

NEW YORK STATE BAR ASSOCIATION

**Committee on Professional Ethics**

Opinion 717 – 4/15/99

Topic: Medical liens; duty to pay funds to third party; missing lienor.

Digest: Plaintiff's attorney should pay holder of valid lien from settlement proceeds. If client disputes amount or validity of lien, attorney should remit to client funds not in dispute and hold remaining funds pending resolution of dispute. In event of missing lienor, attorney should consider several options, including application for court order concerning disbursement of funds.

Code: DR 9-102(C)(1),(4); DR 9-102(F).

**QUESTION**

A lawyer has received a settlement check payable to a client and containing the legend "...for treatment or services and interest rendered." The check represents full settlement of a claim arising from a motor vehicle accident. The attorney's fee is not in issue. The client had incurred five medical bills for treatment as a result of the accident and they remain unpaid. The lawyer's preliminary research indicates that two of the five medical service providers have liens and that one of the two is "no longer in business." One of the providers without a lien is also out of business.

May the attorney turn the check over to the client, relying on the client to pay the providers from the proceeds of the check?

If the attorney has an obligation to pay the holders of valid liens directly, how would that be accomplished in the case of the lienor which is out of business?

### OPINION

DR 9-102(C)(1) states that a lawyer must: “Promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest.” Therefore, the attorney must notify the client and the holders of valid liens and assignments when the check is received.<sup>1</sup>

DR 9-102(C)(4) requires the lawyer to “promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person *is entitled to receive*” (emphasis added). The attorney should make a reasonable effort to ascertain whether the provider has an interest in or is entitled to receive payment from the funds in the attorney’s possession. See Nassau County 96-13. Absent an assignment or lien, a provider would not have an interest in and be entitled to payment from the funds. *Leon v. Martinez*, 84 NY2d 83 (1994).

We do not believe the attorney is ethically bound to prefer providers without liens or assignments over the client because those providers would simply be creditors of the client. An attorney who honored the claims of such creditors over the client’s clear entitlement would run afoul of DR 9-102(C)(4). See Connecticut Opinion 95-20 (1992); Alaska Opinion 92-3 (1995). At the same time, DR 9-102(C)(4) requires the attorney to pay a provider from the proceeds of the check if the provider asserts that it has a lien or assignment from the client, the attorney is satisfied that the assertion is correct, and the client does not dispute that assertion. See Nassau County 96-13. An attorney who fails to honor a lien or assignment may be held liable to the provider if he or she pays out money in disregard of the lienor or assignor’s entitlement to the funds. *Leon v. Martinez*, 84 N.Y. 2d 83 (1994).

If a provider asserts that it has a valid lien or assignment, but the client disputes the provider’s assertion, the attorney should hold the check or its proceeds, pending resolution of the dispute. Nassau County 92-10, 96-13. If the check is payable to the *client*, the attorney should counsel the client to endorse the check for deposit in the attorney’s trust fund to avoid the check becoming stale.<sup>2</sup> If the client refuses to do so, the attorney should retain possession of the

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<sup>1</sup> While this committee does not render *legal* opinions, it would seem that there are no common law or statutory liens for doctors’ medical services. *Iaiello v. Levine*, 255 N.Y.S. 2d 921 (S.Ct Nassau Co. 1965); *Healy v. Brotman*, 409 N.Y.S. 2d 72 (S.Ct Suffolk Co. 1978.)

<sup>2</sup> Some banks will declare checks stale in as few as 90 days.

check pending resolution of the dispute. If, on the other hand, the client endorses the check, the attorney should promptly remit the balance due the client to comply with the prompt payment mandate of DR 9-102(C)(4) and hold the disputed portion. The attorney may attempt to resolve disputes by way of negotiation or, alternatively, commence an interpleader action to enable a court to resolve the dispute. See Nassau County 94-19, 91-21.<sup>3</sup>

There is no provision in the Code specifically addressing the obligation to pay a lienor who is out of business. Nevertheless, to fulfill the requirements of DR 9-102(C)(4), the attorney might consider the following options:

(a) If the attorney has exhausted all reasonable efforts to locate any persons or entities who might succeed to the assets of the out-of-business lienor, the attorney might disburse the funds to the client.

(b) The attorney might employ the procedure described in DR 9-102(F) for dealing with money owed to a missing client, which is to apply to the Supreme Court in the county in which the attorney maintains an office for the practice of law for an order directing the payment of the money to the “Lawyers’ Fund for Client protection for safeguarding and disbursement to persons who are entitled thereto.”

(c) If the lienor was a *hospital*, the attorney might fulfill the ethical responsibility by depositing the funds with the Commissioner of Finance in New York City or the applicable County treasurer where the lien was filed. See N.Y. Lien Law, §189 (9).

## CONCLUSION

If a provider undisputedly has a valid lien through statute or assignment by the client, the attorney should pay the provider directly from the proceeds of the check. If the client disputes the validity of the lien or assignment, pending resolution of the dispute the attorney should hold the disputed funds while disbursing any funds that are not in dispute. If the check is payable to the client and the client refuses to endorse it for deposit in the attorney’s trust account, the lawyer should hold the check itself until the dispute is resolved. An interpleader action would be an appropriate procedure to resolve the dispute. If the provider with a valid lien is no longer in business and reasonable search locates no successor with a valid claim to the entity’s assets, the attorney should consider several options, including applying to the Supreme Court for an order directing the money to be paid to the Lawyers’ Fund for Client Protection.

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<sup>3</sup> Although, as we recently opined in another context, filing an interpleader action would be an appropriate vehicle “... to protect the property of others,” N.Y. State 710, the attorney would not be *ethically* required to employ the this alternative. See Nassau County 91-21.

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