

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2009-177**

ISSUE: In what manner may an attorney maintain her rights in a charging lien when her former client demands that the attorney endorse a settlement check jointly payable to the client and his current and former attorneys without violating the requirement of rule 4-100 of the California Rules of Professional Conduct that the attorney promptly pay or deliver funds to which the client is entitled?

DIGEST: When responding to a request to endorse a settlement check made jointly payable to a client and his or her current and former attorneys where the former attorney has asserted a valid lien on the settlement proceeds, the former attorney must take prompt steps to find a reasonable method or methods of delivering the undisputed portion of the proceeds to which the client is entitled. The former attorney does not violate rule 4-100 by refusing to use a method that would extinguish the attorney's charging lien, but has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances. If the client does not agree to proposed reasonable methods for delivering the undisputed portion or does not agree with the former attorney's determination of the amount of the proceeds that undisputedly belong to the client, the attorney must promptly seek resolution of the fee dispute through arbitration or judicial determination, as appropriate.

AUTHORITIES

INTERPRETED: Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California.

Commercial Code section 3110(d).

Civil Code section 2913.

STATEMENT OF FACTS

Client retained Attorney A to represent Client in a personal injury action against a construction company. The retainer agreement between Attorney A and Client provided for a contingency fee of 35 percent of any recovery obtained by Client through judgment, settlement or other recovery and specifically included a legally valid charging lien in favor of Attorney A upon the proceeds of Client's prospective recovery. Upon receiving the signed retainer agreement, Attorney A commenced work on the matter. After two years of active litigation, Client discharged Attorney A and retained Attorney B. Attorney A filed a notice of lien in the litigation. The litigation was resolved several months later by settlement when the opposing party sent Attorney B a check made out to "Client, Attorney A, and Attorney B." Client demanded that Attorney A endorse the check. Fearing that endorsing the check in that manner would forfeit certain legal rights she had pursuant to the lien, Attorney A declined to endorse the check under those conditions, but did offer to take prompt and reasonable steps so that the portion of the settlement check that undisputedly belonged to Client, as determined in accordance with applicable governing authorities concerning the reasonable value of the services Attorney A had rendered at the time of discharge, could be immediately released to Client. Client refused to agree to the steps Attorney A proposed. Consequently, Attorney A initiated an independent action to determine the amount of fees to which she is entitled and provided timely and proper notice to Client of his right to arbitration.

DISCUSSION

1. **Rule 4-100 of the California Rules of Professional Conduct^{1/} Obligates an Attorney To Promptly Pay or Deliver Any Funds or Property the Client Is Entitled To Receive.**

The dilemma faced by Attorney A is created when the settlement check is jointly made payable to Client, Attorney A and Attorney B. Attorney A does not want to endorse the check if it will forfeit her lien, but, alternatively, does not want to take any action that improperly delays Client's receipt of the settlement proceeds to which Client is entitled.

Rule 4-100(B)(4) provides that an attorney shall "[p]romptly 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." Thus, where an attorney has asserted no lien rights over the settlement proceeds and no valid rights to any portion of such proceeds exist in favor of any third parties, the attorney must promptly pay or deliver all the settlement proceeds to the client. (*In the Matter of Kaplan* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509 [attorney who was not protecting lien rights violated rule 4-100 by delaying and impeding his own endorsement of the client's settlement draft].) Where the attorney is asserting lien rights against less than all of the settlement proceeds, the attorney nonetheless has a duty to promptly take reasonable steps to pay or deliver to the client the portion of the proceeds that are not in dispute. (Rule 4-100(B)(4); *In the Matter of Feldsott* (Rev. Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754 [an attorney with a charging lien did not violate rule 4-100 where attorney offered reasonable options to release the undisputed portion of the proceeds to the client, but client refused]; *Fletcher v. Davis* (2004) 33 Cal.4th 61, 69 [14 Cal.Rptr.3d 58] [stating that, when the proceeds have been deposited into a client trust account, "the attorney may withhold an amount equivalent to the disputed portion"].)

Under current California law, if Attorney A were to endorse the settlement check as Client has requested, Attorney A would forfeit her legal rights under the charging lien. (*Feldsott, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 757-758, citing Civ. Code, § 2913.)^{2/} Section 2913 of the California Civil Code provides that "[t]he voluntary restoration of property to its owner by the holder of a lien thereon dependent upon possession extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons, subsequently acquiring a title to the property, or a lien thereon, in good faith, and for value." In circumstances like those presented by the fact pattern considered herein, namely, when the settlement check is made payable jointly to the Client, Attorney A (the former attorney) and Attorney B (the successor attorney), the former attorney may refuse to endorse the check in order to preserve the charging lien until a resolution is reached. (*Fletcher v. Davis, supra*, 33 Cal.4th at p. 69; *Feldsott, supra*, 3 Cal. State Bar Ct. Rptr. at p. 758.) Because rule 4-100 requires prompt payment or delivery of only those funds "which the client is *entitled to receive*" (emphasis added), the Committee is of the opinion that the attorney need not endorse the check because the check includes certain funds that in some part are owed to the attorney and to which the client is not entitled. "The unfortunate effect . . . is that '[t]he settlement proceeds will thus be tied up until everyone involved can agree on how the money should be divided . . . or until one or the other brings an independent action for declaratory relief.'" (*Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1176 [121 Cal.Rptr.2d 532], internal citation omitted.)^{3/}

As a result, the attorney must fulfill his or her duty to promptly find other reasonable methods of delivering the undisputed portion to the client. Indeed, where the client requests that the attorney disburse the funds to the client and the attorney claims an interest in such funds, "the attorney violates rule 4-100(B)(4) if he or she does not

^{1/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

^{2/} In accordance with section 3110(d) of the California Commercial Code, "[i]f an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them."

^{3/} An independent action is often required because the court in the underlying action may lack jurisdiction to determine the validity of the charging lien where the attorney is neither a party nor an intervenor in the action. (*Carroll, supra*, 99 Cal.App.4th at pp. 1176-1177.)

promptly take appropriate, substantive steps to resolve the dispute in order to disburse the funds.” (*In the Matter of Kroff* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838.) Attorney A may not simply sit back and wait for such a resolution. Where the attorney and client cannot reach agreement on disbursement of the funds, and the client has requested payment or delivery of those funds, the attorney has *an affirmative obligation* to seek arbitration or a judicial determination without delay in order to comply with rule 4-100(B)(4). (L.A. County Bar Assn. Formal Opn. No. 438.)

Rule 4-100 does not suggest how an attorney may comply with the rule when there is a lien dispute as to a portion of the proceeds from the underlying matter. In *Feldsott*, *supra*, the attorney who was asserting his lien acted reasonably in offering to place the disputed funds in his trust account or in a separate blocked account requiring signatures from the attorney and the client, among other reasonable alternatives, and both of those alternatives were held not to be in violation of the rule. (3 Cal. State Bar Ct. Rptr. at p. 757.) Alternatively, in *Kroff*, *supra*, the attorney participated in a fee arbitration requested by the clients and promptly abided by the arbitration award. The Review Department of the State Bar Court also determined that such conduct did not violate rule 4-100(B)(4). (3 Cal. State Bar Ct. Rptr. at p. 854.)

The Committee is of the opinion that agreeing to place the settlement proceeds in the successor counsel’s account, pursuant to an express agreement to hold the disputed portion of the funds in trust for former counsel pending resolution of the lien dispute, also would be reasonable where the successor counsel has notice of a valid lien in favor of the former attorney and the dispute over the amount to which the former attorney is entitled. The successor counsel assumes a fiduciary obligation to the former attorney when agreeing to hold such funds, and cannot favor his or her client by converting the property to the client’s use pending resolution of the competing claims to the funds. (See: *Virtanen v. O’Connell* (2006) 140 Cal.App.4th 688, 693, 702-703 [44 Cal.Rptr.3d 702]; Cal. State Bar Formal Opn. No. 2008-175; but see *In the Matter of Respondent H* (Rev. Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234 [rejecting argument that attorney owes fiduciary duties to hold in trust funds that third parties claim to have an interest in, when no evidence exists that the funds are subject to a proper lien by the prior attorney].)

2. An Attorney May Decline To Promptly Pay or Deliver Only That Portion of the Settlement Proceeds to Which the Attorney Is Reasonably Entitled under a Valid Charging Lien.

The Review Department of the State Bar Court determined in *Feldsott*, *supra*, that, in a situation such as the one between Attorney A and Client, the former attorney “continue[s] to owe [the client] a fiduciary duty of utmost good faith and fair dealing with respect to, at least, the subject matter of [the attorney’s] prior representation of [the client], including [the attorney’s] express lien for his attorney’s fees.” (3 Cal. State Bar Ct. Rptr. at p. 757; see also Rest.3d, Law Governing Lawyers § 33.) In that case, the State Bar Court reviewed a determination that the respondent attorney did not violate rule 4-100(B)(4) by refusing to endorse a draft settlement check jointly payable to the client, the respondent attorney and the client’s current attorney when the funds were subject to a charging lien in favor of the respondent attorney and the client continued to dispute the attorney’s right to the fees. The client had signed a retainer agreement with the respondent attorney to represent him in litigation for a flat fee of \$2,000 and 25 percent of any gross recovery. The agreement also granted the attorney a lien on any recovery in favor of the client. Due to attorney-client relationship problems and unspecified ethical issues, the attorney moved for a continuance of the trial date and permission to withdraw as counsel shortly before trial. Although the motions were denied initially, the client obtained substitution counsel at a later date after an unrelated four-month continuance was ordered. The respondent attorney filed a notice of lien in the action for \$5,000, which was substantially less than the attorney would have been able to charge if the engagement had been based on an hourly arrangement only. The underlying lawsuit was settled and the opposing party issued a check payable to the client and both his former and current attorneys, which the client and his new attorney asked the respondent attorney to endorse. The respondent attorney offered to accept \$2,000, and when the client refused, the attorney offered multiple suggestions for dealing with the funds or participating in binding arbitration. Although the client agreed to the suggestion of placing \$5,000 of the settlement funds in a blocked account, he did not follow through on the agreement and, instead, filed a malpractice action against the attorney. The attorney filed a cross-complaint to recover the reasonable value of his services. In response to the State Bar’s contention that the attorney was required by rule 4-100(B)(4) to endorse the check and could only pursue fees through his cross-complaint, the Review Department disagreed:

Respondent affirmatively demonstrated good faith by asserting and perfecting his lien only on \$5,000 out of the full \$26,500 settlement proceeds. His duty of good faith and fair dealing did not

require that he abandon his lawfully perfected lien by endorsing the \$26,500 settlement draft when it was under [the client's] control. Under Civil Code section 2913, had respondent endorsed the settlement draft when it was under [the client's] control as the State Bar contends he was required to do, respondent's lien would have been immediately extinguished as to [the client's] creditors and thereafter subject to extinguishment if [the client] spent the money.

(3 Cal. State Bar Ct. Rptr. at pp. 757-758.)

Consequently, Attorney A must make a reasonable determination of the amount of fees to which she is entitled under the lien and promptly offer reasonable suggestions for the disbursement or release of any and all remaining funds belonging to Client. An attorney's duty under rule 4-100(B)(4) to pay or deliver any funds which the former client is entitled to receive is not extinguished by the termination of the attorney-client relationship.^{4/}

A single rule does not exist to determine in all cases the fees to which an attorney is entitled, if any, after withdrawing or being discharged from a matter. (See Vapnek, et al., "California Practice Guide: Professional Responsibility" (TRG 2006), section 5:1030, et seq.) The amount of the funds in dispute in such situations may turn on several factors, including: whether the attorney fully or partially performed the agreement with the client (see, e.g., *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-791 [100 Cal.Rptr. 385]); whether the attorney was discharged or withdrew, whether withdrawal was justifiable or not (see, e.g., *Hensel v. Cohen* (1984) 155 Cal.App.3d 563, 568-569 [202 Cal.Rptr. 85]); and other factors, such as the reasonable value of the services, taking into account the hourly or contingent nature of the fee agreement (see, e.g., *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287 [256 Cal.Rptr. 209]), and the availability of contractual pre-judgment interest (Civ. Code, § 3287; see, e.g., *Fitzsimmons v. Jackson* (Bankr. 9th Cir. 1985) 51 B.R. 600, 612-613).

In addition, the legal procedures for establishing the amount the attorney is entitled to receive and for enforcing the lien vary depending on the circumstances. In many instances where a contractual lien for attorneys' fees is contested, an independent action by the attorney against the client must be used to establish the amount of the lien and to enforce it. (See, e.g., *Valenta v. Regents of the Univ. of Cal.* (1991) 231 Cal.App.3d 1465, 1470 [282 Cal.Rptr. 812]; *Hansen v. Jacobsen* (1986) 186 Cal.App.3d 350, 356 [230 Cal.Rptr. 580]; *Bandy v. Mount Diablo Unified School Dist.* (1976) 56 Cal.App.3d 230, 234-235 [126 Cal.Rptr. 890].) In certain types of actions, the court hearing the underlying matter has jurisdiction to determine the validity of the claim and a reasonable amount to be paid to the attorneys. (See, e.g., *Padilla v. McClellan* (2001) 93 Cal.App.4th 1100, 1104-1106 [113 Cal.Rptr.2d 680]; *Curtis v. Fagan* (2000) 82 Cal.App.4th 270, 278-280 [98 Cal.Rptr.2d 84].) In some circumstances, mandatory fee arbitration may be pursued (Bus. & Prof. Code, § 6200 et seq.; State Bar Rules of Proc. for Fee Arbitrations, Rules 1.0 et seq.; see *Hansen, supra*, 186 Cal.App.3d at p. 356, fn. 5 ["The discharged attorney is not required to comply with the procedures set out in Business and Professions Code sections 6200-6206 for fee arbitration until his or her independent action to establish the amount of the fees is commenced."]), or the retainer agreement with the client may provide for an alternative form of arbitration (see: *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 571-575 [87 Cal.Rptr. 3d 700, 710-714]; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 987-990 [12 Cal.Rptr.3d 287]).

In light of the different considerations applicable in any individual case, the attorney has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances.^{5/} If the client does not agree with that determination, the attorney should seek prompt resolution through arbitration or judicial determination, as appropriate.

Here, it is the Committee's opinion that Attorney A did not violate rule 4-100(B)(4) by refusing to endorse the check because her charging lien was valid and she reasonably believed she was entitled to a portion of the proceeds, she

^{4/} Termination of the attorney-client relationship itself triggers the duty to promptly return unearned fees that are paid in advance under rule 3-700(D).

^{5/} In *Feldsott, supra*, the State Bar Court used the term "fiduciary duty" to describe the duty of utmost good faith and fair dealing in the context of dealing with an express lien for attorneys' fees. Although the duty of good faith and fair dealing is typically understood as contractual in nature, attorneys should be aware that the State Bar Court may view such a duty as arising from the fiduciary relationship.

suggested reasonable alternatives to enable Client to promptly receive those funds to which he was undisputedly entitled, and she initiated proceedings to promptly resolve the issue while providing timely and proper notice to Client of his right to arbitration. While attempting to informally resolve the matter with Client, Attorney A also made a reasonable determination concerning the amount of funds she would be entitled to receive under the circumstances so that the undisputed amount could be delivered to Client.

CONCLUSION

When a former attorney has valid lien rights in settlement proceeds, that attorney will not violate rule 4-100 by taking prompt and reasonable action to resolve a dispute with his or her former client over the amount which the attorney is entitled to receive, and any undisputed amount to which the client is entitled is promptly disbursed through a method upon which the attorney and client agree. In light of the different considerations applicable in any individual case, the attorney has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances. If no agreement can be reached with the former client on these issues, the attorney has an affirmative obligation to promptly seek resolution of the dispute through arbitration or judicial determination, as appropriate. However, the attorney is not required to endorse a settlement check that is jointly payable to him or her, the client and successor counsel pending resolution of the dispute, because doing so would extinguish the attorney's charging lien under current California law.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.