

# Ethics Opinion

## 910226

**QUESTION PRESENTED:** May the balance of unpaid attorney's fees be withheld from funds held by the attorney for the client?

**ANSWER:** No. An attorney does not have the authority to unilaterally determine the amount of the fee and withhold it from the funds held for the client over the client's objection.

**ANALYSIS:** Rule 1.15 of the Rules of Professional Conduct provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(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 interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

ABA Disciplinary Rule 9-102(a)(2) states that:

(2) Funds belonging in part to a client and in part to the lawyer (presently or potentially) or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Rule 1.15(a) continues the requirements for segregation of funds and record-keeping that were initially prescribed by Disciplinary Rule 9-102. DR 9-102(a) permitted a lawyer to withdraw funds to which he or she was entitled, unless there was a dispute, in which case the attorney was permitted to withdraw only the undisputed portion. This provision left open whether the client had to be notified in advance of the withdrawal, and how the client was to signal that a dispute

existed. Rule 1.15(a) no longer contains affirmative authority for such withdrawals. When a lawyer is or claims to be entitled to a portion of the funds being held, Rule 1.15(c) is applicable instead. Under that subsection, the lawyer may not disburse any funds to himself until after there has been an accounting and agreement by the beneficiary. Hazard, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1987) at 282.

Even under DR 9-102, in order to unilaterally withdraw funds from a client's trust account, agreement had to be reached between the attorney and the client on at least three points: (1) the right of the attorney to look to the client for the payment of these fees; (2) the amount to which the attorney is entitled; and (3) the time at which payment will be expected. *In the Matter of Marine*, 264 N.W.2d 285, 288-89 (Wis., 1978). See also *Comm. on Legal Ethics of the W. Va. State Bar v. Tatterson*, 319 S.E.2d 381, 386 (W.Va. 1984); *Matter of disciplinary Proceeding against Sawyer*, 656 P.2d 503, 505 (Wash. 1983); *Jackson v. State Bar*, 600 P.2d 1326, 1329 (Cal. 1971); and ABA/BNA Lawyers' Manual on Professional Conduct (1990) at 901:310 (Illinois Ethics Opinions 88-15 (1989) in which it was held that a lawyer may transfer his clients' funds held in trust for payment of fees only after giving notice and receiving written consent). Some states permitted withholding of client funds under DR 9-102, but only after the client had agreed to the amount of the fee. ABA/BNA Lawyers' Manual, *supra*, at 45:1204.

In the instant case, the facts suggest that the amount owed the attorney is in dispute. Thus, according to the decisions cited above, the attorney would not be permitted to offset fees from the settlement amount.

It is true that there is some authority to the contrary. See ABA/BNA Lawyers' Manual, *Supra*, Ethics Opinions (1980-85) at 801:3902 (Kentucky Ethics Opinion E-233 91980), in which it was held that, in the absence of a written contract entered into at the time of employment allowing the lawyer to offset his fees on any unrelated judgment or settlements which the client may obtain in the future, the lawyer could withdraw an amount due on a related matter.)

The majority view, however, is that, upon termination of representation, a lawyer may not withdraw funds from client trust accounts as a lawyer's fees or reimbursement for expenses without the consent of the client. ABA/BNA Lawyers' Manual on Professional Conduct (1987) at 45:1202, citations omitted. The client must agree on the right of the lawyer to make the withdrawal, the amount to which the lawyer is entitled, and the time of the withdrawal. *Id.*, citations omitted.

It should be noted that in Montana, pursuant to section 37-61-420(2), MCA, an attorney who appears for a party is considered to have a lien upon a client's cause of action for which attaches to a verdict, report, decision, or judgment in the client's favor and the proceeds thereof in whose hands they may come. *Kelleher Law Office v. State Compensation Insurance Fund*, 691 P.2d 823, 826 (Mont., 1984). However, there is no indication that such a verdict or judgment was rendered by a court in favor of this particular client, and it is unclear whether the lien may attach to a property settlement. See *Hill v. Turley*, 710 P.2d 50, 57-58 (Mont. 1985). Nor has the attorney brought an action to enforce such a lien even if it were appropriate in this case. See 7 Am.Jur.2d Attorneys at Law, sec. 345 (1980).

An attorney does not have the authority to unilaterally determine the amount of the fee and withhold it from funds held for the client over the client's objection.

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