

# ADVISORY ETHICS OPINION 97-10

## SYNOPSIS:

An attorney whose client first agrees to a settlement and later refuses to endorse the settlement check may not accept a substitute check payable to the attorney as trustee on behalf of his client for deposit in his Trust Account and distribution.

## FACTS:

Attorney A's client entered into an arbitration agreement in settlement of his personal injury claim. As part of the settlement, the client also executed releases in favor of the defendant and the defendant's insurance company. Under the terms of a separate fee agreement, Attorney A is to be paid one-third of the total settlement, plus disbursements. Third party lienholders also have rights to the settlement fund. After the payment of Attorney A's fees and disbursements to lienholders, Attorney A's client will receive nothing. The settlement check has been issued payable to Attorney A and his client. The client has refused both to endorse the check and to communicate with Attorney A. The insurance company may be willing to issue a new check, payable to Attorney A "as Trustee" for his client. Attorney A inquires as to whether he may request the substitute check and distribute the settlement funds.

## ISSUES:

1. Should Attorney A accept a substitute check made out to him "as trustee for" his client?
2. If so, may Attorney A pay his own fees from the settlement, and may he pay the claims of lienholders?

## DISCUSSION:

Since Attorney A's client will not communicate with him, we must assume that the client disputes one or more of the following: the terms of the settlement; the terms of the fee agreement; or the validity or size of one or more of the liens. If the client wishes to repudiate the terms of the settlement, acceptance of the funds by his attorney will undermine his ability to do so. If the client accepts the terms of the settlement but disputes the claims of his attorney or any one of the lienholders, he would not be prejudiced by his attorney's acceptance of the settlement funds, in escrow. He would, however, be prejudiced by their distribution over his objection. In the absence of any indication from the client as to the basis for his objection, the attorney should neither accept nor distribute the settlement amount.

DR 7-101 provides that an attorney shall not intentionally fail to seek the lawful objectives of his client through all reasonably available means permitted by law. We are not prepared to conclude that there can be no lawful objective to the client's actions and no reasonably available means for him to voice his objections, whatever they may be. Clearly there is an appropriate procedure and forum for the resolution of any one of these potential dispute and it would be inappropriate for Attorney A to accept the settlement check in light of his client's apparent objection.

If Attorney A learns that his fees are in dispute, the exercise of his professional judgment may well be compromised by his own financial interest and he should consider withdrawal pursuant to DR 5-101(A). If withdrawal is appropriate, Attorney A may, of course, pursue his claim for fees and may be entitled to assert an attorney's lien on any funds payable to his client as a result of his efforts.<sup>1</sup>

Even if his fees are not at issue, Attorney A may seek to withdraw as counsel pursuant to the terms of DR 2-110 (C) if he feels that his client's conduct renders it unreasonably difficult for him to carry out his employment. Withdrawal may also be an option if Attorney A's client insists on acting against Attorney A's advice or is asserting a position which cannot be supported in good faith.

## CONCLUSION:

Having concluded that Attorney A should not accept the substitute check, we need not reach the matter of his distribution of client funds.

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<sup>1</sup> See generally, *Valley Disposal, Inc. v. Central Vermont Solid Waste Management District*, 113 F.3d 357 (2d Cir. 1997), *In re Button v. Anderson*, 112 Vt. 531 (1942), *Hurlbert v. Brigham*, 56 Vt. 368 (1881), and Professional Responsibility Opinion No. 85-4.