New York State Bar Association

Committee on Professional Ethics

Opinion 760 – 1/27/03

Topic: Retainer agreement – power of attorney; Lawyer settling matter under power of attorney; Lawyer endorsing settlement check on behalf of client under power of attorney

Digest: A lawyer may obtain or use a revocable power of attorney, either in a stand-alone document or as part of the lawyer's retainer agreement, that authorizes the lawyer to settle a case and to endorse the client's name to the settlement check, provided that the lawyer makes full disclosure as to the effect of such power of attorney and provided that (i) the lawyer may only settle a case on terms indicated in advance by the client or if the settlement is submitted to the client for approval, and (ii) a lawyer who endorses a settlement check on behalf of the client must promptly comply with the notice, record keeping and disbursement requirements of DR 9-102.

Code: DR 1-102(A)(1), (4), (5), (6); DR 9-102(B)(4), (C), (C)(1), (D); EC 7-7.

QUESTION

May a lawyer's retainer agreement contain a power of attorney authorizing the lawyer to sign a general release and stipulation of discontinuance for the client upon settling the case, or to endorse a settlement check on behalf of the client? May an attorney use a power of attorney executed separately by the client in favor of the lawyer to sign a settlement agreement or to endorse a

settlement check made out jointly to the lawyer and the client or solely to the client?

OPINION

The Code of Professional Responsibility ("Code") does not expressly prohibit a lawyer from obtaining or using a power of attorney from the client authorizing the lawyer to perform a variety of acts on behalf of the client. Indeed, the relationship between attorney and client is generally considered to be an agency relationship in which the client gives the lawyer authority to act on his or her behalf in connection with the representation. Moreover, there are good reasons why a client might wish to give a general or specific power of attorney to the lawyer. *See*, *e.g.*, N.Y. State 746 (2001) (lawyer with a durable power-of-attorney should not petition for the appointment of a guardian without the client's consent if the client becomes incompetent unless there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests). However, without the client's informed consent the lawyer should never use a stand-alone power of attorney or a power of attorney contained in a retainer agreement to exercise rights or prerogatives reserved to the client under the Code or substantive law.

Authority to Agree to Settlement

Even without a power of attorney, a lawyer is authorized to make many decisions on behalf of the client. For example, the lawyer generally is entitled to make decisions in certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the right of the client. EC 7-7. In civil cases, however, it is for the client to decide whether to accept a settlement offer. EC 7-7; American Law Institute, Restatement (Third) of the Law Governing Lawyers (hereinafter, "Restatement"), § 22, comment *d* (A lawyer may not make a settlement without the client's authorization. A lawyer who does so may be liable to the client or the opposing party and is subject to discipline.) Nevertheless, a client may authorize the lawyer to negotiate a settlement that is subject to the client's approval or to settle a matter on terms indicated by the client. Restatement, § 22, Comment *c*. A retainer agreement is generally signed before the commencement of the representation or within a reasonable time thereafter, before the lawyer has had an opportunity to ascertain the facts of the case and the willingness of the parties to settle. *See, e.g.*, 22 NYCRR Part 1215 (Joint Order of Appellate Divisions establishing requirement to provide written letter of engagement or obtain retainer agreement). Consequently, it is unlikely that at the time of entering into the retainer agreement the lawyer would have been able to make the disclosures necessary to validate using the settlement authority. Therefore, if the lawyer obtains a general power of attorney in advance of the settlement, the lawyer should not use the power to settle the matter without obtaining more explicit instructions from the client after the lawyer and the client

have discussed the merits of the case, the client's willingness to settle and the settlement terms that are acceptable to the client.

Court rules may require a lawyer to appear at a settlement conference with the authority to settle a matter. *See, e.g.*, 22 NYCRR 202.19(b)(3) (Uniform Rules - Trial Courts; compliance conference to explore potential settlement); NYCRR 202.16(f)(2)(iii) and (3) (matrimonial matters); 22 NYCRR 600.17(e)(1st Dep't), 22 NYCRR 670.4(a)(2d Dep't) and 22 NYCRR 800.24-b (3d Dept) (all civil matters); Federal Rules of Civil Procedure 16(a) ("At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.") While the lawyer may comply with such rules by appearing with the client, the lawyer may also comply by obtaining express settlement authorization from the client. We see nothing unethical about the lawyer obtaining such authorization in advance. We believe, however, that it would be inconsistent with the Code for the lawyer to use such settlement authorization without obtaining explicit instructions from the client after the lawyer and the client have discussed the merits of the case, the client's willingness to settle and the settlement terms that are acceptable to the client.

Any power of attorney granted to the lawyer for settlement purposes, whether general or specific, must be revocable. *See Hayes v. Eagle-Picher Indus., Inc*. 513 F.2d 892 (10th Cir. 1975); *cf.* Model Rule 1.2, comment 5:

> An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked ... to surrender the right ... to settle litigation that the lawyer might wish to continue.

See also Restatement, § 22(3) ("Regardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make the decisions described in Subsection (1) [including whether and on what terms to settle a claim]"); Restatement, § 22, comment *d* (A lawyer may not enter into an irrevocable contract that the lawyer will decide on the terms of settlement. A contract that the lawyer as well as the client must approve any settlement is also invalid.)

Settlement Checks

It is not per se unethical for a lawyer to obtain a power of attorney that would authorize the lawyer to sign a settlement check on behalf of a client. Indeed, it will usually be convenient in contingent fee matters for the proceeds of a settlement check to be deposited into the lawyer's trust account for further disposition and accounting. *See*, *e.g.*, *Rohrbacher v. Bancohio Nat'l Bank*, 171

A.D. 2d 533, 567 N.Y.S.2d 431 (1st Dep't 1991) (retainer agreement stated "We hereby authorize you to endorse my name on any check or draft obtained herein, if said check or draft is deposited to your escrow-trust account pending distribution of the proceeds pursuant to the terms of this retainer").

Nevertheless, neither a general power of attorney in favor of the lawyer nor a specific power of attorney authorizing the lawyer to sign settlement checks on behalf of the client would override the provisions of the Code that apply to client money in the possession of the lawyer. In particular, DR 9-102(B)(4) provides that all funds belonging in part to the client – which would include the proceeds of a settlement or judgment where the lawyer claims part of the proceeds as a fee or for reimbursement of expenses -- must be deposited in the lawyer's attorney trust account, and the lawyer may not withdraw the part that the lawyer claims to the extent that the client disputes the lawyer's entitlement thereto:

> Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm shall be kept in such special account or accounts [the attorney trust account], 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 or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Moreover, under DR 9-102(C) the lawyer must promptly notify the client of the receipt of funds in which the client has an interest and, under DR 9-102(D), the lawyer must properly account for all such funds.

We note that the Appellate Division, Second Department has upheld a disciplinary action against an attorney for using an irrevocable power of attorney in a personal injury action to authorize him to endorse a settlement check. *In re Stanley S. Hansen*, 108 A.D.2d 206, 488 N.Y.S.2d 742 (2d Dep't 1985). The respondent in that case had received a letter of admonition that the routine inclusion of an unconditional power of attorney in his retainer agreements in no-fault collection cases "represented over-reaching and created a dangerous possibility of abuse." We do not read this case as prohibiting any use of a power of attorney to authorize a lawyer to endorse the client's name on a settlement check. Rather, we believe the court was objecting to the irrevocable nature of the power of attorney used by the respondent:

> Notwithstanding the fact that he may (as the Special Referee found) have intended to delete the word "irrevocably" therefrom, there is nothing in the record which would even tend to support his decision to procure an unconditional power of attorney from the client in the first instance.

We are not aware of any cases in New York holding that a revocable power of attorney authorizing a lawyer to sign a settlement check would be per se unethical.

We note that it is a common practice in certain lawsuits – for example, where the defendant's potential liability is the subject of an insurance policy – for the check paying a judgment or settlement to be made out to both the plaintiff and his or her lawyer. This is particularly true in personal injury actions, where plaintiff's counsel may be charging a contingent fee and may have a lien on the proceeds. As the Second Circuit Court of Appeals noted in *Hafter v. Farkas*, 498 F.2d 587 (2d Cir. 1974), drawing a settlement check in the names of both the plaintiff and his or her attorney is a way for the debtor to ensure that both the creditor and his or her lawyer are made aware of the satisfaction. *Id*. at 590.

The regulations of the New York State Insurance Department do not mandate that settlement checks be made out to both the plaintiff and his or her attorney. However, Regulation 64 of the Insurance Department provides that, when an insurer is paying $5,000 or more in settlement of a third-party liability claim to a natural person, it must mail written notice to the claimant at the same time payment is made to the claimant's attorney or other representative. 11 NYCRR §216.9(a). According to an interpretation issued by the office of the General Counsel of the Insurance Department, this provision, which was adopted in 1988, was added to the Insurance Department's Rules at the request of the Clients' Security Fund (now the Lawyers' Fund for Client Protection), which saw it as a necessary response to documented instances of theft where an attorney would forge a client's endorsement on a check and pocket the proceeds. *See* N.Y. Department of Insurance, NY General Counsel Opinion 4-1-2002, available on the Insurance Department's website at http://www.ins.state.ny.us/rg204011.htm (last visited January 8, 2003). Thus, the regulations of the Insurance Department are consistent with DR 9-102. We do not believe that the existence of the Insurance Department regulation obviates the need for the lawyer to give the notice required by DR 9-102(C).

For all these reasons, we believe that it is not per se unethical for an attorney to seek such a power of attorney. If the lawyer uses this authority promptly to cash the check and to deposit the proceeds in the lawyer's trust account, and (i) promptly notifies the client of the receipt of the funds in accordance with DR 9-102(C)(1), (ii) maintains complete records of such funds in accordance with DR 9-102(D), including the deposit and disbursement thereof, and (iii) promptly pays to the client as requested any funds the client is entitled to receive, then no violation of the Code would have occurred. *See also* Wolfram, *Modern Legal Ethics*, Section 4.8, footnote 21 (The need to renegotiate the instrument promptly in order to protect against non-payment argues for obtaining the client's signed permission to sign the client's name to the check as designated endorsee.)

Prompt deposit of the endorsed check into a trust account fully complies with the safekeeping requirements of DR 9-102. If, on the other hand, the lawyer uses the power of attorney to endorse the client's name on the check and does not promptly notify the client and otherwise comply with DR 9-102, then the lawyer will have violated not only DR 9-102, but also DR 1-102(A)(1) (lawyer shall not violate a disciplinary rule), DR 1-102(A)(4) (lawyer shall not engage in conduct involving deceit), DR 1-102(A)(5) (conduct prejudicial to the administration of justice), and DR 1-102(A)(7)(conduct that adversely reflects on fitness to practice law). The lawyer will therefore be subject to discipline and possibly a law suit for conversion of the client's funds. *See, e.g.*, *In re Theodore L. Malatesta*, 124 A.D.2d 62, 511 N.Y.S.2d 246 (1st Dep't 1987). *Malatesta* involved an attorney who converted the proceeds of a settlement check by signing a settlement check made out to the attorney and client. The lawyer argued that he was authorized to do so based on a handwritten notation on the retainer agreement which stated "[subject to] full authority to settle, sign release and endorse check." Although the court found that the client had not added the language to the retainer agreement, it concluded that, even if the language had been agreed to by the client, it did not excuse the lawyer's conversion of the funds.

CONCLUSION

A lawyer may obtain and use a revocable power of attorney, either in a stand-alone document or as part of the lawyer's retainer agreement, that authorizes the lawyer to settle a case and to endorse the client's name to the settlement check, provided that the lawyer makes full disclosure as to the effect of such power of attorney and provided that (i) the lawyer may only settle a case on terms indicated in advance by the client or if the settlement is submitted to the client for approval, and (ii) a lawyer who endorses a settlement check on behalf of the client must promptly comply with the notice, record keeping and disbursement requirements of DR 9-102.

(25-02)