

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 92-3**

**Clarification of Ethics Opinion 86-4
Regarding Attorney's Duty When Dispute Arises
Concerning the Rights of Third Parties
to Client Funds in the Possession of Attorney**

A number of questions have arisen regarding the scope of Opinion 86-4, and the circumstances under which an attorney may be held responsible for failing to honor a claim by a third party against client funds in the possession of the attorney.

It is the opinion of the Committee that: (1) In order to trigger an obligation on the part of the attorney to pay a creditor's claim, in contravention of a client's instructions, the creditor's claim must be a valid assignment on its face or statutory lien which has been brought to the attorney's attention.¹ (2) If a client instructs an attorney to ignore or disregard a valid assignment or statutory lien, the attorney should advise the client that absent an explanation (e.g., a written release, or some other form of written waiver by the lienor or assignee) the attorney will withhold the disputed funds, and, absent some amicable resolution, the funds will be deposited into court where the dispute can be decided by the judge.

A. WHAT THIRD PARTY CLAIMS MUST BE HONORED?

This is another way of asking the question when is the attorney obligated to deliver to the client funds "which the client is entitled to receive." See DR9-102(b)(4) (emphasis added). The Committee believes that when a client executes a valid assignment from settlement proceeds, or there exists a perfected statutory lien against settlement proceeds, it creates a presumption that the client is not "entitled" to those funds. Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Id. App. 1983); Herzog v. Riace, 594 A.2d 1106 (Me. 1991).

There may be other claims unrelated to the subject matter of the representation; for instance child support, alimony, restitution for criminal conduct and so on. "However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party." See Comment to Model Rule

¹ However, practitioners should be aware that under some tax lien statutes, the statutory filing requirements provide the element of notice. See 26 U.S.C. § 6321.

1.15.² A client is capable of and responsible for payment of his or her own obligations. Unless the claim in question has been reduced to a valid assignment or perfected lien, a creditor has no more special "entitlement" to those funds than does the client. The creditor in that situation has other remedies, such as prejudgment attachment. See Alaska R. Civ. P. 89. However, where a settlement includes or references specific allocation for a lien claimed by a third party, the amount designated for satisfaction of the lien must be utilized for that purpose. In re Burns, 679 P.2d 510 (Az. 1984).

B.

WHEN DOES A DISPUTE ARISE OVER THE CLIENT'S ENTITLEMENT TO HIS OR HER FUNDS, AND HOW SHOULD THOSE DISPUTES BE RESOLVED

In the view of the Committee, if a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly inform the client that the attorney is obligated to withhold and segregate those funds in question. Unless the client and the creditor are able to amicably resolve their differences, or unless the client provides the attorney with some verification that the lienor or assignee have waived their interest in those funds, the attorney will be required to deposit the funds into court for disposition by the judge. Given the fact that both sides will incur expense and delay in the event this step is taken, it would be appropriate to encourage the client and the creditor to resolve their differences promptly and amicably.

C. THE ATTORNEY SHOULD BE CAREFUL NOT TO INDUCE RELIANCE ON THE PART OF THE THIRD PARTY CREDITOR

Any number of questions may arise regarding a client's "entitlement" to funds being held by the attorney. The Committee believes that care should be taken to dispel any confusion which might arise regarding the attorney's obligations under these circumstances.

If, for instance, an attorney receives a letter from a medical provider to the effect that he or she is owed money for services provided to the client relating to the subject matter in question, that does not, in the Committee's view, create a presumption that the client is not entitled to receive the funds in question at his or her request. However, the Committee believes that the attorney in that instance should respond to the letter and convey to the medical provider the fact that this is a matter between the client and the medical provider. The medical provider should be on notice that the attorney will not be assuming the responsibility for payment of the client's bills relating to the subject matter in question; that is the client's responsibility.

The Committee believes it is inappropriate for the attorney to remain silent after having received notice of such a potential claim. While the attorney may believe that his or her silence in the face of receiving such notice is or may be interpreted as a constructive denial of the creditor's position, it is just as likely that the third party creditor may view that silence as implicit or tacit acceptance of the third party claim.

The situation is ripe for confusion, and the Committee believes the attorney should take the affirmative step of responding to these claims by shifting the burden back where it belongs, namely on the third party creditor and the client.

² The Model Rules of Professional Conduct have been approved by the Alaska Board of Governors and are currently pending before the Alaska Supreme Court.

In conclusion, the Committee believes that an attorney is not ethically obligated to arbitrate claims between creditors and his or her client. With respect to third party creditors who have not received an assignment from the client, or who have not perfected a statutory lien, and assuming the attorney has followed the recommendations outlined in Section C above and informed the creditor that the claim should be taken up directly with the client, the attorney should be free to follow the client's instructions with respect to return of client property. Even though the attorney may be aware of a potential problem in this regard, the Committee does not believe this vitiates the client's "entitlement" to return of his or her property, pursuant to DR 9-102(B)(4).

If a client instructs an attorney to disregard the terms of a valid assignment or statutory lien, the attorney should promptly take the appropriate steps to segregate those funds in question, and to inform the client that, absent a resolution which is satisfactory to all parties concerned, the attorney will be obliged to deposit the funds into court for disposition by the judge.

Approved by the Alaska Bar Association Ethics Committee on
April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

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