

Committee Opinion  
June 14, 1994

LEGAL ETHICS OPINION 1591

CLIENT FUNDS — TRUST ACCOUNTS:  
ATTORNEY'S COMMON LAW  
POSSESSORY LIEN ON ESCROWED  
FUNDS.

You have presented a hypothetical situation in which Attorney was retained by Client as the third counsel to represent him in his domestic relations case. There had been some problems with the payment of fees by Client to prior counsel, as a result of which, Prior Counsel had filed an improper attorney's lien against Client. You indicate that Attorney wrote to Prior Counsel, informing him that no lien of the type exerted by Prior Counsel exists in Virginia. Prior Counsel's lien against Client was never enforced.

You further indicate that Client and his wife received certain funds representing proceeds of the sale of a jointly owned property which were deposited in an escrow account with Attorney and Opposing Counsel as escrow agents. The funds were to remain in escrow pending the outcome of the litigation and a final disposition of the marital estate. On the motion of Client, and over the objection of Wife, the circuit court ordered some funds released to pay for joint mortgage obligations of the parties so that the parties' property would not be foreclosed.

You advise that Wife later signed an agreement with Client resolving all remaining issues in the case and agreeing to release all of the escrow funds to Client. Four days later, Wife revealed that she had filed a bankruptcy petition prior to the signing of the agreement in order to stop the foreclosure of the parties' various properties; that she was in bankruptcy when the parties signed the agreement; and that as a result of the automatic stay of the bankruptcy court, the funds could not be released to Client.

You further indicate that the agreement was not approved by the bankruptcy court which did, however, grant the state court a lift-stay with respect to the pending domestic relations action. Over the objection of Wife, the state court granted Client an equitable distribution award consistent with the parties' agreement, thus ordering the escrow funds to be released to Client. The bankruptcy court allowed for the enforcement of the award, resulting in a dismissal of Wife's bankruptcy petition.

The facts presented also indicate that Client has been making monthly payments, ranging from \$ 1,000 to \$3,000 per month, to Attorney on account for legal services rendered. As a result of the protracted and intense litigation in this case, Client has fallen behind in his monthly payments to Attorney and is in debt to Attorney for more than \$30,000. This amount is now outstanding. Client does not dispute the reasonableness of these fees and has even testified under oath that he believes the fees to be reasonable. In a phone conversation with Attorney's office manager, Client stated that Attorney is aware that he would be getting paid out of the escrow funds when these funds were released. Client retracted this statement when confronted by Attorney and told Attorney that he was planning to pay over a period of time.

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Finally, you indicate that the escrow funds have been determined to be the sole property of Client and have been released to Attorney by the escrow agents (Attorney, Client, and previous Opposing Counsel) to be delivered to Client. Attorney would like to withdraw from the case and exert a common law attorney's possessory lien on a portion of these funds representing what is owed to him by Client.

You have asked the committee to opine whether, under the facts of the inquiry, Attorney can exert a common law possessory attorney's lien on that portion of the released escrow funds that represent the amount of fees owed to him.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-108(D) which states that upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned; DR:9-102(B)(1) which provides that a lawyer shall promptly notify a client of the receipt of his funds, securities, or other properties; and DR:9-102(B)(4) which states that a lawyer shall promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

The committee has previously opined that, under certain circumstances, it is not improper for a firm to maintain a lien to secure payment of fees provided that the client has refused to pay the firm's fees. *See* LE Op. 996.

In the facts you present, the committee opines that, assuming there is a lien permitted by law, it is not *per se* improper, under DR:9-102(B)(1), for Attorney to assert a common law possessory lien, provided that client is promptly notified of the release of the escrowed funds and that he immediately receives the excess portion of the funds along with a full accounting of the funds upon which Attorney is asserting the lien. The committee cautions that the determination of what can be done with the funds once the lien is asserted raises a legal question beyond the committee's purview. *See* DR:9-102(A)(2) and DR:9-102(B)(4). The committee believes that since termination of representation will be simultaneous with termination of the litigation, client's interests will not, under DR:2-108(D), be negatively impacted by the assertion of the lien. *See* LE Op. 1471.

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