ADVISORY ETHICS OPINION 85-04

SYNOPSIS:

An attorney violates no provision of the Code by holding in escrow funds of his client upon which second attorney claims an attorney's lien, and which were obtained by the attorney through the second attorney's endorsing an insurance company settlement check which had been made payable to both attorneys.

OPINION:

Our opinion is requested regarding the ethical obligations of an attorney withholding funds payable to the client as proceeds of a personal injury litigation settlement at the request of the client's prior attorney who claims the client owes him sums for services rendered on related and unrelated prior matters.

FACTS:

Briefly stated the facts are as follows: Attorney A represented the client in a divorce matter and there remains an unpaid balance due to the attorney for services rendered in that matter. The client has been billed for these services but has declined to pay. Subsequent to the divorce matter Attorney A represented the client as plaintiff in a personal injury action; however, the client changed attorneys during the litigation and is now represented by Attorney B in the personal injury action. Attorney A makes no claim for any fees for services rendered in connection with the personal injury litigation[1] but does seek reimbursement for certain out-of-pocket expenses incurred while he represented the client in that litigation.

A settlement was reached in the personal injury litigation and an insurance company settlement check was sent to Attorney B, made payable to Attorneys A and B. As a condition to endorsing the check, Attorney A insisted that the client's past due account for services rendered in the divorce action and for the out-of-pocket costs in the personal injury action be paid from the client's share of the settlement proceeds. Upon agreement to these terms by Attorney B, Attorney A endorsed the check.

Attorney B has distributed the proceeds of the check except for an amount equal to Attorney A's unpaid bill and expenses. This amount is placed in Attorney B's escrow account The client now requests the release of the funds from Attorney B. Attorney A objects. Attorney B asks our opinion as to his ethical responsibilities.

ANALYSIS:

To resolve the ethical considerations in this dispute it is first important to note the legal and factual issues that we do not address. We render no opinion as to whether Attorney A has a valid attorney's lien to the funds held by Attorney B. No facts are presented as to the bas1s for the lien and in any event. It is beyond the purview of this committee to express an opinion as to that matter. The issue of the validity of an asserted attorney's lien is a matter of law, not ethics. The Vermont Code of Professional Responsibility does recognize and permit enforcement of a properly asserted attorney's lien[2], and attorney's liens are recognized in Vermont.[3] We note in passing that in *Hurlbert v. Brigham*[4] the Court recognized and approved two types of attorney's liens: a charging lien, a lien arising out of services provided in a particular matter and entitling an attorney to payment from any funds generated in that matter, and a retaining lien, a general attorney's lien, broad in scope, under which an attorney has a "right to retain money or other property which comes into his hands . . . for the payment of whatever is due him for professiona1services, whether bestowed upon the particular thing retained or otherwise."[5] The attorney's retaining lien as recognized in this state thus permits an attorney to retain funds which come into his possession even though the funds are unrelated to the matter which generated the unpaid fees. The Court in *Hurlbert* cited with approval language from an opinion by Lord Mansfield in which the Court recognized a number of remedies available to an attorney to enforce his lien, including application to a court to prevent funds from being dispersed until the attorney's lien is satisfied and also stopping money *"in transitu",* if the attorney can "lay hold of it"[6]

[1] Such a claim for contingency fees would give rise to an equitable lien in favor of Attorney A as to the funds recovered in addition to any attorney's lien that might arise. *Estate of Button v. Anderson,* 112 Vt. 531 (1942).
[2] EC 5-7; DR5-103(A)(1).
[3] *Nason v. Addison County Trust Co.,* 104 Vt. 183 (1932); *Davis v. Farwell*, 80 Vt. 166 (1907). See Professional Responsibility Committee Opinion 82-9 and cases cited therein.
[4] *Hurlbert v. Brigham*, 56 Vt. 368 (1881).
[5] *Id.* at 372.
[6] *Id.*

EC 5-7 states, in pertinent part,

> . . . it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation.

DR5-103(A)1 states:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client except that he may acquire a lien granted by law to secure his fee or expenses.

These provisions of the Code make clear that attorneys' liens are cognizable under the Code if they are recognized as enforceable within the jurisdiction, and there is no ethical conflict involved in asserting and enforcing an attorney's lien even where such enforcement places the attorney's interest at odds with his client's interests. Within this framework, it is clear that Attorney A has a right to assert an attorney's lien. Attorney A, by virtue of being named payee on the settlement check, was able to "lay hold" of the settlement proceeds and thus assert his lien.[7] Attorney A gave notice of his lien to Attorney B and relinquished control over the proceeds only on condition that his lien would be honored Attorney B violates no provision in the Code by further retaining the funds under the force of this notice. Moreover, the Code is not violated if he releases the funds to his client, although such a step may expose him to liability to Attorney A. The violation of a lien obligation is a matter of law, not ethics.

[7] Had Attorney A not been listed as a payee on the settlement check a more difficult issue would be presented as to the scope of any claimed attorney's lien asserted by Attorney A. Language in *Hurlbert* suggests that by giving notice of the lien to Attorney B, Attorney A would have been able to put a hold on disbursements of the funds even though they were not in Attorney A's possession. We need not reach the question of Attorney B's obligation under such circumstances as it is not presented here. See *Hurlbert v. Brigham, supra,* at 372, where the Court cited with approval Lord Mansfield's statement: ". . . if the attorney gave notice to the defendant not to pay till his bill should be discharged, the payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice."