in demanding a fee of Dr. S was improper and that having agreed to protect the doctor's fees out of any settlement or recovery with his client's acquiescence, his failure to do so, simply because Dr. S refused to pay him a fee, was professionally reprehensible.

The respondent is hereby reprimanded.