



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 1.7, 1.8(e), 1.15(e) with its Comment [4], 8.3(a), 8.4(b) and (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.

Opinion No. 93-3
September 17, 1993

Topic: Duty to report professional misconduct. Duty to hold separate funds of client which are in dispute.
Validity of interpleader action to resolve interest in disputed funds.

Digest: Attorney report is not mandatory under Rule 8.3 unless the attorney has knowledge, which is not otherwise protected, of a violation of Rule 8.4(a)(3) or (4).

Attorney is required by Rule 1.15(c) to hold in a separate account, the funds disputed by the client and the client's former attorney.

An interpleader action is not inconsistent with Rule 1.15.

Ref.: Illinois Rules of Professional Conduct, Rules 8.3(a)(3) and (4), 1.8(d), 1.15, 1.2(a) and 1.7(b).
1980 Illinois Code of Professional Responsibility, 9-102
In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988)
In re Cassidy, 89 Ill.2d 145, 432 N.E.2d 274, 59 Ill.Dec. 690 (1982)
ISBA Advisory Opinions on Professional Conduct, Nos. 90-8, 90-28, 90-36, 91-23 and 91-16

FACTS

Client Q discharges law firm ABC from representation in a contingency fee matter. During the course of that representation, ABC made loans to the client for matters believed to be other than fees and expenses advanced. Client Q then retains law firm XYZ, which concludes the handling of the contingency fee case,

and prior to the distribution of settlement funds, receives a notice of a claimed lien by firm ABC on those proceeds.

Client Q disputes the amount of the loan and/or the propriety of the loan. Firm XYZ has issued a disbursement check from its trust account for the amount of the disputed loan payable to firm ABC and the client. Neither firm XYZ nor the client are willing to endorse the check or negotiate a resolution as to the disputed loan.

Firm ABC has made demand upon firm XYZ to reissue the check payable only to firm ABC upon proof that the loan was made. Firm XYZ has resisted such action.

QUESTIONS

1. Is XYZ required under Rules 8.3(a), 8.3(a)(3) and 8.4(a)(4) to report the information it has regarding potential improper loans made by another law firm to the Attorney Registration and Disciplinary Commission (ARDC)?
2. Is XYZ in violation of Rule 1.15 if it pays the loans disputed by its client to ABC out of the disputed funds?
3. Is it proper, pursuant to Rule 1.15, for XYZ to file an interpleader action to resolve the dispute between Q and ABC?

OPINION

The first inquiry raises the issue of mandatory reporting of misconduct. This issue has been addressed in In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988) and in ISBA Opinions 90-8, 90-28, 90-36 and 91-23, which all interpreted Rules of Professional Conduct 8.3(a), 8.4(a)(3) and 8.4(a)(4).

Rule 8.3(a) requires reporting of knowledge of misconduct which is "not otherwise protected as a confidence of these rules or by law...." The "Terminology" section of the Rules and Rules of Professional Conduct define knowledge as "actual knowledge of the facts in question." Hearsay evidence need not be reported. Opinion No. 90-28. The case of In re Himmel, supra at 712, makes it clear that unprivileged information obtained regarding misconduct must be reported.

It is unclear from the present set of facts how XYZ learned of the loans. Therefore, we will assume, for purposes of this opinion, that XYZ had actual knowledge which is not protected. Rule 8.3(a) limits mandatory reporting of misconduct to violations of Rule 8.4(a)(3) and 8.4(a)(4). Disclosure is required under Rule 8.4(a)(3) for "a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Rule 8.4(a)(4) requires reporting if the attorney engages in "conduct in involving dishonesty, fraud, deceit, or misrepresentation."

While the facts given present a violation of Rule 1.8(d) of the Rules of Professional Conduct, they demonstrate neither a criminal act nor conduct involving dishonesty, fraud, deceit, or misrepresentation. Therefore, our opinion is that XYZ is not required to report ABC's alleged misconduct. The opinion is consistent with Opinion Nos. 90-8, 90-28, 90-36 and 91-23.

The question of whether XYZ may ignore the client's claim for impropriety and reissue the check to ABC alone has to be examined in light of Rule 1.15(c) of the Rules of Professional Conduct.

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 interest. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The facts here do not present a dispute between the client and XYZ, but between the client and ABC. This situation was addressed in Opinion 91-16. The Committee gave an opinion in that set of facts that if Attorney A has funds in his possession which are subject to dispute between a client and a former attorney, that fund should be held separate by Attorney A, in accordance with Rule 1.15, until said dispute is resolved. Therefore, consistent with Opinion 91-16, we are of the opinion that XYZ may not reissue the check of ABC against the client's wishes.

The last question addressed is whether XYZ should interplead the funds or take other action. The opinion in analysis of the previous question indicates that XYZ would be acting in accordance with Rule 1.15 by merely maintaining the funds in a separate account. It is further the Committee's opinion, in light of In re Cassidy, 89 Ill.2d 145, 432 N.E.2d 274, 59 Ill.Dec. 690 (1982) that because there is a question as to Q's rights to the funds, XYZ cannot be charged with improper delay under old Illinois Code of Professional Responsibility Rule 9-102 if it refuses to pay the funds to Q. Cassidy involved a disciplinary action against Cassidy for failing to promptly deliver funds to his client. A dispute existed between the client and lienholder as to who was entitled to the funds held by Attorney Cassidy. Cassidy believed the liens to be valid and held the funds while trying to negotiate the liens. The Supreme Court determined that Cassidy reasonably believed that his client did not have rights to the funds and, therefore, he could not be charged with improper delay under then DR 9-102.

Although it is the opinion of the Committee that XYZ could properly hold the funds in accordance with Rule 1.15, it is our opinion that an interpleader action would not be contrary to Rule 1.15. The attorney in Cassidy, supra, eventually filed an interpleader action to determine the ownership of the funds involved in that case. The Supreme Court recognized that decision and did not site any impropriety in the attorney's filing of that action. The Court's language in addressing the strategy which was used by the attorney in delaying the use of the interpleader infers that the Court felt that an interpleader action was not contrary to the Rules of Professional Conduct.

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