



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5(c) and 1.15. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion Number 88-4
February 9, 1989

Topic: Missing client; settling case, signing draft, deducting attorney fee for such client; general power of attorney in retainer agreement

Digest: Where client has disappeared or cannot be located it is improper for a lawyer to settle his case, sign a settlement draft, or deduct fee without authority from the client; power of attorney to settle in retainer agreement must be narrowly drawn.

Ref: In re Walner, 119 Ill.2d 511, 519 N.E.2d 903, 116, Ill. Dec. 688 (1988)
Rules 9-102(b), (c) (4); 2-106(c) (3)

FACTS

A negligence case against a public transit authority was "settled" by plaintiff's attorney. The plaintiff's attorney received a draft from the public transit authority for the amount agreed upon; however, the client now cannot be located to sign the draft.

QUESTIONS

1. In a case where the client has disappeared and can no longer be located, is it proper for

the lawyer to:

- (a) settle the case on behalf of the absent client?
 - (b) sign the settlement draft on behalf of the absent client, deduct attorney's fees and hold the remaining funds in an interest bearing escrow account until the client is found?
2. Is it proper to include in a retainer agreement a general power of attorney giving the attorney authority to settle the client's case without any further contact or consent by the client?

OPINION

Improper to Settle an Absent Client's Case Without Authority

It is improper for an attorney to settle a client's case without authority from the client. It is, likewise, improper for an attorney to sign a settlement draft on behalf of the client, and deduct the attorney's own fee unless the attorney has authority to do so from the client.

The recent case of In re Walner, 119 Ill.2d 511, 519 N.E.2d 903, 116 Ill.Dec. 688 (Ill.1988) is directly on point. In Walner, the attorney represented four plaintiffs in connection with an automobile accident. When settlement offers were received, one plaintiff could no longer be located. The attorney concluded that one of the other plaintiff's had authority to approve a settlement on behalf of the missing plaintiff, but no basis for that authority was shown. The retainer agreement provided that "no settlement will be made without the consent of the injured party." Since the plaintiff could not be located, the attorney had both a release and the settlement check for \$400 signed in the plaintiff's name (without any indication it was not the plaintiff himself signing), deposited one-third in an escrow account, used one third for the medical expenses, and took one third for attorney's fees. After the settlement was effected, the client was located and sent papers to sign. However, he disappeared again without signing them.

On these facts, the Illinois Supreme Court found that the attorney had acted improperly in settling the case without authority. It rejected the recommendation of the Review Board that the attorney be censured. The court concluded that "the case law and ethical rules provided sufficient guidance" to the attorney in this instance.

This court has consistently condemned the activities of settling a claim without the client's consent and of signing a client's name without authority...For an attorney to settle a personal injury case and direct the cashing of settlement checks without authorization by his client is itself an impropriety requiring discipline. 591 N.E.2d 903 at 909

The court further found that the attorney had withdrawn his attorney's fees without proper notice to the client, a violation of Disciplinary Rule 9-102(b). Although the Hearing Board found only a technical violation of the rule, the Supreme Court declined to label that violation as "merely technical."

This was not a case of mere oversight. The respondent had not been able to notify his client of the settlement. Until Jordan [the client] knew of the settlement and expressed approval of his fee, it was highly improper for the respondent to withdraw his fee. Although the fee in [this] case appears to be appropriate, that does not make the violation merely technical. The respondent had a duty to preserve his client's funds, and this he failed to do. 519 N.E.2d 903 at 908.

The court in Walner also determined that when the client was located after the settlement had been effected, that the attorney was improperly tardy in waiting nine months to notify him of the settlement, providing him with a closing statement, and offering to pay him the settlement proceeds in violation of Rule 9-102 (c) (4).

If Settlement Authorized Prior to Disappearance, Additional Authority Needed for Attorney to Sign Documents for Client and Deduct Fee

In connection with the current inquiry; if the settlement was in fact authorized and the client then disappears, the attorney needs additional authority (whether from the retainer agreement or elsewhere) to sign releases, drafts, or other settlement documents on behalf of the client, and to deduct his contingent fee from the settlement proceeds.

Ordinarily Improper to Include General Power of Attorney in Retainer Agreement

The attorney in Walner was also charged with improper conduct in settling the cases of two other plaintiffs who could not be located when a settlement offer was received. In this instance, however, the retainer agreement gave the attorney a general power of attorney to do what was needed to resolve the case, including a power to sign drafts and releases. Accordingly the court held that the attorney had not settled these cases without authority.

As to the use of such a power, the court noted that "although that particular form of power of attorney may be subject to abuse," there was no evidence that the respondent attorney abused that authority in the current case. However, the court went on to state that: "This court has previously condemned the procurement by attorneys of a general authority to settle, particularly when the attorney is hired on a contingent basis."

"To prevent any conflict of influence and appearance of impropriety" such general powers should not be used. "Any power of attorney should have been narrowly drawn to limit the attorney's power to settle within a certain range of options and for a certain time period." 519 N.E.2d 903 at 908

In rejecting the attorney's reliance on the power of attorney to justify settling the two absent client's cases, the Review Board (who recommended suspension for one year) noted that "the disappearance of a client could be the result of death or disability, circumstances that would terminate a power of attorney." The Board "seriously questions the use of powers of attorney

in litigation, particularly in the settlement of personal injury cases, and believed that prohibiting their use would be the only way of ensuring that clients are consulted regarding disposition of their claims and that they received prompt payment of their proceeds." The Court did not prohibit their use, but indicated that if used, they must be limited as to time and narrowly drawn.