



**ILLINOIS STATE
BAR ASSOCIATION**

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 1.15 and *Dowling v. Chicago Options Associates, Inc.*, 226 Ill.2d 277 (2007). 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.

**Opinion No. 02-02
November, 2002**

Topic: Attorney fees, client trust accounts, notice and consent for payment

Digest: Client deposited funds into Firm's trust account for a specific transaction. The transaction never closed. More than five years later, Client and subsidiaries were involuntarily dissolved by Illinois Secretary of State. Firm may properly transfer the funds to its operating account in satisfaction of its claim for attorney fees if it has obtained written consent from the dissolved Client, through one of its former officers. Absent consent, Firm should reduce its claim to judgment and thereafter obtain a court order to set off its judgment lien against the funds held in the trust account.

Ref: Illinois Rules of Professional Conduct, Rules 1.5 and 1.15(a) through (d)

ISBA Advisory Opinion Nos. 93-17, 88-15, 845 and 703

In re Smith, 63 Ill.2d 250, 347 N.E.2d 133 (1976)

In re Ushijima, 119 Ill.2d 51, 518 N.E.2d 73, 115 Ill.Dec. 548 (1987)

Upgrade Corp. v. Michigan Carton Co., 87 Ill.App.3d 662, 410 N.E.2d 159 (1980)

Client Trust Account Handbook of the ARDC, Section IV.B.

Uniform Disposition of Unclaimed Property Act, 765 ILCS 1025/1, et seq.

FACTS

For almost 20 years, Law Firm A ("Firm") served as outside counsel to an Illinois corporation and several of its affiliated and subsidiary companies (collectively referred to as "Client"). In early 2000, Client ceased doing business and the Illinois Secretary of State subsequently dissolved Client late in 2000 for failure to file its Annual Report and pay its franchise taxes.

There was on deposit in Firm's trust account monies that had been wired into the account several years earlier by Client for a transaction that did not close. Client had directed Firm to keep the funds until further notice. Firm received no further instructions.

Client currently owes Firm legal fees and costs in excess of the amount held in the trust account. Firm believes that under Illinois law it has a common law retaining lien on funds currently held in the trust account. Firm also understands that ordinarily, an attorney may transfer funds which he is holding in trust for his client to pay attorney fees after reasonable notice to the client and consent by the client.

QUESTIONS

Must Firm serve written notice and obtain consent to the transfer of Client's funds from Firm's trust account to its operating account in satisfaction of unpaid legal fees? If so, to whom should notice be given of Firm's intention to transfer the funds? What alternatives are available to Firm if it is incapable of serving written notice?

OPINION

Assuming that the fees are reasonable (Rule 1.5(a)), we turn to Rule 1.15 for guidance. In paragraph (c) we observe:

When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claims interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

We know that the Firm claims an interest in the funds held in trust. Although not stated in the facts, we assume that any remaining creditors as well as the former shareholders of the dissolved corporation would also claim interest in the funds held in trust. Firm should continue to comply with Rule 1.15(c) by keeping segregated the entire amount of Client's funds until this issue is resolved.

We have previously considered the payment of attorney fees from a client trust account; however we find most of the Opinions to be distinguishable from the facts before us. For example, in Opinion 703, we considered what constituted a retainer and whether the retainers were the client's funds. In the present case, the funds held in trust were not delivered for retainer purposes.

In Opinion 845, we gave guidance to a law firm, which was unable to remit judgment proceeds it received on behalf of a foreign client because the client was dissolved, and the law firm was unable to locate a representative of the dissolved client. The law firm asserted no claim to the funds held in trust. In that Opinion we observed:

The law firm should deposit the judgment payments in its trust account and then make reasonable efforts to notify the officers and/or directors of the dissolved foreign corporation of the receipt of the funds. Depending on the amount of funds involved, reasonable efforts would likely include such things as: sending a certified letter, return receipt requested, to a known individual associated with the corporation at the last available address, with instructions for the Post Office to forward and with a request that the return receipt show the address where delivered; asking the Post Office to provide a forwarding address; contacting the Secretary of State of the state of incorporation for names and addresses of officers and/or directors; hiring a skip tracing service; and/or hiring a private detective.

If an officer and/or director of the dissolved corporation cannot be located after making every reasonable effort consonant with the amount of funds involved, the law firm should continue to preserve the funds of its client by maintaining the funds in its trust account. The law firm should then comply with the provisions of the Uniform Disposition of Unclaimed Property Act....

In Opinion 88-15 the question presented was whether the attorney could withdraw monies that he was holding for his client as payment toward his attorney fees. In that case, the attorney was paid a retainer in a criminal case. At the conclusion of the case, the client owed attorney an additional \$4000 in excess of the retainer. Prior to serving his sentence, the client asked the attorney to hold \$3500 for him, which was deposited in the attorney's trust account. While incarcerated, the client asked the lawyer to withdraw certain monies for the defendant. Subsequent to the client's release from incarceration, the client made further claim to the funds held in the trust account. In its Opinion, which is reproduced in full, the Committee stated:

The attorney may transfer funds which he is holding for his client to pay the attorney's fees provided the attorney gives written notice to the client of his intention to withdraw the money and the client affirmatively consents in writing or otherwise.

Although the Code does not require consent in writing, the Illinois Supreme Court's opinion in In re Ushijima, 119 Ill.2d 51, 518 N.E.2d 73 (1987), suggests that writing is preferable. In that case, relevant to the present question, an attorney's authority to withdraw funds from a trust account to pay attorney's fees was disputed and the Court noted that the Hearing Board of Attorney Registration and Disciplinary Commission had concluded that the authority should have been in writing.

Opinion 93-17 involved the co-mingling of funds and the payment of fees from the client trust account. There, the attorney agreed to serve as an escrow agent for the buyer and seller of real estate and deposited into his trust account funds provided by the buyer. When the transaction closed the seller asked the attorney to deliver the escrowed funds. Some six months later, the attorney remitted only a small fraction of the funds together with a letter explaining that the sum represented the "net proceeds" after the attorney's fees were deducted. The client denied that any money was due the attorney and asserted that the attorney was already paid in full for his services. We opined that the attorney could not deduct his fees from the funds held in the trust account because the attorney had not notified the client of his intent to do so nor had the client consented. In concluding that the attorney's actions were improper we found that:

Attorney's interest in the funds arises out of attorneys right to a common law retaining lien. Such lien entitles him to retain possession of any property belonging to the client that comes into his possession as part of the professional relationship until amounts due him for services rendered have been paid....

The Opinion then cited two disciplinary cases as well as the Illinois Appellate Court decision in *Upgrade Corp. v. Michigan Carton Co.*, 87 Ill.App.3d 662, 410 N.E.2d 159 (1980), which defined a retaining lien as a common law possessory lien in favor of an attorney for his fees.

Finally, we find the *Client Trust Account Handbook* published by the Illinois Supreme Court's Attorney Registration and Disciplinary Commission to be instructive. At Section IV, C, 2, the Handbook states:

Before an earned legal fee may properly be withdrawn from a trust account, the client should be given notice of the nature of the services rendered and the amount of the legal fee proposed to be paid to the lawyer. See *In re Smith*, 63 Ill.2d 250, 347 N.E.2d 133 (1976). If no objection is received within a reasonable time, the lawyer may withdraw the fee from the trust account.

This of course presupposes a prior agreement between the lawyer and the client that the lawyer upon notice to the client, will deduct earned legal fees from the amount the lawyer is holding in trust as well as the fact that it presumes that the client is in existence and capable of responding, which may not be the case in the facts before us. Accordingly, it would be misplaced reliance on *Smith* for the Firm to simply send notice to the last known address of the dissolved client and withdraw the funds within a reasonable time thereafter.

Firm has a retaining lien within the meaning of *Upgrade Corp.* However, before Firm pays the legal fees from its trust account, it should take steps to transform its retaining lien to a judgment and obtain an order of court directing the Firm to pay the funds held in trust to the Firm via an appropriate action.

A final caveat: If Firm knows or believes that Client filed bankruptcy, the funds held in trust would constitute assets of the debtor's estate and Firm would have the duty to disclose existence of the assets to the Trustee. Thereafter, it can assert its common law retaining lien.

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