

BBA ETHICS COMMITTEE OPINIONS

BBA Ethics Opinion 97-1

Summary of Opinion

Under DR 9-102(A)(2), a lawyer receiving proceeds from a settlement reached on behalf of his client must promptly remit to the client any amounts that exceed the amount of any fees that the lawyer claims and, if the client disputes the lawyer's entitlement to such fees, must retain in a client funds account the amount in dispute, pending a resolution of the dispute

Facts

The inquiring lawyer represented his client, an individual, in a dispute with a municipal agency that involved a claim by the client for damages. The client orally agreed to pay the lawyer an hourly fee to represent him.

Agreement on a settlement was reached that provided for payment to the client of certain sums in installments. After agreement was reached on the terms of the settlement but before the settlement was reduced to writing, a fee balance remained on the client's account. The client agreed to pay this amount in full. Shortly after agreeing to do so, the client remitted a partial payment. The lawyer contacted the client and reluctantly agreed to defer payment of the remainder until the first installment payment on the settlement was made.

The settlement agreement provided that the first installment was to be delivered to the lawyer and the remaining installments directly to the client. The lawyer later sent the written settlement agreement to the client for signature. The client returned the signed settlement agreement to the lawyer with a letter in which the client said he was happy with the result, but did not think that the lawyer should get the entire fee for which the client had been billed. The client took the position that he had himself handled some of the negotiations with the municipality, that the favorable settlement was in part the consequence of his own efforts and that the lawyer should discount his fee accordingly.

The lawyer subsequently received the first installment and deposited the amount in a client account. The amount in the account exceeds the unpaid fees for which the lawyer has billed the client. The lawyer asks what his obligations are with respect to the proceeds of the settlement in the client account.

Discussion

The starting place for our analysis is DR 9-102(A) which deals with client funds accounts. The rule generally prohibits the commingling of client funds with the lawyer's own funds, but provides an exception that would appear applicable to the inquiring lawyer's situation:

Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited [in a client funds account], but the portion belonging to the lawyer or law firm

must be withdrawn at the earliest reasonable time after the lawyer's or law firm's interest in that portion becomes fixed. If the right of the lawyer or law firm to receive such portion is disputed by the client, the disputed portion shall not be withdrawn until the dispute is resolved.

DR 9-102(A)(2).¹

Initially, it seems reasonably clear that the proceeds of the first installment of the settlement constitute "[funds] belonging in part to a client and in part presently or potentially to the lawyer." Since the amount of the first installment exceeds the amount of unpaid fees, the funds plainly belong at least in part to the client. Moreover, the obvious purpose for providing in the settlement agreement that the first installment (but no later installments) be sent to the lawyer is to permit the lawyer to take his fee from the settlement proceeds and to remit the net proceeds to the client. The settlement agreement, coupled with the possibility of the inquiring lawyer's possession of a statutory "charging lien" on the settlement proceeds,² persuades us, therefore, that the funds also belong "in part presently or potentially to the" inquiring lawyer.

We are also of the view that the right of the lawyer to receive any portion of the proceeds is disputed. Although the client's position in this case appears to be more an effort to renegotiate a fee arrangement after the fact than a valid (or even colorable) legal position, we do not read DR 9-102(A)(2) as turning on the validity of the dispute.

Accordingly, we conclude that the lawyer must remit to the client the portion of the proceeds that exceeds the balance claimed due for the lawyer's legal fees, and must retain the remainder in the client funds account until the dispute with the client is resolved. Although the disciplinary rule does not say so explicitly, we think it implicit in the rule that the lawyer should take the initiative toward the prompt resolution of the dispute, either by negotiating a compromise with the client³ or by more formal means such as fee arbitration with the agreement of the client or Judicial proceedings.⁴ See I G. Hazard & W. Hodes, *THE LAW OF LAWYERING* § 1. 15.40 1, at 462.1 (1997) (commenting on analogous provisions of ABA Model Rule 1. 15).

We add the following comments. In this case, the lawyer had already billed the client for the amounts subject to dispute and was aware of the dispute before receiving the funds. It is not uncommon for a lawyer to receive funds on behalf of a client pursuant to the payment of a judgment or settlement before any final accounting or bill. In such situations, the lawyer should promptly notify the client of the receipt of the funds. DR 9-102(B)(1); see MRPC 1. 15(b). In addition, before a lawyer removes his or her fee from the client funds account, we believe the client should be (i) furnished with a statement setting forth the lawyer's calculation of the amount that the lawyer claims as a fee, and (ii) given a reasonable opportunity to object to the fee.⁵ We also think the same principles apply with regard to bills against any advance payment of fees. See Massachusetts Bar Association Committee on Professional Ethics Opinion No. 95-2 (pre-paid fees belong to client until earned and must be kept in client funds account, non-refundable retainers are improper).

ENDNOTES

¹ Rule 1.15(d)(2) of the Massachusetts Rules of Professional Conduct ("MRPC") approved by the Supreme Judicial Court on June 9, 1997 to go into effect on January 1, 1998 contains the identical language

² Mass. Gen. Laws c. 221, §50 creates for the benefit of lawyers under certain circumstances "a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim and upon the proceeds derived therefrom." See generally *Cohen v. Lindsay*, 38 Mass. App. Ct. 1 (1995); 1. McCann, *The Attorney's Lien in Massachusetts*, 69 MASS. L. REV. 68 (1984). Questions concerning the application of this statute and, more generally, the security arrangements available to lawyers to secure payment of their fees are outside of the scope of BBA Ethics Committee organizational 'jurisdiction' to opine. Accordingly, we express no views concerning whether the inquiring lawyer has an enforceable lien on the proceeds of the first installment of the settlement.

³ Particularly where the client is unsophisticated and/or the amount subject to the dispute is substantial, the lawyer must make sure the client understands that the lawyer is not acting on behalf of the client in connection with the negotiation over the disputed fees and that the client may wish to retain separate counsel in connection with the fee dispute. Where the fee dispute concerns potential malpractice by the attorney - a situation not presented by the inquiring lawyer - the attorney must be mindful of the requirements of DR 6-102(A): "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." See also MRPC 1.8(h).

⁴ Cf. Mass. Gen. Laws c. 221, §50 ("Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce" a lawyer's statutory charging lien).

⁵ The new Massachusetts Rules of Professional Conduct make this clearer than the Disciplinary Rules. See MRCP 1.15(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."); *id.* comment 2.