

speaking of ethics

By Heather Bupp-Habuda

Lawyer's Obligations When a Property Dispute Arises



In this jurisdiction, charges of misappropriation arise most often under Rule 1.15(a) [of the D.C. Rules of Professional Conduct]. Indeed, until this case there have been only two reported decisions regarding the obligations of an attorney when 'a dispute arises concerning the respective interests among persons claiming an interest in . . . property,' Rule 1.15(c): *In re Haar*, 667 A.2d 1350 (D.C. 1995) (*Haar I*), and *In re Haar*, 698 A.2d 412 (D.C. 1997) (*Haar II*).¹ *In re John H. Midlen*, 885 A.2d 1280, 1286 (D.C. 2005).

When the D.C. Bar Legal Ethics Committee issued Opinion 293 (1999, revised 2000) (disposition of client property when ownership is in dispute), *Haar I* and *II* were the case law directly on point in the District of Columbia. Both *Haar* decisions involved the predecessor Disciplinary Rule (DR) 9-103(A)(2). The current version of Rule 1.15(c) is identical in meaning to DR 9-103(A)(2), even though the language more clearly states:

the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

In *Midlen* the lawyer was retained to represent a client in a royalty distribution process. The Board on Professional Responsibility found that the attorney misappropriated funds because he repeatedly deducted attorney's fees from the escrowed royalty payments when he could not reasonably have doubted that the client disputed his entitlement to the fees. That is the exact situation in which Rule 1.15(c) imposes a duty on the lawyer to keep the funds separate until

the dispute is resolved. The District of Columbia Court of Appeals agreed with the board's finding of misappropriation.

Initially problematic for attorney Midlen was the ambiguity in his retainer agreement with his client about the deduction of attorney's fees. The court described the agreement as "hardly a model of clarity." *Midlen* at 1287. Later the interaction between Midlen and his client is described as "factually complex," and at one point centered on itemization complaints. *Id.* at 1289.

A legal fee dispute grew between Midlen and his client during the course of the representation, as did Midlen's misconduct and dishonesty. *See id.* at 1283-85. The totality of Midlen's actions toward his client indicates that he "accorded a higher priority to the collection of his fee than to . . . complying with professional standards." *Id.* at 1288, 1292; *In re James*, 452 A.2d 163, 170 (D.C. 1982).

This case is significant because, in part, it is the first misappropriation case to reach the court that arises from a dispute about ownership of entrusted funds and failure to segregate them under Rule 1.15(c), as opposed to reckless or intentional misappropriation. *Midlen* at 1288; *cf. In re Berryman*, 764 A.2d 760 (D.C. 2000). "The fact that, as it turned out, [Midlen] was contractually entitled to more than the amounts he withdrew 'does not change the nature of the disagreement . . . because at the moment he withdrew the funds, the client had not acknowledged he had earned and was entitled to at least that amount' [of attorney's fees]." *Midlen* at 1288; *Haar I* at 1353. An attorney subject to Rule 1.15(c) is not permitted to gamble that his or her claim to ownership of funds will be upheld. *Midlen* at 1288.

However, if Midlen had sought to resolve his legal fee dispute in an ethical manner, the dispute might have been effectively resolved through the D.C. Bar Attorney/Client Arbitration Board (ACAB) in a relatively short period of

time. A fee dispute processed by the ACAB is generally resolved in a matter of months, compared with Midlen's years of disciplinary proceedings and eventual suspension from the practice of law in the District of Columbia.

Lawyers practicing in the District of Columbia should, according to comment 15 of Rule 1.5, "conscientiously consider submitting to" arbitration or mediation established for resolution of fee disputes with clients. Rule 1.6(d)(5) encourages the lawyer to minimize disclosure of client confidences in a fee collection action. Arbitration through the ACAB furthers the purposes of Rule 1.6(d)(5) by protecting the client from a public airing of confidential matters. *See* D.C. Bar Legal Ethics Comm. Op. 218 at 2 (1991). Information about the ACAB is available at www.dcbar.org/acab.

D.C. Bar Legal Ethics Opinion 218 (1991) instructs an attorney about the proper language to include in a legal fee agreement providing for mandatory arbitration of fee disputes through the ACAB. Opinion 218 also specifies the procedures an attorney should follow to inform a client about his or her decision whether to accept the fee agreement with a mandatory arbitration clause. A client must be advised in writing of the availability of counseling about mandatory arbitration by the staff of the ACAB.

Without the required language in the written fee agreement and client consent in writing, when a fee dispute arises a client's decision whether to arbitrate the fee dispute will be voluntary, not mandatory. For additional assistance with writing an unambiguous fee agreement, consult the written fee agreement checklist available as a publication of the D.C. Bar Practice Management Advisory Service at www.dcbar.org/pmas.

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