

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

OMINSKY & OMINSKY PC	: JANUARY TERM, 2001
Plaintiff,	
v.	: No. 3846
JOSEPH L. MESSA, JR.,	: Commerce Program
ANDREW D. SWAIN, and	
JOSEPH L. MESSA, JR. & ASSOCIATES PC	:
Defendants,	
v.	:
ALBERT OMINSKY, ESQUIRE, individually	:
and OMINSKY & OMINSKY P.C.	
Additional Defendants.	: Superior Court Docket No. 1000EDA2003

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**OPINION**

**Albert W. Sheppard, Jr., J. .... April 7, 2003**

This Opinion is submitted relative to defendants/counter-claim plaintiffs’ appeal of this court’s Order of December 26, 2002, which Order required them to escrow a certain percentage of disputed legal fees.

This court believes that the Order appealed from is interlocutory and that this appeal should be quashed. However, should the appeal be proper, this court respectfully submits that, for the reasons discussed, its Order of December 26, 2002, should be affirmed.

## Background

Defendants/counter-claim plaintiffs, Joseph L. Messa, Jr. and Andrew D. Swain (“Messa”)<sup>1</sup> are former associates of the plaintiff law firm, Ominsky & Ominsky PC (“Ominsky”). On **January 16, 2001**, Messa informed Ominsky that he was leaving the Ominsky firm. This litigation ensued.

The litigation involves numerous charges and countercharges which for present purposes need not be detailed. Suffice it to say, it is a hard-fought, passionate lawsuit and involves a considerable sum of money in the nature of disputed attorney fees.

In November 2001, Ominsky filed a Motion to Escrow Fees and Reimburse Costs which Messa strenuously opposed. The court entered an Order on January 17, 2002 which essentially required Messa to reimburse Ominsky for fifty percent (50%) of the costs and to escrow twenty percent (20%) of the fees received as a result of settlement or verdict of any case which had originated before January 16, 2001. Ominsky promptly filed a Motion for Reconsideration urging that an escrow of twenty percent (20%) was not sufficient. Messa again strenuously opposed being required to put any of the disputed fees into escrow.

The court held this Motion under advisement for eleven (11) months, trying assiduously to have the matter mediated and/or to have the parties and their counsel settle the case,<sup>2</sup> but to no avail.

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<sup>1</sup>In this Opinion, “Messa” also includes Joseph L. Messa, Jr. & Associates, PC, the firm formed by Messa and Swain.

<sup>2</sup>This court firmly believes that this is a case that cries out to be settled.

This brings us to the appealed from Order. On December 26, 2002, this court granted Ominsky's Motion for Reconsideration, ordering Messa to: (a) "reimburse the Ominsky Firm one hundred percent (100%) of its invested costs in cases originated on or before January 16, 2001, . . .", and (b) "escrow thirty-three and one-third percent (33<sup>1</sup>/<sub>3</sub>%) of all fees earned on cases originated on or before January 16, 2001 and that have concluded . . . since October 1, 2001."

Messa has appealed this Order.

## **Discussion**

### **I. The Order Appealed Is Interlocutory And The Appeal Should Be Quashed.**

As a general rule, an appeal will lie only from a final order, unless otherwise permitted by statute. Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978). An order is interlocutory and not final unless it effectively puts a litigant out of court. T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 372 A.2d 721 (1977). An appealable order is one which ends the litigation or alternatively disposes of the entire case. Gottschall v. Jones & Laughlin Corp., 333 Pa. Super. 393, 482 A.2d 625 (1984). An order is final for purposes of appeal only if because of either its technical effect or its practical ramifications the litigant appealing the order is out of court. Matthews v. Johns-Manville Corp., 307 Pa. Super. 300, 453 A.2d 362 (1982). *See also*, Pa. R.A.P. 341(b)(1).

Since the December 26, 2002 Order does not put Messa out of court, does not end the litigation, or does not dispose of the entire case, the appeal should be quashed.

However, this court recognizes that, pursuant to Pa. R.A.P. 313(a), an appeal may be taken as of right from a collateral order. Although this court does not deem this a collateral order (in that

it is not of a nature that if review is postponed until final judgment, the claim will be irreparably lost)<sup>3</sup> it will in the interest of completeness comment of the order's propriety.

**II. The Order Appealed Is  
Proper And Should Be Affirmed.**

This court believes that the Order entered was the fair thing to do. Further, the court believes that the decision was discretionary and that its decision was not capricious nor did it constitute a clear abuse of discretion.

The Messa defendants (appellants) apparently do not quarrel with the direction to reimburse Ominsky for those costs expended. The objection is to the increase of the pertinent fees to be escrowed from twenty percent (20%) to one-third (a) . Since the money will be in escrow and presumably earning interest, Messa, should he prevail on the merits at trial, will not be harmed. Further, the amount in question - - that is, 13.33 percent (33a%) of the fees is not crucial to the Messa practice. In Ominsky's papers he claims that Messa realized fees of \$746,080.00, during the one month period between January 1 and January 31, 2002. Messa counters that only \$284,631.49 in fees were realized. In any event, the amount ordered to be escrowed, given the magnitude of the recoveries achieved here, will not have an adverse impact on Messa's ability to carry on his successful practice.

This is an equity matter. This court sitting as a chancellor genuinely believes that, pending a final accounting, the requirement that one-third of the fees be escrowed is proper.

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<sup>3</sup>Pa. R.A.P. 313(b).

**Conclusion**

This court respectfully submits that if the appealed Order is subject to appellate review, the Order of December 26, 2002 should be affirmed.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**