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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Andrew Berrey,

10 Plaintiff,

11 v.

12 Plaintiff Investment Funding, LLC, et al.,

13 Defendants.
14

No. CV-14-00847-PHX-BSB

ORDER

15 Defendant Injury Assistance, LLC (Injury Assistance) has filed a Motion to
16 Disgorge Michael Love's Attorney Fees. (Doc. 79.) Michael Love (Love) is counsel for
17 Plaintiff Andrew Berrey (Berrey), who opposes the motion. (Doc. 80.) For the reasons
18 set forth below, the Court denies the motion.

19 **I. Background**

20 This is an interpleader action in which the parties assert conflicting claims to
21 settlement proceeds that Berrey received in a personal injury action. (Doc. 15.) Berrey
22 deposited the settlement proceeds into the Court's registry on June 23, 2014. (Doc. 25.)
23 On October 27, 2014, Berrey, Injury Assistance, and Defendants Plaintiff Investment
24 Funding, LLC (PIF) and Scottsdale Healthcare Corp., filed a Joint Stipulation for Entry
25 of Judgment asking the Court to enter partial judgment in favor of Berrey for payment of
26 his attorneys' charging lien for \$11,549.98. (Doc. 62.) The Court granted the stipulated
27 motion and ordered that \$11,549.98 be disbursed from the interpleaded funds to Berrey's
28 attorneys, and judgment was entered for Berrey in this amount. (Docs. 63, 64.)

1 Injury Assistance now asks the Court to order Berrey’s attorney, Love, to disgorge
2 the attorney’s fees that the Court previously ordered disbursed based on the parties’ joint
3 stipulation. (Doc. 79.) The motion seeks disgorgement based on broad theories,
4 including Love’s alleged misconduct in obtaining the joint stipulation for disbursement of
5 his attorney’s fees from the settlement funds “under false pretenses,” Love’s alleged
6 conflict of interest in representing Berrey in this case and representing PIF in an unrelated
7 case in state court, and Love’s alleged violation of fiduciary duties to Berrey and non-
8 clients, including Injury Assistance. (Doc. 79; Doc 82.)

9 Berrey opposes the motion, which he characterizes as an improper attempt to bring
10 a claim against Love, a non-party, and he argues that the Court should find that Injury
11 Assistance is estopped from seeking to disgorge the attorney’s fees because it previously
12 stipulated to the disbursement of these fees. (Doc. 80 at 4-5, 10.) Berrey also asserts he
13 has properly safeguarded the settlement proceeds by depositing them in the Court’s
14 registry, Injury Assistance has no interest in the funds disbursed for his attorney’s
15 charging lien, his attorney, Love, does not have a fiduciary duty to Injury Assistance, and
16 Injury Assistance cannot assert that Love has a conflict of interest because it is not his
17 client. (*Id.* at 5-6, 9-10.) The Court first addresses Berrey’s arguments asserting estoppel
18 and characterizing the motion, and then addresses Injury Assistance’s allegations that
19 Love engaged in misconduct in obtaining the joint stipulation, that Love has a conflict of
20 interest, and that he violated fiduciary duties.

21 **II. Estoppel and Characterization of Injury Assistance’s Motion**

22 **A. Judicial Estoppel Does Not Bar Injury Assistance’s Motion**

23 Relying on state law, Berrey argues that Injury Assistance is judicially estopped
24 from its requested relief because Injury Assistance stipulated to the disbursement of the
25 fees that are now at issue in the motion to disgorge. (Doc. 80 at 10 (citing *State v.*
26 *Towery*, 920 P.2d 290, 304 (Ariz. 1996).) However, “federal law governs the application
27 of judicial estoppel in federal court.” *Helpand v. Gerson*, 105 F.3d 530, 534 (9th Cir.
28 1997) (citation omitted). Judicial estoppel, or the doctrine of preclusion of inconsistent

1 positions, “precludes a party from gaining an advantage by taking one position, and then
2 seeking a second advantage by taking an incompatible position.” *Id.* (citations omitted.)
3 “It is an equitable doctrine, intended to protect the integrity of the judicial process by
4 preventing a litigant from ‘playing fast and loose with the courts.’” *Id.* (citations
5 omitted).

6 Here, Injury Assistance has changed its position with respect to the stipulated fee
7 disbursement, but it does not appear that Injury Assistance is seeking to gain an unfair
8 advantage by taking inconsistent positions. Instead, as set forth below in Section III,
9 Injury Assistance seeks to withdraw its assent to the joint stipulation because it asserts
10 that it discovered misconduct by Love and was misled into entering the joint stipulation.
11 (Doc. 82 at 2.) It would be inappropriate to use the equitable doctrine of judicial estoppel
12 to shield allegations of misconduct from review. Therefore, the Court declines to apply
13 judicial estoppel and will review the motion on its merits.

14 **B. The Motion Does Not Assert a Claim Against Love**

15 Berrey characterizes Injury Assistance’s motion as asserting an independent “tort
16 [claim] in the nature of a breach of fiduciary duty” against Love, and contends that this
17 Court lacks jurisdiction over Love because he is not a party to the underlying action and
18 has not been served with process. (Doc. 80 at 5.) Accordingly, Berrey argues that the
19 motion must be summarily denied. (*Id.*) The Court disagrees with Berrey’s
20 characterization of the motion and does not construe the motion as asserting an
21 independent claim against Love because the motion pertains directly to the Court’s
22 October 27, 2014 Order and Judgment. (Doc. 79 at 3-4, ¶ 9; Doc. 63; Doc. 64.)

23 **C. The Motion Seeks Relief from an Order and Judgment under Rule 60**

24 By seeking to disgorge Love’s attorney’s fees, the motion effectively requests that
25 the Court vacate its October 27, 2014 Order granting the parties’ joint stipulation to
26 disburse the attorney’s fees (Doc. 63), and grant relief from the Order and Judgment
27 (Doc. 64) by directing Love to deposit the previously disbursed funds in the Court’s
28 registry. Therefore, although the parties do not assert that Rule 60 of the Federal Rules of

1 Civil Procedure applies to Injury Assistance’s motion, the Court construes the motion as
2 a Rule 60 motion for relief from a judgment or order.

3 Rule 60(b)(3) provides that “[o]n motion . . . the court may relieve a party or a
4 party’s legal representative from a final judgment, order, or proceeding for the following
5 reasons . . . fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
6 misconduct by an opposing party.” Fed. R. Civ. P. 60(b)(3). Because the motion alleges
7 that Love committed various ethical violations and falsely induced the parties to enter the
8 joint stipulation to disburse attorney’s fees, the Court assumes that Injury Assistance
9 alleges “misconduct by an opposing party” pursuant to Rule 60(b)(3).

10 To prevail on a Rule 60(b)(3) motion, the moving party must prove by clear and
11 convincing evidence that the judgment was obtained through misconduct, and that the
12 “conduct complained of prevented the losing party from fully and fairly presenting the
13 defense.” *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).
14 “Rule 60(b)(3) is aimed at judgments which were unfairly obtained, not those which are
15 factually incorrect.” *Id.* Therefore, the Court will consider whether Injury Assistance has
16 established by clear and convincing evidence that Berrey obtained the October 27, 2014
17 Order and Judgment through misconduct.

18 **III. Alleged Misconduct to Obtain Judgment**

19 Injury Assistance asserts that Berrey, through Love, used false pretenses to obtain
20 the October 27, 2014 Order and Judgment, and that Love violated various ethical
21 obligations. For the reasons below, the Court rejects these assertions.

22 **A. Love Did Not Use “False Pretenses” to Obtain the Joint Stipulation**

23 Injury Assistance asserts that Love should be ordered to disgorge his attorney’s
24 fees because Love did not disclose his representation of PIF in an unrelated state court
25 case.¹ (Doc. 82 at 2.) Injury Assistance argues that by not disclosing his representation
26 of PIF, Love obtained the joint stipulation for the disbursement of attorney’s fees under

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28 ¹ The Court takes judicial notice of Maricopa County Superior Court case number
CV2014-011941, which was filed on September 16, 2014.

1 false pretenses. (*Id.*) As set forth below, that argument lacks merit because Injury
2 Assistance had notice of Love’s representation of PIF in the unrelated state court case
3 *before* entering the stipulation for the disbursement of funds and nothing in the record
4 suggests that Love attempted to conceal his representation of PIF or mislead the parties in
5 this case.

6 First, Injury Assistance is a party in the state court matter in which Love
7 represents PIF. In both the state court case and here, Injury Assistance is represented by
8 George Griffeth. (Doc. 72 at 39, Ex. 5.) Because Griffeth and Love are counsel of
9 record in both the state court case and here, Injury Assistance had notice of Love’s dual
10 representation prior to entering the joint stipulation in this case.

11 Second, the docket in both cases supports the conclusion that Injury Assistance
12 had notice of Love’s representation of PIF. In the state court case, Love filed an answer
13 on behalf of PIF on October 3, 2014, and Griffeth filed an answer on behalf of Injury
14 Assistance on October 9, 2014. (Doc. 72 at 39, Ex. 5.) The parties filed the joint
15 stipulation to disburse attorney’s fees a few weeks later, on October 27, 2014. (Doc. 62.)
16 Thus, Injury Assistance had at least two weeks to object to Love’s dual representation
17 before filing the joint stipulation, but failed to do so. (Doc. 72 at 39, Ex. 5.)

18 Third, other than Love’s representation of PIF in the unrelated state court case,
19 Injury Assistance has not asserted any basis to find that Love misled the parties or
20 induced them to enter in the joint stipulation to disburse attorneys’ fees under “false
21 pretenses.” Because Love’s role in both cases was a matter of public record, and Injury
22 Assistance was a party in both cases and had the same counsel in both cases, there is
23 nothing in the record to support Injury Assistance’s claim that it was misled when it
24 entered the joint stipulation in this case.

25 Therefore, the Court finds that Injury Assistance has failed to prove by clear and
26 convincing evidence that the October 27, 2014 Order was obtained through false
27 pretenses, or that Love’s conduct prevented Injury Assistance from fully and fairly
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1 presenting its case. Accordingly, Love’s alleged failure to disclose his representation of
2 PIF does not constitute misconduct for purposes of Rule 60(b)(3).

3 **B. Love Did Not Violate His Ethical Obligations**

4 Injury Assistance also makes a number of claims regarding Love’s representation
5 of Berrey and the extension of fiduciary duties from Love “to [Injury Assistance] and all
6 other claimants.” (Doc. 79 at 3-4.) First, Injury Assistance objects to Love’s
7 representation of Berrey on conflict of interest grounds. (*Id.* at 3.) Second, Injury
8 Assistance alleges that Love violated the Arizona Rules of Professional Conduct by
9 representing Berrey. (*Id.* at 3-4.) Third, Injury Assistance argues that Love violated his
10 fiduciary duties to Injury Assistance and the other claimants in this matter. (*Id.*) As
11 explained below, the Court rejects each of these arguments.

12 **1. Injury Assistance Cannot Assert Love’s Conflict of Interest**

13 Injury Assistance argues that Love’s representation of Berrey in this case creates a
14 concurrent conflict of interest with Love’s representation of PIF in an unrelated case in
15 state court. (Doc. 79 at 3-5.) In Arizona, only a lawyer’s client is entitled to object to a
16 lawyer’s representation based on a conflict of interest. *State v. Garaygordobil*, 359 P.2d
17 753, 755 (Ariz. 1961) (citation omitted) (“the only ones entitled to object to such
18 representation on the ground of conflicting interests is one who holds the relation of
19 client to an attorney who undertakes to represent conflicting interests”). Therefore, the
20 threshold question before considering Injury Assistance’s assertion of a conflict is
21 whether an attorney-client relationship exists between Love and Injury Assistance.

22 “An attorney-client relationship exists when a person has manifested to a lawyer
23 his intent that the lawyer provide him with legal services and the lawyer has manifested
24 consent to do so.” *Simms v. Rayes*, 316 P.3d 1235, 1238 (Ariz. Ct. App. 2014). Nothing
25 in the record shows that Injury Assistance manifested to Love its intent that Love provide
26 legal services to it, or that Love manifested any intent to do so. Love’s only attorney-
27 client relationship in this case is with Berrey. Because Injury Assistance does not have
28 an attorney-client relationship with Love, Injury Assistance cannot be prejudiced by

1 Love's representation of Berrey. *Garaygordobil*, 359 P.2d at 755. Thus, Injury
2 Assistance cannot assert a conflict of interest to object to Love's representation of Berrey.
3 *Id.*

4 **2. Love May Represent Berrey and PIF in Unrelated Cases**

5 Assuming Injury Assistance could appropriately object to Love's representation of
6 Berrey based on a conflict of interest, its argument would still fail. As explained below,
7 although Love's dual representation of Berrey and PIF may create a concurrent conflict
8 of interest, both affected clients waived that conflict. Accordingly, Love has not violated
9 the applicable ethical rules by representing Berrey in this case.

10 The Arizona Rules of Professional Conduct (ethical rules), as set forth in Rule 42
11 of the Rules of the Arizona Supreme Court, apply to attorneys practicing before this
12 Court. *See* LRCiv 83.2(e); *Research Corp. Techs., Inc. v. Hewlett-Packard Co.*, 936 F.
13 Supp. 697, 700 (D. Ariz. 1996). Therefore, this Court applies the Arizona ethical rules
14 when evaluating potential conflicts of interest.

15 The ethical rules prohibit a lawyer from undertaking a representation involving a
16 concurrent conflict of interest. *See* ER 1.7(a). A concurrent conflict of interest exists if a
17 lawyer's representation of one client will be directly adverse to another client, or if there
18 is a significant risk that the lawyer's responsibilities to another client, a former client, a
19 third person, or the lawyer's personal interest will materially limit the lawyer's
20 representation. (*Id.*) From the limited record, it appears that Love's representation of
21 Berrey presents a concurrent conflict of interest because Berrey is directly adverse to PIF
22 in this case, and Love represents PIF in an unrelated state court case. *See* ER 1.7(a)(1).

23 Notwithstanding that apparent concurrent conflict of interest, the ethical rules
24 permit a lawyer's representation if "each affected client gives informed consent,
25 confirmed in writing," and all three elements of Rule 1.7(b) are satisfied. *See* ER 1.7(b).
26 Therefore, Love may represent Berrey in this matter because both Berrey and PIF have
27 waived the conflict of interest, and it appears that all three elements of ER 1.7(b) are
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1 satisfied.² The elements of ER 1.7(b) are that (1) the lawyer reasonably believes that he
2 will be able to provide competent and diligent representation to each affected client,
3 (2) the representation is not prohibited by law, and (3) the representation does not involve
4 the assertion of a claim by one client against another client in the same case. *See* ER
5 1.7(b)(1)-(3).

6 Here, Injury Assistance has not argued or established any basis for the Court to
7 find that Love could not reasonably believe that he could provide competent and diligent
8 representation to each of his affected clients. *See* ER 1.7(b)(1). Furthermore, Love’s
9 representation of Berrey is not prohibited by law, and he does not represent Berrey and
10 PIF in the same litigation. *See* ER 1.7(b)(2) – (3). Therefore, the Court concludes that
11 Love’s representation of Berrey does not violate the ethical rules prohibiting concurrent
12 conflicts of interest.

13 **3. Love Did Not Violate Duties to Injury Assistance**

14 Injury Assistance makes four assertions regarding the duties it believes that Love
15 owes to Injury Assistance and other claimants in this matter. The Court rejects these
16 assertions. First, Injury Assistance argues that “Love, in addition to the fiduciary duty
17 toward Berrey, has a fiduciary duty to Injury Assistance and all other claimants in this
18 matter.” (Doc. 79 at 3.) To support this argument, Injury Assistance cites ER 1.15(d),
19 which provides that “[a] lawyer shall hold property of clients or third persons that is in a
20 lawyer’s possession in connection with a representation separate from the lawyer’s own
21 property.” ER 1.15(a). The comments to the rule note that a lawyer may have a duty to
22 protect third party claims, “such as a client’s creditor who has a lien on funds recovered
23 in a personal injury action.” *Id.* at cmt 4.

24 Here, Berrey, through Love, apparently recognized the duty to protect the interest
25 of the various claimants to the settlement proceeds and deposited those proceeds in the
26 Court’s registry. (Doc. 25.) The parties, however, filed a joint stipulation to disburse

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28 ² Although Love has not submitted the written waivers by Berrey and PIF, the Court notes Love’s undisputed declaration that he obtained written consent from both affected clients prior to his representation of Berrey. (Doc 80 at 14.)

1 \$11,549.98 from the deposited funds in payment of the attorneys' charging lien. (Doc.
2 62.) By entering the joint stipulation for the disbursement of Love's attorney's fees,
3 Injury Assistance apparently recognized the priority of the attorneys' charging lien over
4 its claim. Other than its argument that Berrey falsely induced the parties to enter the joint
5 stipulation to disburse attorneys' fees, Injury Assistance does not make any argument to
6 challenge the validity of the attorneys' charging lien. Therefore, Injury Assistance has
7 not established that it has any interest in the funds disbursed to Love pursuant to the
8 Court's October 27, 2014 Order or that Love violated any duty under ER 1.15(d) with
9 respect to the disbursed attorney's fees. The only funds in which Berrey, Injury
10 Assistance, and the other parties may have an interest are the remaining settlement
11 proceeds deposited in the Court's registry. (Doc. 25.) Love did not violate any fiduciary
12 duties with respect to these funds.

13 Second, Injury Assistance asserts that "[n]either [Injury Assistance], nor any other
14 party to this action, need be Love's client in order for a fiduciary duty, in their favor, to
15 attach to Love's actions." (Doc. 79 at 3, ¶8.) In support of this proposition, Injury
16 Assistance cites *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976). In
17 *Fickett*, the court analyzed whether a guardian's attorney owed a derivative duty to a
18 ward. *Id.* at 990. The duty recognized in *Fickett* "stem[med] from the attorney's
19 undertaking to perform legal services for the client but reach[ing] out to protect the
20 intended beneficiary" of the legal services. *Id.* at 990.

21 In contrast to the shared interests of the ward and guardian in *Fickett*, Injury
22 Assistance's interests are directly adverse to Berrey's. Thus, Injury Assistance is not the
23 intended beneficiary of Love's services. See *Lewis v. Swenson*, 617 P.2d 69, 72 (Ariz.
24 Ct. App. 1980) ("[A]n adverse party is not an intended beneficiary of the adverse
25 counsel's client.") (citation omitted); *Wetherill v. Basham*, 3 P.3d 1118, 1128 (Ariz. Ct.
26 App. 2000) (envisioning "no benefit and much potential mischief from imposing on
27 attorneys a duty to exercise reasonable care to nonclient third parties whose interests are
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1 directly adverse to those of the attorney’s client”). Therefore, Love does not owe a duty
2 to Injury Assistance under an intended beneficiary theory.

3 Third, Injury Assistance argues that “[t]he potential for harm to all parties owed a
4 duty by Love is sufficient justification for an order mandating that Love disgorge his
5 entire fee in this matter because of his disloyalty and obvious breach of fiduciary duty.”
6 (Doc. 79 at 3–4, ¶ 9.) To support this argument, Injury Assistance cites a Texas case,
7 *Burrow v. Arce*, 997 S.W.2d 229, 237–38 (Tex. 1999). The Court, however, is not bound
8 by authority from Texas, and *Burrow* does not stand for the proposition for which it is
9 cited. Instead, *Burrow* holds that a lawyer who violates a duty to a client may be denied
10 compensation without proof of damages by the client. *Id.* at 240. Because Injury
11 Assistance is not Love’s client, and Love has not violated any fiduciary duties to Injury
12 Assistance or any of the other parties, the Court finds that *Burrow* is inapplicable and
13 rejects this argument.

14 Finally, Injury Assistance argues that “Love’s duties to all parties involved in this
15 matter include, without limitation, avoiding conflicts of interest, safeguarding funds owed
16 the client and/or third persons and a clear duty to honor the [sic] their interests.”
17 (Doc. 79 at 4, ¶ 11.) Injury Assistance’s reliance on *Ulico Cas. Co. v. Wilson, Elser,*
18 *Moskowitz, Edelman & Dicker*, 843 N.Y.S.2d 749 (2007), is misplaced. *Ulico* is a New
19 York case that did not involve the duties owed to non-clients or adverse parties, but rather
20 discussed the duties that exist between a lawyer and his current clients. *Id.* at 759.
21 Again, because Berrey properly deposited the settlement funds in the Court’s registry,
22 Love’s fees were disbursed by Court order based on the parties’ joint stipulation, Injury
23 Assistance is not Love’s client, and Love did not violate any duties under ER 1.7 or ER
24 1.15, the Court is not persuaded by this argument.

25 In sum, Love did not violate any duty to Injury Assistance under ER 1.15(d), or
26 based on a theory that Injury Assistance is an intended beneficiary of Love’s professional
27 services. In addition, Injury Assistance and Love do not have an attorney-client
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1 relationship. Therefore, Injury Assistance cannot enforce against Love the various duties
2 that an attorney would owe to a client.

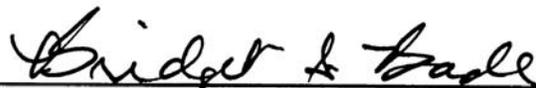
3 **IV. Conclusion**

4 The Court construes Injury Assistance's motion to disgorge attorney's fees as a
5 Rule 60 motion for relief from a judgment or order and finds that Berrey, through his
6 attorney Love, did not engage in misconduct that warrants vacating the October 27, 2014
7 Order. Therefore, the Court denies Injury Assistance's motion.

8 Accordingly,

9 **IT IS ORDERED** that Injury Assistance's Motion to Disgorge Michael Love's
10 Attorney's Fees, construed as a motion for relief from a judgment or order, (Doc. 79) is
11 **DENIED.**

12 Dated this 10th day of April, 2015.

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Bridget S. Bade
16 United States Magistrate Judge
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