



# ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5(e), 1.15(e), 5.4(a), 7.2(b) with its Comments [6-7], 8.3(a), and 8.4(b)-(c). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

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## Opinion No. 01-04 January, 2002

Topic: Reporting Duty for Failure to Segregate  
Funds; Reporting Duty for Failure to Give Funds to Undisputed Owner

Digest: Lawyers acting as bar association officers have no duty to report a lawyer who fails to segregate a referral fee she owes to the bar association where the lawyer has filed a petition to adjudicate the lien raising serious ethical issues regarding the validity of the lien.

The lawyers acting as bar association officers have no duty to report the failure of the attorney to turn over the money after a final determination has been made that it belongs to the association and collection proceedings have commenced.

Ref: Illinois Rules of Professional Conduct 1.5(f) and (g), 1.15(c), 5.4(a), 7.2(b), 8.3(a), 8.4(a)(3), 8.4(a)(4)

Skolnick v. Alheimer & Gray, 191 Ill. 2d 214; 730 N.E.2d 790 (2000)  
Eastman v. Messner, 188 Ill. 2d 404; 721 N.E.2d 1154 (1999)  
Cirincione v. Johnson, 184 Ill. 2d 109; 703 N.E.2d 67 (1998)  
In re Merriwether, 138 Ill. 2d 191; 561 N.E.2d 662 (1990)  
In re Himmel, 125 Ill.2d 539; 533 N.E.2d 790 (1988)  
In re Clayter, 78 Ill.2d 276; 399 N.E.2d 1318 (1980)  
Richards v. SSM Health Care, Inc., 311 Ill. App.3d 560; 724 N.E.2d 975  
(1<sup>st</sup> Dist., 3<sup>rd</sup> Div.2000)  
People v. Lopez, 129 Ill. App. 3d 488; 472 N.E.2d 867 (1<sup>st</sup> Dist., 5<sup>th</sup> Div.  
1984); 725 ILCS 5/16-1(a)(1)(2000)  
ISBA Advisory Opinion on Professional Conduct 93-3 (1993)  
ISBA Advisory Opinion on Professional Conduct 90-36 (1991)  
Thomas P. Sukowicz, The Himmel Duty: Observations By an ARDC  
Lawyer, 11 CBA Record 16, 17 (1997).

## FACTS

An attorney who participates in a bar association lawyer referral service owes \$31,250, 25% of her \$125,000 contingency fee, to the bar association. As a condition of the referral the lawyer agrees to pay this 25% for fees totaling \$1,501 and over. The “usual charges of a non-for-profit referral service” levied by bar associations are authorized by Illinois Rule of Professional Conduct 7.2(b). Richards v. SSM Health Care, Inc., 311 Ill. App.3d 560, 569; 724 N.E.2d 975, 982 (2000). She asks the bar association to reduce the 25% charge. The association responds that it needs more information to consider her request. And it asks the attorney to segregate the funds she owes them, to protect the association’s lien.

After the association makes this request that the funds be segregated, the attorney files a petition to adjudicate the lien. The attorney argues that the referral arrangement violated the prohibition against fee splitting with a non-lawyer and that the fee was disproportionate, thus the agreement was void as violative of the Rules of Professional Conduct. IRPC 1.5(f) and (g), 5.4(a). The trial court upheld the validity of the lien.

The bar association states that attorney failed to segregate the funds and apparently spent them for personal use. Collection proceedings have commenced and the attorney has paid no part of the charge.

## QUESTIONS

Whether a lawyer’s knowledge that an attorney has failed to segregate money and used it, despite a claim by a third party that the money belongs to them, requires him to report it to the ARDC?

Whether a lawyer’s knowledge that an attorney has kept money belonging to another despite

a properly perfected lien and a final court adjudication that the money belonged to another requires him to report it to the ARDC?

## OPINION

Non-privileged knowledge of fellow attorney's crime, dishonesty, fraud, deceit or misrepresentation triggers a reporting duty. IRPC 8.3(a), 8.4(a)(3), 8.4(a)(4). Attorneys, however, must only report crimes that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. ISBA Advisory Opinion on Professional Conduct 93-36 (1991)(no duty to report violations of 1.2(e)); *cf.* Thomas P. Sukowicz, The Himmel Duty: Observations By an ARDC Lawyer, 11 CBA Record 16, 17 (1997)(listing types of misconduct that must be reported). Theft of client funds or forgery of documents that the lawyer files with the court must be reported. Skolnick v. Altheimer & Gray, 191 Ill. 2d 214, 228; 730 N.E.2d 4, 14-15 (2000); In re Himmel, 125 Ill.2d 539; 533 N.E.2d 790 (1988).

Generally, the failure to segregate client or third party funds violates IRPC 1.15(a). And whenever a third person claims money held by an attorney, the attorney must keep that money separate pending the resolution of the dispute. IRPC 1.15(c); ISBA Advisory Opinion on Professional Conduct 93-3 (1993)(involving the duty to keep disputed funds in a separate account and the appropriateness of an interpleader).

The bar association claims an interest in a fee arising from the representation. A lien is a "hold or claim on another's property...." Eastman v. Messner, 188 Ill. 2d 404, 407; 721 N.E.2d 1154, 1156 (1999). This claimed lien appears to fall squarely within the terms of Rule 1.15(c). However, whether the failure to segregate violates Rule 1.15(c) is immaterial to resolving the whether the conduct must be reported. Even if the failure to segregate the disputed funds violates Rule 1.15(c), there is no reporting duty.

The inquiry assumes that a lien exists, without stating the facts that support that assertion. Obviously, the failure to pay her contractual obligation would not be theft absent other facts. Deadbeats are not necessarily thieves.

Assuming that a valid lien exists, an attorney becomes liable for tortious conversion when: (1) the lienholder has a right to the property; (2) he has the right to immediate and absolute possession; (3) he has made a demand; and (4) the attorney wrongfully took possession or control of the property. Cirrinzione v. Johnson, 184 Ill. 2d 109, 114; 703 N.E.2d 67, 70 (1998).

An attorney's conversion of money subject to a lien has been found to violate the law of professional conduct. Where the money involved was client money but it was not owed to the client because a third party had a lien on it, the conversion was nevertheless violative of the law of professional conduct. In re Merriwether, 138 Ill. 2d 191, 200; 561 N.E.2d 662,

666 (1990). Moreover, honest motives may mitigate but will not defend against a disciplinary authority's allegation of conversion or commingling. Merriwether, 138 Ill. 2d at 201-202; 561 N.E.2d at 666-667.

Thus, a mere "technical conversion" violates Rule 1.15 regardless of intent: Any time the bank balance in his client trust fund dips below the amount entrusted to the lawyer, regardless of his possession of other money deposited elsewhere sufficient to make good the debt, the lawyer violates the rule. In re Clayter, 78 Ill.2d 276, 283; 399 N.E.2d 1318; 1321 (1980). While a violation of Rule 1.15 requires no proof of intent, theft, by contrast, requires proof of intent to permanently deprive. *Compare* In re Clayter, 78 Ill.2d 276, 283; 399 N.E.2d 1318; 1321 (1980) (imposition of discipline for conversion on an attorney requires no proof of dishonest motive) *with* People v. Lopez, 129 Ill. App. 3d 488, 494; 472 N.E.2d 867, 872 (1<sup>st</sup> Dist., 5<sup>th</sup> Div. 1984)(an attorney's theft conviction requires proof of his dishonest motive).

The failure of the lawyer to keep the Rule 7.2(b) "usual fee" separate may violate Rule 1.15. Notwithstanding the attorney's presumably good faith challenge to the size of the fee, her failure to segregate the disputed funds violates the rule. Faced with a clear violation of the Rules of Professional Conduct the only dispute is whether such a violation must be reported. Two categories of violations must be reported: (1) criminal acts that reflect on the lawyer's trustworthiness and (2) fraud, deceit or misrepresentation.

No criminal act occurred in the lawful challenge to the association's right to the money. While the lawyers may suspect the attorney intends to deprive them of the money, it is no more than a suspicion. *Cf.* Skolnick v. Altheimer & Gray, 191 Ill. 2d 214, 228; 730 N.E.2d 4, 14 (2000). Certainly, there is no fraud, deceit, or misrepresentation involved in the failure to pay. The attorney has forthrightly challenged the association's right to the money.

In In re Himmel, the attorney failed to report who had cashed a settlement check, spent the money, then lied about the case to a client. Here, by contrast, there exists a genuine dispute regarding the legality and size of the referral fee. The attorney has not lied or concealed the fact that she received a judgment and a fee in the case.

The bar association tells her it would consider her request and does not demand immediate payment. It merely requests that the attorney comply with the strictures of Rule 1.15 and segregate the funds owing it under the referral agreement while it considers the attorney's request for a reduction.

The failure to segregate these funds does not rise to the level of a crime, fraud, deceit or misrepresentation. Although it may amount to a "conversion" under the disciplinary rules, it does not amount to a criminal conversion because there is no proof of intent. Until the petition for adjudication of the lien is resolved, the bar association has no right to absolute and immediate possession. Thus, there is no tort of conversion.

The reporting duty under Rule 8.3 obliges lawyers to report other lawyers only for specific types of misconduct, certain crimes, fraud, deceit, and misrepresentation. The lawyer's adjudication of the lien and appeal raised a serious ethical issue. The attorney possessed a good faith basis for filing the petition to adjudicate the lien. While in hindsight the bar association possessed a right to the \$31,250, that was not clear at the time she filed her petition to adjudicate the lien.

While the bar association certainly may report this possible violation of Rule 1.15(c), their failure to report the attorney should not result in discipline.

After order deciding the money belongs to the bar association becomes final, the attorney fails to pay and the matter proceeds to collection.

These facts may indicate the attorney intends to keep the association's money despite the court order. Although the rules do not require association officers to report the lawyer for the failure to segregate the money, keeping the money indefinitely may change whether the lawyers must report her.

The refusal to give the money to the association after the court has determined it belongs to the association may amount to theft. After the courts have made a final determination of who owns the money and the lawyer does not hand it over to the owner, the attorney "exerts unauthorized control over the property of the owner." 720 ILCS 5/16-1(a)(1) (2001); *cf.* People v. Lopez, 129 Ill. App. 3d 488, 494; 472 N.E.2d 867, 872 (1<sup>st</sup> Dist., 5<sup>th</sup> Div. 1984)(an attorney's theft conviction requires proof of his dishonest motive—the intent to permanently deprive).

Proof of the intent to permanently deprive rests with the particulars of the case. In Lopez, the attorney took \$115,000 of foundation funds, leaving a bank balance of only \$801 and he had no means to repay the money he took. The facts here do not indicate whether the attorney can pay the association the \$31,250.

And, again, we have assumed that the association has a property interest in the funds, a properly perfected lien. Although unusual, theft of intangible property such as a lien interest may incur criminal liability. See People v. Dillon, 93 Ill App. 2d 151, 153; 236 N.E.2d 411, 413(1<sup>st</sup> Dist, 1<sup>st</sup> Div. 1968)(theft of property in which complaining witness had a lien is theft under the theft of services provisions of Section 16-3 of the Illinois Criminal Code 720 ILCS 5/16-3 (2000)); United States v. Howard, 30 F.2d 871, 876 (7<sup>th</sup> Cir. 1994) (commenting in dicta that theft of a government's secured interest could incur criminal liability).

If the attorney fails to turn over the money despite a court order, it may show intent to

permanently deprive. That would make her guilty of theft. Because theft reflects poorly on her trustworthiness, it must be reported to the ARDC.

Knowledge sufficient to trigger a reporting duty must be more than mere suspicion but less than certainty. Skolnick v. Alheimer & Gray, 191 Ill. 2d 214, 228; 730 N.E.2d 4, 14 (2000). Although keeping the money after its ownership has clearly been established may raise a strong suspicion of the intent to permanently deprive, these facts insufficient to establish knowledge of lawyer theft. The lawyers who act as bar association officers are under no duty to report the attorney's conduct to the ARDC.

### **CONCLUSION**

While the failure to segregate money held by a lawyer but claimed by a third party violates Rule 1.15(c) of the Rules of Professional Conduct, there is no duty to report this violation.

Even assuming a perfected lien, when the lawyer continues to keep the money even after the court decides the money belongs to the association, there is no duty to report the conduct to the ARDC absent other facts that show the intent to permanently deprive.

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