

## **Another Look at Letters of Protection**

**by**  
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It is unprofessional conduct for a lawyer to refuse to honor a letter of protection signed by the lawyer. Although this has long been the policy of the Office of Lawyers Professional Responsibility (OLPR) and has been discussed previously (see "Letters of protection: keeping your client's promise," in the March 19, 2001, edition of *Minnesota Lawyer*), a recent complaint filed with the office suggests that confusion remains on this issue.

The purpose of this article is to remind lawyers of their professional obligation regarding letters of protection and to explain the basis for that obligation.

### **A written promise**

Letters of protection are the lawyer's written promise to a third party to protect that party's interests in the settlement of the client's case. A recent complaint filed with the OLPR concerned a client who had been injured in an automobile accident and received extensive chiropractic and rehabilitation services.

The client retained a lawyer to pursue a claim against the driver of the other vehicle. The parties agreed to submit the matter to arbitration. The client had earlier signed an agreement with the chiropractor promising that the chiropractor would be paid directly from any settlement proceeds. The chiropractor forwarded the agreement to the lawyer who then signed it, promising that the lawyer would protect the chiropractor's interests.

However, when the case was resolved the lawyer refused to honor the letter of protection and paid the award directly to the client. When the client did not pay the chiropractor, the chiropractor filed an ethics complaint with the OLPR.

The director of the OLPR referred the matter to a District Ethics Committee (DEC) for investigation. While finding that the lawyer had signed the agreement and had released the funds to the client contrary to the earlier pledge to the chiropractor, the DEC recommended that the director not pursue discipline. The DEC reasoned that the agreement was a contractual one between the lawyer and the chiropractor and the

chiropractor had other forums in which to pursue the claim. While the director gives great weight to DEC recommendations, he occasionally departs from those recommendations for the purposes of maintaining uniformity in the attorney disciplinary system. This was one such instance.

### **A negative effect**

At least as far back as 1987 (see "Summary of Admonitions," in the March 1987 edition of *Bench & Bar*), the OLPR has taken the position that a lawyer's failure to honor a letter of protection can constitute unprofessional conduct.

Letters of protection provide assurance to third parties (such as healthcare providers) that their interests will be protected in the event of the settlement of the client/patient's legal claim. This enables the client to continue receiving treatment that he or she might not be able to receive if the healthcare provider were to require immediate payment for continuing treatment. If lawyers were able to refuse to honor their pledges to healthcare providers with impunity, it would have a deleterious effect on the ability of clients to receive such treatment.

The director has noted that such conduct violates Rule 8.4(c) of the Minnesota Rules of Professional Conduct (MRPC), prohibiting "misrepresentations," and Rule 8.4(d), prohibiting conduct that is "prejudicial to the administration of justice."

### **Potential conflict**

By signing a letter of protection the lawyer is taking a position that is potentially in conflict with the client's stated interest. That is why it is required, prior to signing any such agreement, that the lawyer discuss the conflict with the client and obtain the client's consent.

In the case discussed above, when the lawyer initially explained the possible conflict with the client, the client refused to consent to having the lawyer sign the letter of protection. However, when the chiropractor stated that he would not continue treatment without the letter of protection, the client waived the conflict of interest and instructed the lawyer to sign the letter of protection.

After a favorable ruling at arbitration, the lawyer and the client took the position that while the arbitrator had awarded additional benefits, none of the benefits awarded were specifically for the services provided by the chiropractor. At the time she signed the letter of protection the lawyer added language stating that she would honor the chiropractor's claim "as provided by law." The lawyer reasoned that she was permitted to release the funds to the client since the chiropractor was only to be paid as provided by law, and that meant that the charges had to be reasonable and necessary.

The DEC agreed that if the chiropractor's charges were excessive, the lawyer had not acted unethically in releasing the funds. However, the analysis of the lawyer and the DEC ignores the fact that the lawyer had agreed to protect the chiropractor's interests. Those interests were in seeing that the chiropractor was paid from the settlement proceeds. So while the lawyer's determination of the chiropractor's ultimate entitlement to payment may or may not be correct, the lawyer's handling of the funds clearly was not.

### **Multiple duties**

Once there was a dispute between the chiropractor and the client over whether the chiropractor was entitled to payment, the lawyer was faced with precisely the type of situation that had necessitated the conflict discussion with her client. Obviously, the lawyer owed a fiduciary duty to the client. However, by signing the letter of protection, the lawyer also had a duty to protect the interests of the chiropractor.

When there was a dispute over payment, the lawyer should have held the funds in her trust account until the client and the chiropractor reached an agreement resolving the chiropractor's claim or until there was an adjudication as to the chiropractor's entitlement to benefits. (The arbitrator's decision was not binding on the chiropractor as he was neither a party to the arbitration nor had he consented to be governed by its outcome.)

The lawyer's action in unilaterally settling the question of the chiropractor's entitlement to payment by sending the funds to the client was unprofessional conduct. By failing to honor her letter of protection, the lawyer violated Rules 8.4(c) and (d) of the MRPC, and exposed herself to professional discipline.