

78353-5

FILED
JUL 11 2006

CLERK OF SUPREME COURT
STATE OF WASHINGTON

THE WASHINGTON STATE SUPREME COURT

CASE NO: 78353-5

SAYED ZIA EHSANI, a single man, and GUITTY ZAMANI, a single woman,

Plaintiffs/Respondents,

v.

THE MCCULLOUGH FAMILY PARTNERSHIP, a Washington partnership, et al.,

Defendants

and

DAVID D. CULLEN, an individual,

Petitioner

WASHINGTON STATE BAR ASSOCIATION'S *AMICUS CURIAE*
MEMORANDUM IN SUPPORT OF PEITITION FOR REVIEW

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I. INTRODUCTION

The Washington State Bar Association (“WSBA”) files this Memorandum in Support of the Petition for Review because the Court of Appeals’ decision in this case has a potentially profound impact on the practice of law in the State of Washington and creates a practical and ethical conundrum for attorneys practicing law in this State.

II. STATEMENT OF THE CASE

Attorney David D. Cullen represented The McCullough Family Partnership, David E. McCullough, Chong R. McCullough, Edward F. McCullough, and The McCullough Group, Inc., the defendants in the lawsuit underlying this appeal (collectively, “McCullough”). CP 190-91. Following trial, the trial court entered judgment against plaintiff Sayed Zia Ehsani and in favor of McCullough. CP 139-42.

The trial court awarded McCullough \$106,410.50, which included \$97,459.00 for attorneys’ fees and \$8,951.50 for expert accountant fees. CP 139, 141. The judgment specifically listed McCullough as the judgment creditor. CP 139. The judgment further provided: “The \$77,900.00 (plus 38.95% of accrued interest) to be paid over to Defendants McCullough under the preceding paragraph 10 of this judgment shall be paid by escrow *directly to the Defendants McCulloughs through their attorney of record, David D. Cullen, by check made payable*

to the DAVID D. CULLEN ATTORNEY CLIENT TRUST ACCOUNT.”
CP 142. (emphasis added).

Mr. Ehsani paid \$77,900 into Mr. Cullen’s trust account as directed by the court. CP 38, 260, 274. The client, McCullough, directed Mr. Cullen to disburse the \$77,900 as follows: to Frost & Company; David McCullough; ABC Legal Messengers; the Court of Appeals; David D. Cullen, Attorneys & Counselors. CP 274. Mr. Cullen disbursed the funds from his trust account as directed by McCullough. CP 274.

Mr. Ehsani appealed the trial court’s decision in favor of McCullough. *Ehsani v. McCullough Family P’ship*, 2002 WL 31106405 (Wash. App. 2002) (“*Ehsani I*”). He did *not* post a supersedeas bond. *See Ehsani v. McCullough Family P’ship*, 2005 WL 3462780, *2 (“*Ehsani II*”). After the funds were disbursed from Mr. Cullen’s trust account pursuant to his client’s instructions, the Court of Appeals overturned the trial court’s entry of judgment in favor of McCullough and remanded the case. *See Ehsani I*, 2002 WL 31106405.

On remand, Mr. Ehsani filed a motion seeking restitution from Mr. Cullen of the \$77,900 that had been deposited in Mr. Cullen’s trust account in partial satisfaction of the judgment entered in favor of McCullough. CP 158-60. The trial court refused to grant this relief, and Mr. Ehsani filed a second appeal of this decision, as well as other trial court decisions made on remand. CP 292, 298.

On appeal, Mr. Cullen argued, in part, that “he did not control the funds because they were paid into his trust account and some were eventually distributed to the accountant, [the Court of Appeals], and a messenger service.” *See Ehsani II*, 2005 WL 3462780, *3. The Court of Appeals held that Mr. Cullen “had authority to control the funds” under RPC 1.14(a)(2), and required him to reimburse Mr. Ehsani for the *full* \$77,900 deposited into Mr. Cullen’s trust account, which included the amounts that were disbursed to persons and entities other than Mr. Cullen’s law firm, including the Court of Appeals, the McCullough’s accounting experts, and legal messengers. *Id.*; CP 274.

III. ARGUMENT

The Court of Appeals’ decision requires attorneys to choose between upholding their ethical obligation to follow their clients’ directives with regard to the disbursement of proceeds held in the attorneys’ trust account or becoming *de facto* guarantors of the funds should the opposing party appeal without following the supersedeas bond procedure. This unconscionable dilemma will have a far-reaching impact on the handling of client trust accounts by lawyers in the State of Washington and will increase conflicts between attorneys and clients throughout the State. As a result, this case “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

A. **The Court of Appeals' Decision Conflicts with State Ethics Opinions and Creates a Substantial Likelihood of Increasing Conflicts of Interest Between Attorneys and Clients.**

According to the Court of Appeals, an attorney who deposits funds awarded as a judgment to her client into her trust account has “authority to control the funds . . .” *Ehsani*, 2005 WL 3462780 at *3. This view reflects an incomplete understanding of RPC 1.14 and conflicts with Supreme Court decisions and ethics opinions interpreting the rule.

RPC 1.14, entitled “Preserving Identity of Funds and Property of a Client,” provides:

(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, 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, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) A lawyer shall:

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(emphasis added). When funds deposited in a trust account belong “in part to a client and in part presently or potentially to the lawyer or law firm” the attorney or law firm may withdraw funds when they are due, unless the attorney’s right to payment of the funds is disputed by the client. RPC 1.14(a)(2). However, “when the client is entitled to receive” funds from a trust account, an attorney *must* promptly distribute funds at the client’s request. RPC 1.14(b)(4). Thus, while an attorney has a potential right to retrieve funds from a trust account to cover costs and fees incurred on behalf of the client, the attorney has no right to access client funds if the client disputes the attorney’s fees or “when the client is entitled to receive” the funds from the trust account.

Once an attorney deposits funds belonging to a client into his or her trust account, the attorney is “responsible for ensuring that the funds [are] distributed in accordance with [the client’s] wishes.” *Hetzel v. Parks*, 93 Wn. App. 929, 940, 971 P.2d 115 (1999). “RPC 1.14 provides the minimum requirements for a lawyer’s fiduciary responsibility when handling clients’ funds and property.” *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 863, 64 P.3d 1226 (2003). It “requires

more than merely keeping track of or not stealing client funds.” *Id.* at 864. “RPC 1.14 encompasses the extreme care, caution, and good judgment required of a lawyer when handling client’s property. A lawyer has the highest fiduciary duty to steward his client’s funds with the utmost care, transparency, and prudence.” *Id.* at 865.

Ethics opinions interpreting RPC 1.14 consistently have held that a lawyer may not ignore the client’s directions with regard to disbursing or encumbering client funds held in the attorney’s trust account, even in cases in which the attorney believes he or another person or entity has earned the funds. *See, e.g.*, Informal Opinion 1674 (1996) (when payments are received from a judgment debtor on behalf of an unidentified client, “the money should be placed in a separate interest-bearing account” and “[w]ithout a fee agreement with [the] client, [the attorney] should take no fees out of the money paid by the judgment debtor”); Informal Opinion 1428 (1991) (attorney holding fees owing to a Canadian lawyer may not disburse the fees when client has instructed attorney not to pay); Informal Opinion 1026 (1986) (“where your client had previously signed a medical release which provided that you were authorized to pay the medical provider from client funds, and now the client has instructed you not to pay those funds, you are obligated to follow your client’s instructions”); *see also* Formal Opinion 185 (1990); Informal Opinion 1852 (1999); Informal Opinion 1477 (1992); Informal

Opinion 1320 (1989); Informal Opinion 1287 (1989); Informal Opinion 1166 (1988); Informal Opinion 1101 (1987); Informal Opinion 1037 (1986); Informal Opinion 917 (1985).¹

The Court of Appeals' decision is at odds with RPC 1.14. The Court of Appeals held that, because Mr. Cullen's fees were greater than the amount deposited in his trust account in partial satisfaction of the judgment, he had the right to control and disburse the fees. This decision overlooks the fact the entire judgment, including the portion attributed to attorneys' fees and costs, was to be paid "directly to Defendants McCulloughs" via the trust account and that McCullough had expressly directed Mr. Cullen to make disbursements of the judgment proceeds to entities other than his law firm. Mr. Cullen was ethically bound to comply with his clients' directives regarding the trust funds. Although Mr. Cullen had a potential claim against his clients for his fees, he certainly did not err in following his client's directions regarding distribution of the funds from his trust account.

By holding Mr. Cullen liable for all of the judgment funds placed in his trust account, including the portion distributed to entities other than his law firm, the Court of Appeals created an ethical conundrum and an inherent conflict between attorneys and their clients when judgment

¹ All ethics opinions are available on www.wsba.org.

proceeds are held in an attorney's trust account. If an attorney and his or her law firm may be held personally liable for any funds disbursed from the trust account should the case be overturned on appeal, the attorney develops a personal stake in determining how, or if, the funds are distributed. When the client instructs the attorney to pay out the funds, the attorney will be cognizant of the fact that obeying the client's instructions could make the law firm responsible for repaying the funds—including funds paid to the client and third parties—should the case be overturned on appeal. This creates an untenable dilemma.

The decision by the Court of Appeals essentially makes the attorney a *de facto* guarantor of the judgment proceeds if the opposing party fails to follow the supersedeas bond procedure on appeal. This creates a direct and inherent conflict between the client's best interests and the best interests of the attorney when it comes to disbursement of judgment proceeds. The Court of Appeals' decision provides no guidance to attorneys with regard to their ethical obligations in this situation. If the funds belong to the client, RPC 1.14 requires that the attorney follow the client's instructions in distributing the funds; however, the Court of Appeals' decision makes it impossible for the attorney to do so without potentially exposing his or her firm to liability for the judgment. The decision creates an unsound public policy by greatly increasing the

likelihood of attorney-client conflicts of interest with regard to money held in attorney trust accounts.

B. The Ethical Problems Caused by the Court of Appeals' Decision Are of Substantial Public Interest and Should Be Addressed by the Supreme Court.

A case is appropriate for review by this Court if it “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). This Court has held that cases implicating the Washington State justice system and attorney ethics involve matters of substantial public interest. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (holding that Court of Appeals’ decision that prosecutor’s circulation of a memorandum to trial court judges constituted *ex parte* communication “present[ed] a prime example of an issue of substantial public interest” because it had “the potential to affect” subsequent Pierce County sentencing hearings involving DOSA); *In re Disciplinary Proceeding Against Bonet*, 144 Wn.2d 502, 513, 29 P.3d 1242 (2001) (finding that whether “a prosecuting attorney may [ethically] offer an inducement to a defense witness not to testify at a criminal proceeding” was an issue of substantial public interest).

Here, the Court of Appeals’ decision will have a far-reaching impact on attorney-client relationships, attorneys’ duties under RPC 1.14, and attorney-client conflict throughout the State. If attorneys are to be held liable for repaying the funds disbursed to their clients, third parties,

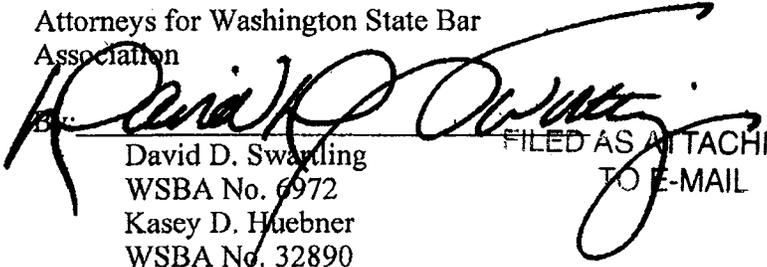
and themselves following a successful appeal, they need guidance from this Court regarding their duties to their clients and application of Washington's ethical rules.

IV. CONCLUSION

The Court of Appeals has created an ethical conundrum for attorneys licensed to practice law in the State of Washington by misconstruing attorneys' duties relating to trust accounts and creating the potential for direct conflicts of interest between attorneys and clients throughout the State. Unless the Supreme Court addresses the Court of Appeals' decision, Washington attorneys will be left without guidance concerning their responsibilities with regard to judgment proceeds deposited into their trust accounts on behalf of their clients.

DATED: June 27, 2006.

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BY C. J. MERRITT
Bar

CLERK

Debra A. Turner hereby certifies as follows:

1. On June 28, 2006, I caused the *Washington State Bar Association's Motion to File Amicus Curiae Memorandum in Support of Petition for Review*, and the *Washington State Bar Association's Amicus Curiae Memorandum in Support of Petition for Review* to be served on the following counsel by giving a copy of the same to ABC\LMI Legal Messengers for service that same date upon the following:

Christopher I. Brain
1700 Seventh Avenue
Suite 2200
Seattle, Washington
Attorney for David D. Cullen

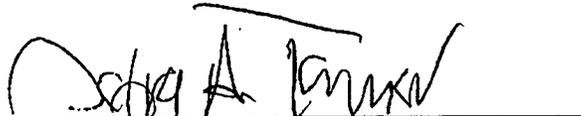
Helmut Kah
16818 – 140th Avenue NE
Woodinville, Washington
Attorney for Guitty Zamani

2. On June 28, 2006, I caused the *Washington State Bar Association's Motion to File Amicus Curiae Memorandum in Support of Petition for Review*, and the *Washington State Bar Association's Amicus Curiae Memorandum in Support of Petition for Review* to be served on the following Pro Sec Plaintiff by giving a copy of the same to the United States Postal Service, overnight express postage prepaid at Seattle, Washington for next day delivery upon the following:

Sayed Zia Ehsani
23400 Maestro Place

West Hills, CA 91304
Plaintiff Appearing Pro Se

DATED this 28th day of June, 2006.

A handwritten signature in black ink, appearing to read "Debra A. Turner", written over a horizontal line.

Debra A. Turner

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