

OCBA PROFESSIONALISM & ETHICS COMMITTEE FORMAL OPINION 99-002 (FEE DISPUTE)

STATEMENT OF FACTS

Attorney represents Client under a written hourly fee agreement, with an express provision that the attorney has a lien for fees and costs on any settlements or judgments. Included in the settlement terms is a provision that the settlement check will be made out to both Attorney and Client. Client agrees to the terms.

Attorney sends the settlement document to Client for signature. Client surreptitiously alters the document so as to provide for payment to herself alone. Attorney does not notice the change and the settlement papers are signed and a check is issued to Client, but delivered to Attorney, who then discovers the alteration of the agreement. Upon notifying Client of receipt of the check, Client refuses to allow Attorney to cash the check on Client's behalf, deduct sufficient funds to cover Attorney's unpaid fees and deliver the remainder to Client. Instead, Client demands the entire check.

QUESTION PRESENTED

How may attorney dispose of the check?

DISCUSSION

No California or ABA ethics provisions directly address this question. An analysis of relevant provisions may, however, present some guidance in the resolution of this problem.

California Rules of Professional Conduct, Rule 4-100 governs the ordinary disposition of settlement proceeds:

(A) All funds received or held for the benefit of clients . . . shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import . . .

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

It appears, then, because of the lien clause, that the deposit of the check into the trust account would be an ethically acceptable action, along with the prompt transmittal of the Client's undisputed portion of the funds. However, in the case presented, the check is not made out to Attorney, who may not therefore deposit it into her trust account without Client's permission. If Client refuses permission, further ethical inquiry becomes necessary.

Rule 4-100 further provides for the payment of funds belonging to a client:

(B) A member shall: . . . (4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

In the present case, it appears that Client is entitled to only part of the proceeds. Since the check itself is indivisible, it is impossible to deliver only that portion to which Client is entitled. Attorney may, of course, entrust client with Attorney's (apparently disputed) portion of the proceeds, but does not appear to be required to do so by Rule 4-100, as Rule 4-100(A)(2) provides that Attorney may

retain funds as to which a dispute exists pending resolution of the dispute.

Though not binding in California, the *ABA Model Rules of Professional Conduct* are followed by the large majority of states, and thus may be considered advisory authority in interpreting California ethics rules. Rule 1.15 provides for the disposition of property to which both the Attorney and Client have claims:

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their prospective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. (See also *ABA Model Code of Professional Responsibility*, DR 9-102(A)(2) for a similar rule followed in a minority of states.)

In the present case, since the check is indivisible, it is impossible for Attorney to keep separate only that part of the proceeds as is in dispute. Thus, it appears that a prudent course of conduct would be for Attorney to keep the entire check separate and to offer Client the right to arbitrate pursuant to the provisions of *Business and Professions Code* §6201. This section requires that an attorney give the client notice of the client's right to arbitrate a fee dispute. Such notice must be given prior to the initiation of an action by the attorney against the client, who has 30 days from receipt of the notice to elect arbitration.

Should Client fail to avail herself of the opportunity to arbitrate, Attorney would then be prudent to bring a legal action at the earliest possible date to resolve the parties' relative rights to the proceeds of the settlement check. In this instance Attorney should send the entire check to the client with a letter indicating the amount Attorney believes is owed to her. Attorney may then proceed to sue Client for this amount.