LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 496
November 16, 1998

"LIENS ON RECOVERY IN UNRELATED CASE"

SUMMARY

Attorney-client fee arrangements may include an assignment of anticipated court-ordered statutory fees to be paid to the prevailing party in a civil rights case, to satisfy unpaid hourly fees owing in an unrelated client matter, on condition that: the client knowingly agrees to the arrangement; the attorney provides full disclosure of the terms to the client, obtains the client's informed consent to the agreement, and also fulfills the requirements of good faith and fair dealing toward the client; and any applicable statutory requirements relating to written fee agreements are met.

AUTHORITIES CITED

Cases

Bandy v. Mt. Diablo Unified School District 1976) 56 Cal.App.3d 230, 126 Cal.Rptr. 890
Baron v. Mare (1975) 47 Cal.App.3d 304, 120 Cal.Rptr. 675
Berk v. Twenty-Nine Palms Ranchos, Inc. (1962) 201 Cal.App.2d 625, 20 Cal.Rptr. 144
Cetenko v. United California Bank (1982) 30 Cal.3d 528, 179 Cal.Rptr. 902
Epstein v. Abrams (1997) 57 Cal.App.4th 1159 1167, 67 Cal.Rptr.2d 555
Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal.App.3d 364, 105 Cal.Rptr. 445
Grossman v. State Bar (1983) 34 Cal.3d 73
Haupt v. Charlie's Kosher Market (1941) 17 Cal.2d 843, 112 P.2d 627
Hawk v. State Bar (1988) 45 Cal.3d 589, 247 Cal.Rptr. 599
In the Matter of Feldsott (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754
In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752
In the Matter of Respondent F (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17
In the Matter of Respondent K (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335
Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 26 Cal.Rptr.2d 554
Setzer v. Robinson (1962) 57 Cal.2d 213, 18 Cal.Rptr. 524
Severson & Werson v. Bolinger (1991) 235 Cal.App.3d 1569, 1 Cal.Rptr.2d 531
Valenta v. Regents of University of California (1991) 231 Cal.App.3d 1465, 1470, 282 Cal.Rptr. 812

Walton v. Broglio (1975) 52 Cal.App.3d 400, 404, 125 Cal.Rptr. 123
Weiss v. Marcus (1975) 51 Cal.App.3d 590, 597, 124 Cal.Rptr. 297

Codes and Rules
42 U.S.C. § 1983
42 U.S.C.§ 1988
Business and Professions Code § 6147
Business and Professions Code § 6148
Civil Code § 2881
Probate Code §16004
Probate Code §16004(c)
Rule 3-300, Rules of Professional Conduct
Rule 4-200(B), Rules of Professional Conduct
Rule 5-101, [Former] Rules of Professional Conduct

Opinions
LACBA Opinion No. 438
LACBA Opinion No. 458
LACBA Opinion No. 479
LACBA Opinion No. 492
Bar Association of San Francisco Opinion No. 1989-1

Other Authorities
Fee Agreement Forms Manual, Continuing Education of the Bar, June 1996, § 1.23, p. 28

FACTS AND ISSUES PRESENTED

Law Firm represents plaintiffs in civil rights litigation under 42 U.S.C. § 1983, in which prevailing plaintiffs are permitted recovery of attorneys fees from defendants under 42 U.S.C. § 1988. Law Firm may represent a plaintiff-client in several concurrently pending, unrelated matters. Law Firm bills on an hourly rate basis, but the client often is unable to remain current in paying the outstanding balance during the pendency of the case. Consequently, Law Firm typically must await resolution of each case before attaining a full fee recovery.

In light of the Law Firm's willingness to continue to represent the client in any given action while foregoing its right to immediate payment of fees, Law Firm wishes to include in the fee contract, a provision whereby client authorizes a priority lien against any recovery in a particular civil rights case, in which Law Firm is assigned an interest in such recovery in an amount sufficient to satisfy the unpaid fees in the unrelated matter(s).

DISCUSSION

It is generally recognized that the terms of an attorney-client fee agreement prior to the commencement of the attorney-client relationship are determined through arms-length negotiations, and the attorney owes no fiduciary duties to the prospective client. (Berk v. Twenty-Nine Palms Ranchos, Inc. (1962) 201 Cal.App.2d 625, 637, 20 Cal.Rptr. 144; Setzer v. Robinson (1962) 57 Cal.2d 213, 18 Cal.Rptr. 524; Baron v. Mare (1975) 47 Cal.App.3d 304, 120 Cal.Rptr. 675.) Recently, in Ramirez v. Sturdevant (1994) 21 Cal.App.4th

904, 917-918, 26 Cal.Rptr.2d 554, the appellate court reaffirmed the general rule that attorneys are ethically permitted to negotiate terms under which they will agree to provide legal services to a client.

This inquiry addresses the requirements of a prospective, separate retainer agreement, whereby a lien on the recovery in a prior matter is negotiated in connection with the new representation. Consequently, this inquiry does not address modification of an existing retainer agreement. (However, assuming that the attorney intends to modify an existing retainer agreement to permit a lien arrangement where one did not previously exist, the preexistence of the attorney's fiduciary duties to the client would preclude a unilateral modification by the attorney.) The attorney must provide full disclosure of the terms to the client, obtain the client's informed consent to the agreement, and also fulfill the requirements of good faith and fair dealing toward the client. (See, e.g. LACBA Opinion No. 479; Grossman v. State Bar (1983) 34 Cal.3d 73, Severson & Werson v. Bolinger (1991) 235 Cal.App.3d 1569, 1 Cal.Rptr.2d 531 Cf. Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 26 Cal.Rptr.2d 554 and Probate Code § 16004.)

First, the proposed lien does not create a presumption of undue influence pursuant to Probate Code § 16004(c), which expressly provides: "This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee." This exemption to the general presumption of undue influence in transactions between trustees and beneficiaries has been held not applicable to the fee arrangement between attorney and client. (Walton v. Broglio (1975) 52 Cal.App.3d 400, 404, 125 Cal.Rptr. 123.)

Additionally, the Committee noted in Opinion No. 492, Rule 3-300 is not per se applicable to the initial attorney-client retainer agreement, unless the attorney acquires "an ownership, possessory, or other pecuniary interest" adverse to the client, such as a note secured by a real property trust deed. (See, Hawk v. State Bar (1988) 45 Cal.3d 589, 247 Cal.Rptr. 599.) As the first sentence of the comment to Rule 3-300 indicates, the rule is "not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member ownership, possessory, security, or other pecuniary interest adverse to the client." A contingent fee coupled with a lien against the client's prospective recovery in the same matter in which legal services are being provided has never been held to require compliance with the terms of Rule 3-300. In determining whether a "pecuniary interest" is "adverse" to the client, the Supreme Court held that the attorney's "ability to summarily *extinguish* the client's interest in property is what makes the acquisition 'adverse.' [Emphasis in original.]" (45 Cal.3d at 600.) Thus, the Hawk Court made clear that it was the ability to "summarily" acquire the client's property which required compliance with rule 5-101, the predecessor to current rule 3-300. As noted below, the client's right to the property or funds against which the attorney has a contractual lien would not be summarily extinguished without due process of law; hence, rule 3-300 is inapplicable.

Although this Committee does not express opinions regarding general questions of law, we observe that it is recognized in California that an agreement between an attorney and client providing the attorney a lien upon a client's recovery "is decisive as to its existence and constitutes a valid, equitable assignment pro tanto of the judgment or the proceeds received by way of settlement." (Bandy v. Mt. Diablo Unified School District (1976) 56 Cal.App.3d 230, 235, 126 Cal.Rptr. 890.) No ethical violation results from an attorney's assertion of a contractual lien for unpaid fees, after discharge by the client. (See, Bar Association of San Francisco Opinion No. 1989-1.)

The Committee notes that, in California, the enforceability of contractual liens set forth in attorney fee agreements have been upheld as fully enforceable. California Civil Code § 2881 expressly recognizes creation of a lien by contract. Numerous cases have upheld the enforceability of a provision in attorney fee agreements for a contractual lien against a prospective recovery of a client, most notably in contingent fee cases. (See, e.g. Weiss v. Marcus (1975) 51 Cal.App.3d 590, 597, 124 Cal.Rptr. 297; Haupt v. Charlie's Kosher Market (1941) 17 Cal.2d 843, 846, 112 P.2d 627; Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal.App.3d 364, 371, 105 Cal.Rptr. 445.)

Cetenko v. United California Bank (1982) 30 Cal.3d 528, 552, 179 Cal.Rptr. 902, established the viability of an attorney's lien in a contract for an hourly fee. The California Supreme Court noted that there is "nothing inherently unfair in an agreement to pay an attorney an hourly fee for his services," and held that the contractual lien to secure payment of hourly attorney fees was not improper.

The State Bar Court has recently considered a fact situation similar to that presented in this inquiry. In the Matter of Respondent F (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 24 addressed the charge of the Office of the Chief Trial Counsel that an attorney violated former rule 8-101(A)(2) [current rule 4-100(A)(1)], precluding the attorney's unilateral distribution of client funds to satisfy fees in an unrelated matter. The facts presented demonstrated that the attorney in Respondent F had obtained the client's oral authorization to pay outstanding fees for her work in a child custody matter from the proceeds of an unrelated personal injury settlement. The Review Department concluded that, by deducting fees from the personal injury settlement to satisfy unpaid fees in the child custody matter, the attorney did not violate the Rules of Professional Conduct.

In a somewhat analogous case, In the Matter of Feldsott (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 758, the State Bar Court held that an attorney who refused to endorse a settlement check proffered by successor counsel, under circumstances which would have required the predecessor counsel to waive a valid contractual lien claim, did not violate any of the Rules of Professional Conduct. The Review Department held that since the predecessor counsel was involved in "a dispute not only as to the right to funds, but also as to a right to security to the funds ... rule 4-100(B)(4) does not apply." There was no mention in the case of any other duty to the client vis-a-vis enforcement of the contractual lien claim. The attorney was exonerated of any ethical breach.

As a matter of law, an attorney who holds a lien against client funds or property cannot summarily extinguish the client's claim to that fund. In the absence of client agreement to permit the satisfaction of the attorney's lien, the attorney must bring an independent action to enforce the lien. (Valenta v. Regents of University of California (1991) 231 Cal.App.3d 1465, 1470, 282 Cal.Rptr. 812; Epstein v. Abrams (1997) 57 Cal.App.4th 1159, 1167, 67 Cal.Rptr.2d 555.) The client is free to oppose the existence, the amount and/or the enforceability of the lien in the independent action. Thus, the attorney's enforcement of a contractual lien is not a summary procedure, and the lien provision included in the fee agreement is not "adverse" to the client within the meaning of rule 3-300.

The question presented in this inquiry is to be distinguished from that in which the client has not consented to the lien arrangement. There is no doubt that the attorney will violate his/her ethical duty to a client in the event that the attorney unilaterally diverts client trust funds to pay unpaid attorney fees. This is true regardless whether the fees have been earned. (LACBA Opinion No. 438; In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752.) Once the client objects to the attorney's taking of the fee, the attorney is ethically prohibited from distributing the earned fee, until the dispute is resolved. (In the Matter of Respondent K (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.) Absent client consent, an attorney is ethically precluded from satisfying a lien for attorney fees owed in one matter against a recovery obtained on behalf of a client in an unrelated matter. Conversely, where the client expressly consents to pay attorney fees from "any recovery" there would appear to be no ethical violation. (See, Fee Agreement Forms Manual, Continuing Education of the Bar, June 1996, § 1.23, p. 28.)

In the opinion of the Committee, the Law Firm may ethically negotiate an arrangement whereby, upon monetary recovery in a civil rights case, amounts sufficient to satisfy outstanding hourly fees incurred in an unrelated case may be disbursed to the Law Firm, so long as: (1) the terms of the lien arrangement are fully explained to the client and the client provides informed consent to those terms; and (2) the written fee agreement specifies the manner by which the lien will attach; and (3) the written agreement otherwise complies with all applicable provisions of Business and Professions Code § 6147 or § 6148. (See, LACBA Opinion No. 458.)

It is the further opinion of the Committee that the attorney would be wise to account in writing to the client upon the receipt of attorney fees in a matter, and to request the client's prior approval of any distribution of funds to satisfy fees in an unrelated matter. In the event the client raises any objection to the distribution of funds to satisfy fees in the unrelated matter, the attorney should hold the disputed funds in trust until the dispute is resolved. Once the client consents to the distribution of funds to satisfy unpaid fees, the attorney is free to make the distribution as set forth in the attorney/client fee agreement.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the inquiry submitted.