
Applying
Ethics to
Rules of
Evidence
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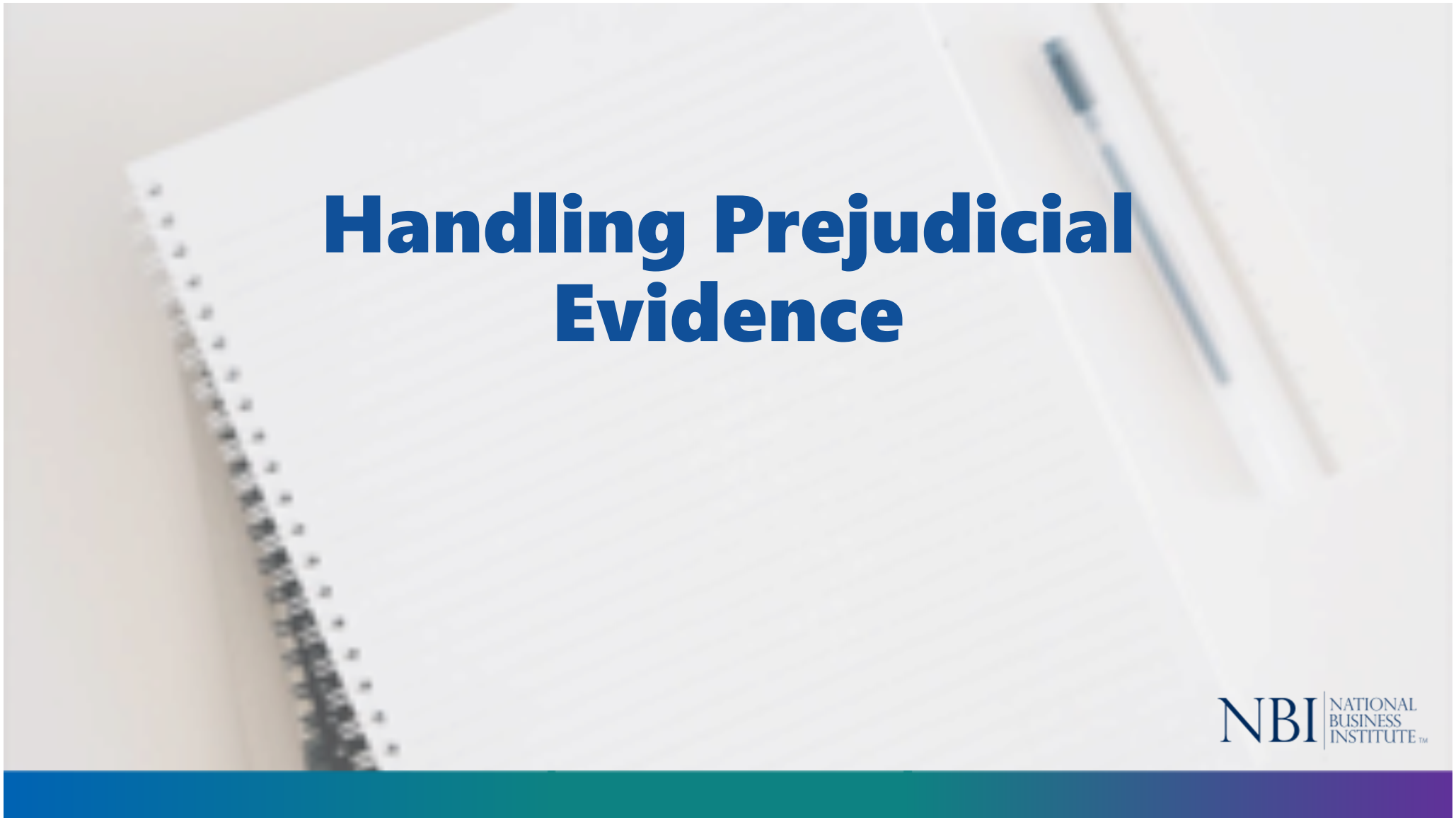
Handling Prejudicial Evidence
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Evidence Offered by A Party Will Usually Harm The Opponent

- PREJUDICIAL EVIDENCE IS NOT JUST HARMFUL TO ONE SIDE
- WHERE PROBATIVE VALUE IS OUTWEIGHED BY PREJUDICE, INADMISSIBLE
- TREAD CAREFULLY IF YOU INTEND ON OFFERING INFLAMMATORY EVIDENCE

Examples of Evidence Which May be Inadmissible Due to Prejudice

Insurance Coverage

or

Other Collateral Source

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- Evidence of Health Insurance or Workers Comp
- Evidence of Liability Insurance
- Evidence Someone Other than Plaintiff Paid the Bills
- Evidence the Employer Paid Sick Leave During Disability

- Health Insurance is Collateral Source and Inadmissible.
- Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000).
- This includes payments by Medicaid and Medicare.

Improper Cross Examination of Criminal Conviction

- Impeachment limited to a felony or misdemeanor involving moral turpitude.

- And, you may not elicit the specific crime, other than a conviction for Perjury. See Evidence Rule 2:609

PRIOR ACCIDENT OR MEDICAL CONDITION

If no expert to relate prior injuries to injury for which Plaintiff is seeking compensation, evidence of prior injuries inadmissible.

Carter v. Shoemaker, 214 Va. 16, 197 S.E.2d 181 (1973)

Suggesting Intoxication of Driver

- Evidence limited to "mere odor" of alcohol must be excluded.

- Hemming v. Hutchinson, 221 Va. 1143 (1981).

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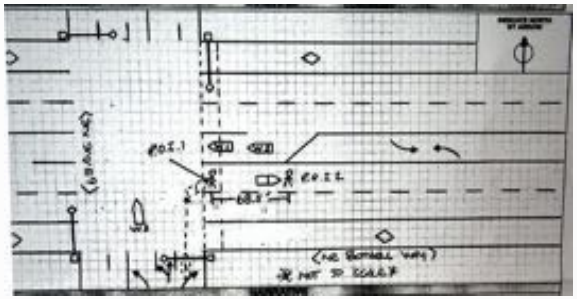
Reference to Crash Report

- Code § 46.2-379 forbids introducing a crash report at trial.

- Even if crash report is not introduced as evidence, no reference should be made to the report by party or counsel.



- Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000).

Crash Report – Limited Use at Trial

- However, crash rpt. can be used to refresh recollection:

➢ *Do not ask the officer to look at his crash report.*

➢ *Ask officer if she has a document which will refresh recollection.*

APPLYNG ETHICS TO RULES OF EVIDENCE

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CANDOR WITH THE COURT

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Virginia Rule of Professional Conduct 3.3 Candor Toward Tribunal

(a) A lawyer shall not knowingly:

1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

Virginia Rule of Professional Conduct 3.3 Candor Toward Tribunal

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule of Professional Conduct 3.3
Candor Toward Tribunal

(4) offer evidence that the lawyer knows to be false.

- First advise the client of the lawyer's duty of candor

- Then seek the client's permission to withdrawal or correct the false statements or evidence

Virginia Rule of Professional Conduct 3.3 Candor Toward Tribunal

If that fails, and withdrawal from the representation is not permitted or will not undo the effect of the false evidence, disclose to the court only what is reasonably necessary to remedy the situation.

Virginia Rule of Professional Conduct 3.3 Candor Toward Tribunal

When the client insists on disclosing false evidence, and you have made a limited disclosure to the Court, you have fulfilled duty of candor.

It is next for the court to

determine what should be done.

WHAT IF THE CLIENT INSTRUCTS YOU NOT TO REVEAL THE FALSE EVIDENCE?

- ✓Must advise the client of duty of candor and must reveal the false evidence.

Query

If misconduct is not perpetrated by your client, can you ignore it?

EXAMPLE: You learn a witness, other than your client, provided false testimony or submitted a forged document?

AND, what if your client instructs you not to reveal the misconduct?

Rule of Professional Conduct 3.3(d)

The lawyer s**hall promptly reveal the fraud.**

If at the request of the client the lawyer remains silent, the client could in effect coerce the lawyer into being a party to fraud on the court.

WHAT IF THE LAWYER SUSPECTS, BUT IS NOT CERTAIN THE EVIDENCE IS FALSE?

- Rule of Professional Conduct 3.3 - Annotation [8]

PROHIBITION against offering false evidence ONLY APPLIES IF LAWYER KNOWS THE EVIDENCE IS FALSE.

A lawyer's reasonable belief or suspicion that evidence is false does NOT PRECLUDE ITS PRESENTATION AT TRIAL.

- A lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client.

- But the lawyer cannot ignore an obvious falsehood.

- Rule is more protective of client in criminal cases

Rule of Professional Conduct
ANNOTATION 9

RULE PERMITS THE LAWYER TO REFUSE TO OFFER TESTIMONY THE LAWYER REASONABLY BELIEVES IS FALSE.

This applies only in civil and not criminal cases.

WHY?

- Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence

- Offering such poof may impair the lawyer's effectiveness as an advocate.

EXCEPTION FOR CRIMINAL CASES

- Because of the special protections historically provided criminal defendants, unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

- Client Deletes Facebook Photos Showing Him Cavorting With Other Women While Wrongful Death Case For Wife is Pending In Court

- Is There Anything Wrong With Deleting Those Photos After Filing Suit?

- Is it OK to Instruct Your Secretary or Other Non-Lawyer to Contact Client to Clean Up His Social Media?

Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d 699 (2013)

- Cannot Instruct Client To Delete Relevant Data After Suit Is Filed
- Cannot Cleanse Emails By Asking Client to Clean Up His Social Media
- Worse if You Do So After the Court has Ordered Production of All Emails
- Worse Still if You Blame it on Your Secretary
- Monetary Sanctions for Deceiving Court and Loss of License

Coaching the Witness

COACHING THE WITNESS

PROPER PREPARATION

VS

IMPROPER COACHING

QUERY

PROPER OR IMPROPER COACHING

- YOU MEET WITH YOUR CLIENT AND HELP HIM PHRASE ANSWERS AND ASSIST HIM WITH REMEMBERING DETAILS IN YOUR FILE THAT HE FORGOT.

- DURING YOUR CLIENT'S DEPOSITION, YOU STATE

  "OBJECTION, MY CLIENT HAS ALREADY ANSWERED BY TELLING YOU HIS LIGHT WAS GREEN"

DUTY AS TRIAL ATTORNEY

- MEET WITH AND PREPARE YOUR CLIENT AND WITNESSES, INCLUDING EXPERTS
- EXPLAIN LEGAL CONCEPTS, LISTEN AND ASSIST WITH WORDS BEST ABLE TO CONVEY STRONG POINTS
- HELP WITH ANTICIPATED & DIFFICULT QUESTIONS.

IMPROPER COACHING AT DEPOSITION

- REPORTED DECISIONS FROM FEDERAL COURT

➢COUNSEL SHOULD NOT CONFER WITH A WITNESS, NOT HIS CLIENT, DURING DEPOSITION.

➢COACHING THE EXPERT AT A BREAK TO CHANGE HIS ANSWER IS SANCTIONABLE.

IMPROPER COACHING AT DEPO

- SPEAKING OBJECTIONS ARE IMPROPER
- SPEAKING OBJECTION IS WHEN YOUR OBJECTION SUGGESTS AN ANSWER TO THE WITNESS

IT IS IMPROPER TO STATE DURING YOUR CLIENT'S DEPO:

"OBJECTION, MY CLIENT HAS ALREADY ANSWERED BY TELLING YOU HIS LIGHT WAS GREEN"

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WITHDRAWING AS COUNSEL DUING LITIGATION

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SUPREME COURT RULE 1:15

RULE OF PROFESSIONAL CONDUCT 1.6

RULE OF PROFESSIONAL CONDUCT 1.16

RULE OF PROFESSIONAL CONDUCT 3.7

WHICH OF THE FOLLOWING COMPLIES WITH THE RULES?

- YOU HAVE A DIFFICULT CLIENT AND AFTER FILING SUIT YOU DECIDE TO WITHDRAW, AND FILE A PRAECIPE WITH COURT AND SERVE OPPOSING COUNSEL NOTING YOUR WITHDRAWAL

- YOU ARE BEFORE THE COURT ATTEMPTING TO WITHDRAW FROM THE CASE, AND THE COURT ASKS YOU TO EXPLAIN, AND YOU REPLY “I CAN ONLY TELL YOU, YOUR HONOR, WE HAVE IRRECONCILABLE DIFFERENCES”.

VA SUP COURT RULE 1:15(d)(2)

- Counsel of record may not withdraw except by leave of court.
- Must give notice to client of the time and place of a motion for leave to withdraw.

- A PRAECIPE NOTING WITHDRAWAL IS INSUFFICIENT

- YOU MUST FILE A MOTION TO WITHDRAW AND SERVE YOUR CLIENT WITH A COPY.

RULE 1.6 CONFIDENTIALITY

A lawyer shall not reveal information protected by the attorney client relationship where it could embarrass or be detrimental to the client.

Exceptions for evidence the client will commit a crime causing death, bodily injury or substantial injury to property or financial interests

CONFIDENTIALITY

- EVEN THOUGH YOU ARE MOVING TO WITHDRAW, YOU CANNOT TARNISH YOUR CLIENT BY REVEALING NEGATIVE INFORMATION IN COURT.

- SO YES, IT IS NECESSARY TO LIMIT YOUR EXPLANTION TO “IRRECONCILABLE DIFFERENCES”

DOES THIS EXAMPLE COMPLY WITH THE RULES?

- YOU WITNESS A CAR ACCIDENT AND YOU SAW THE LIGHT WAS GREEN FOR DRIVER “A” AND YOU GIVE THAT DRIVER YOUR BUSINESS CARD, AND SHE ASKS YOU REPRESENT HER. YOU SAY OK.

RULE OF PROFESSIONAL CONDUCT 3.7

- WHEN THE POTENTIAL CLIENT ASKS YOU TO REPRESENT HER AFTER WITNESSING THE CRASH, YOU ARE LIKELY TO BECOME A LIABILITY WITNESS. BECAUSE YOU CANNOT DETERMINE IF LIABILITY WILL BE AN ISSUE IN THE FUTURE, YOU MUST DECLINE REPRESENTATION.

- YOU SPOKE TO THE DEFENDANT BEFORE HE WAS REPRESENTED.
- HE STATED YOUR CLIENT'S LIGHT WAS GREEN.

- HE LATER CHANGED HIS TESTIMONY TO CLAIM HE HAD THE GREEN.

- YOU ARE AWARE OF A WITNESS WHO ALSO SAW THE CRASH AND STATES YOUR CLIENT HAD THE GREEN LIGHT.
- YOU HAVE LAW PARTNERS WHO COULD ACT AS TRIAL COUNSEL IF YOU MUST TESTIFY.
- CAN YOU REMAIN AS COUNSEL AND CAN YOU TESTIFY?
- CAN ONE OF YOUR LAW PARTNERS TAKE OVER THE CASE?

Rule OF PROFESSINAL CONDUCT 3.7(a)
Lawyer As Witness

A lawyer shall not act as an advocate and witness except where:

1) the testimony relates to an uncontested issue;

(2) the testimony relates to value of legal services rendered;

(3) disqualification of lawyer works substantial hardship on client.

APPLICATION OF RULES TO HYPO

- In hypo, you interviewed an unrepresented defendant who made an admission against interest, which would be admissible in court.

- The admission is now contested by his changed testimony, but you also know of a witness who will confirm your client's light was green.

IF THE FACTS SUGGEST THAT YOUR TESTIMONY WILL BE POTENTIALLY CONTROLLING,

PERHAPS BECAUSE THE OTHER WITNESS IS A POOR SUBSTITUE FOR YOUR TESTIMONY,

YOU WILL NEED TO WITHDRAW SO YOU CAN TESTIFY ABOUT A CRUCIAL FACT IN THE CASE.

RULE OF PROFESSIONAL CONDUCT 3.7(C)

CAN YOUR LAW PARTNER TAKE OVER THE CASE?

- A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.

YES, ONE OF YOUR LAW PARTNERS CAN TAKE OVER THE CASE.

CAVEAT: THERE CANNOT BE ANY CONFLICT AS DESCRIBED IN RULES 1.7 AND 1.9, WHICH PERTAIN TO CONFLICTS WITH CURRENT AND FORMER CLIENTS.

BAR COUNSEL

- WHEN IN DOUBT, EMAIL OR CALL THE VIRGINIA BAR'S ETHIC'S HOTLINE

- https://www.vsb.org/site/regulation/ethics/

- The hotline accepts questions by phone at (804) 775-0564.
- Confidential service is available to Virginia State Bar members.

ENFORCING AN ASSIGNMENT OF BENEFITS SIGNED BY CLIENT

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WHAT IS AN ASSIGNMENT

- AN ASSIGNMENT IS A DOCUMENT WHICH BINDS THE CLIENT TO PAYING MEDICAL BILLS IN FULL FROM THE SETTLEMENT OR VERDICT.

- MOST ASSIGNMENTS ALSO STATE THE CLIENT IS LIABLE FOR THE FULL AMOUNT OF THE UNPAID BILL IF THERE IS NO RECOVERY.

- ASSIGNMENTS ARE GENERALLY USED WHEN THE CLIENT DOES NOT HAVE HEALTH INSURANCE.

- ASSIGNMENTS ARE USUALLY COUNTERSIGNED BY THE ATTORNEY.

- SIGNATURES OF CLIENT AND ATTORNEY PROVIDE NEEDED SECURITY FOR PAYMENT.

HYPOTHETICAL

Client retains you after starting medical care. He has signed an assignment form.

- You learn the client has health insurance and you rightly tell the client he should not have signed.

- Is it proper to advise the client and doctor that you will not honor the assignment?

DOES IT MAKE ANY DIFFERENCE IF THE ATTORNEY HAS NOT COUNTERSIGNED THE ASSIGNMENT?

WHAT IF:

THE CLIENT INSTRUCTS THE ATTORNEY NOT TO SIGN,

AND

INSTRUCTS ATTORNEY TO IGNORE THE ASSIGNMENT BECAUSE HE WAS “TRICKED INTO SIGNING” WHEN HE HAD HEALTH INSURANCE.

- Legal Ethics Opinion 1865
- (November 16, 2012)
- Discusses the obligations of a lawyer handling settlement funds when a third-party lien or provider claim is asserted.

RULE OF PROFESSIONAL CONDUCT 1.15(b)(4)&(5)

SAFEKEEPING PROPERTY - SETTLEMENT MONEY

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ATTORNEY MUST HONOR THE ASSIGNMENT

Rule of Professional Conduct 1.15(b)(4)&(5):

Promptly pay to the client or another as requested by such person the funds in the possession of the lawyer that such person is entitled to receive.

Rule of Professional Conduct 1.15(b)(4)&(5)

You May NOT disburse funds to a client or third party without their consent or convert funds of a client or third party, except as directed by a tribunal.

GET COURT APPROVAL BEFORE DISBURSING CONTESTED FUNDS.

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CLIENT INSTRUCTS YOU NOT TO HONOR THE ASSIGNMENT

- COMMENT 4

- You cannot release the funds to the client even upon demand by the client.

- If a lawyer has actual knowledge of a third party's lawful claim to the specific funds held on behalf of a client, the lawyer has a duty to secure the funds claimed by the third party.

- HERE YOU HAVE ACTUAL KNOWLEDGE OF LAWFUL CLAIM BY A THIRD PARTY PROVIDER

- Client retains you after starting medical care and confirms he has signed an assignment.

WHAT ABOUT CLIENT STATING HE WAS TRICKED INTO SIGNING?

- COMMENT 4 TO RULE OF PROFESSIONAL CONDUCT 1.15(b)

❑ First Discuss With Client to Determine if Actual Fraud or Dishonesty

❑ You Cannot Disburse the Disputed Funds.

- Legal and factual issues may make the third party's claim or the amount claimed uncertain.

- ***Rule 1.15 (b)(4) and (5) does not require the lawyer to determine who gets the money.***

When faced with competing demands from the client and third party, the lawyer must be careful not to unilaterally arbitrate the dispute by releasing the disputed funds to the client.

- Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party.

- Virginia State Bar v. Timothy O'Connor Johnson (lawyer acted unethically by making unilateral decision to disburse to client's chiropractor funds less than the full amount of the lien); LEO 1747.

SOLUTION:

If Differences Between Client and Medical Provider Are Irreconcilable, Must Hold Funds and Interplead with Court.

HYPOTHETICAL

- Client retains lawyer to pursue a claim for personal injuries.
- Client advises he signed some kind of form at therapy office but cannot recall anything about the form.
- Client confirms the therapist copied his health insurance card.

- HYPOTHETICAL CONTINUED

- Lawyer has secured therapy bills & records and faxed the billing office his client's health insurance.

- Lawyer knows that provider participates with client's health insurer.

- HYPOTHETICAL CONTINUED

- At no time did the therapist office communicate the existence of an Assignment or reply to the fax providing client's health insurance.

Can you pay client the settlement funds without further investigating the "unknown paper" signed by the Client?

- Rule of Professional conduct 1.15(b)(5)

  SAFEKEEPING PROPERTY

  CANNOT DISBURSE IF VALID LIEN OR ASSIGNMENT.

  NEED AGREEMENT OR COURT PERMISSION.

The overarching question is whether the lawyer has exercised **reasonable diligence** to determine whether the client signed an Assignment.

- HYPOTHETICAL CONTINUED

Must establish direct communication with the therapy billing office to determine:

1) Whether an assignment form exists, and

2) Whether the client's health insurance has paid

YOU CANNOT DISBURSE THE SETTLEMENT MONEY.

- The lawyer has not done enough under these facts to establish he/she has acted reasonably and in good faith to determine if an assignment exists.
- Rule of Professional conduct 1.15(b)(5)

WHEN IS AN INVESTIGATION SUFFICIENT DO DISBURSE THE SETTLEMENT FUNDS

Assume the lawyer calls, writes & faxes over a period of 5 weeks attempting to get a response about whether there exists an Assignment with the client's signature.

- Assume no response of any kind from the therapy office.
- You have now held the settlement funds in your trust account for 5 weeks.

Under there circumstances, this commentator believes the funds can be disbursed to the client.

YOU EXERCISED REASONABLE DILIGENCE

LEGAL ETHICS OPINION 1865

- Rules of Professional Conduct are rules of reason.
- A lawyer cannot be reasonably expected to hold or preserve funds indefinitely on the possibility that the therapist might respond.

LEGAL ETHICS OPINION 1865

- A lawyer's obligation is to act diligently under Rule 1.3.

- Rule 1.15(b)(4)'s requires the lawyer to "promptly pay or deliver" funds to the client or third party.

- Assume Attorney Receives a Bill From Therapist Showing an Unpaid Bill of $4,000.00, and Lists Dates of Service, but does not mention an Assignment.

What Do You Do Now?

THE BILL DOES NOT REFERENCE CLIENT'S HEALTH INSURANCE.

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- CLIENT SAYS “I NEED THE MONEY”.
- CLIENT SAYS “DO NOT PAY THERAPIST”.
- CLIENT SAYS” I WILL TAKE CARE OF IT LATER”.

- YOU CONFIRM WITH THERAPIST THERE IS NO ASSIGNMENT

- THERAPIST SAYS “YOU HAVE MY BILL. PAY IT IN FULL FROM THE SETTLEMENT”.

§ 8.01-66.2. Lien against person whose negligence causes injury

• If injured by the alleged negligence of another, a treating Va. provider shall have a lien for a just and reasonable charge, but not exceeding:

• $ 2,500 in the case of a hospital or nursing home,

• $ 750 for each physician, nurse, physical therapist, or pharmacy,

• $ 200 for each emergency medical services provider or agency.

HOW DOES A PROVIDER CREATE A STATUTORY LIEN?

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Va. Code § 8.01-66.5
WRITTEN NOTICE REQUIRED FOR LIEN

- WRITTEN NOTICE FROM HEALTHCARE PROVIDER CREATES A LIEN UNDER Va. Code 8.01-66.2

- APPLIES TO TREATMENT IN PERSONAL INJURY CASES

Contents of Written Notice Under Va. Code § 8.01-66.5.

- NAME OF PATIENT
- NAME OF PROVIDER
- AMOUNT OF LIEN
- MAY REQUIRE ITEMIZED CHARGES
  IF MULTIPLE VISITS

PAY THE THERAPIST $750.00.

WARNING

- PAYMENT OF THE STATUTORY LIEN AMOUNT DOES NOT ERASE THE DEBT
- CLIENT STILL OWES THE BALANCE AND MAY BE SUED FOR NONPAYMENT.
- HOWEVER NO FUTHER CLAIM CAN BE MADE AGAINST THE CASE RECOVERY

MORE

- WHAT IF YOU KNOW OF A STATUTORY LIEN THROUGH CORRESPONDENCE FROM THE PROVIDER BUT DISBURSE SETTLEMENT FUNDS ANYWAY?

- IN ADDITION TO PROBABLY RECEIVING A BAR COMPLAINT, IS THERE LIKELY TO BE ANY FINANCIAL PENALTY?

Virginia Code § 8.01-66.6

Insurance Company or Attorney Receiving Notice of Lien Is Personally Liable to the Provider for the Amount of the Lien.

Capped at Maximum Limits in 8.01-66.2.

(no cap if lienholder is a state run facility.