



ISBA Professional Conduct Advisory Opinion

Opinion No. 20-06
September 2020

Subject: Client Funds and Property.

Digest: A lawyer in possession of funds whose ownership is disputed is required to hold those funds until the dispute has been properly resolved, or to initiate an interpleader action to have the court decide the proper disposition of the money.

References: Illinois Rules of Professional Conduct, Rules 1.7, 1.15

ISBA Advisory Opinion on Professional Conduct No. 93-03

Kovitz Shifrin Nesbit, P.C. v. Rossiello, 392 Ill. App. 3d 1059, 911 N.E.2d 1180, 1188 (1st dist. 2009)

Maryland St Bar Assn Ethics Op. Docket No. 2018-03

FACTS

Lawyer A represented Client in a contingency fee personal injury case. Prior to the filing of that case, Client was represented by Lawyer B, also on a contingency fee basis. Client then discharged Lawyer B and hired Lawyer A. Lawyer B properly perfected his attorney's lien in the matter and Client and Lawyer A acknowledged Lawyer B's interest. Thereafter, Lawyer A filed suit and sometime later, settled the case. The defendant provided a settlement check made payable to the plaintiff Client and Lawyer A. Lawyer A deposited the funds into her trust account.

When it came time for the funds to be disbursed, the Client objected to any share being provided to Lawyer B, asserting he had committed legal malpractice prior to the filing of the case. Lawyer A does not believe that Lawyer B committed legal malpractice and is also of the opinion that a legal malpractice claim against Lawyer B is now barred by the statute of limitations. Lawyer A explains this to Client, but the Client is adamant that the funds should not be disbursed to Lawyer B and instead should be given to Client. In the meantime, Lawyer B

continues to contact Lawyer A to get his share of the settlement, until Lawyer A finally tells him that she is unable to disburse the funds to Lawyer B because she has been instructed by her Client to not do so. Lawyer B, who is understandably upset, demands that the money be released to him, noting that the lawyer and Client acknowledged his attorney's lien prior to the settlement, without objection and without assertion of any possible basis for challenging a fee disbursement. Lawyer A disburses the undisputed shares owed to her and the Client, but retains in the trust account the share which is now subject to dispute between Client and Lawyer B.

ISSUES RAISED

Under the Rules of Professional Conduct, how should Lawyer A act with respect to the funds in dispute between Lawyer B and the Client.

ANALYSIS

Lawyers are sometimes placed into awkward positions by their clients, often with respect to counsel or third parties who are due funds in the lawyer's trust account. However, once a client advises that it objects to the disbursement of some part of those funds claimed by another, creating a dispute as to the proper ownership of the funds, the lawyer has no choice but to retain the funds until a proper resolution of the dispute has been made either by agreement or judicial direction. See ISBA Op. No. 93-03.

Under Rule 1.15, a lawyer owes a duty to preserve funds and other property in which a client or third party has an interest. Specifically, in relevant part, the Rule states as follows:

(e) WHEN IN THE COURSE OF REPRESENTATION A LAWYER IS IN POSSESSION OF PROPERTY IN WHICH TWO OR MORE PERSONS (ONE OF WHOM MAY BE THE LAWYER) CLAIM INTERESTS, THE PROPERTY SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THE DISPUTE IS RESOLVED. THE LAWYER SHALL PROMPTLY DISTRIBUTE ALL PORTIONS OF THE PROPERTY AS TO WHICH THE INTERESTS ARE NOT IN DISPUTE.

Comment 4 to Rule 1.15 further explains as follows:

PARAGRAPH (e) ALSO RECOGNIZES THAT THIRD PARTIES MAY HAVE LAWFUL CLAIMS AGAINST SPECIFIC FUNDS OR OTHER PROPERTY IN A LAWYER'S CUSTODY, SUCH AS A CLIENT'S CREDITOR WHO HAS A LIEN ON FUNDS RECOVERED IN A PERSONAL INJURY ACTION. A LAWYER MAY HAVE A DUTY UNDER APPLICABLE LAW TO PROTECT SUCH THIRD-PARTY CLAIMS AGAINST WRONGFUL INTERFERENCE BY THE CLIENT. IN SUCH CASES, WHEN THE THIRD-PARTY CLAIM IS NOT FRIVOLOUS UNDER APPLICABLE LAW, THE LAWYER MUST REFUSE TO SURRENDER THE PROPERTY TO THE CLIENT UNTIL THE CLAIMS ARE RESOLVED. A LAWYER SHOULD NOT UNILATERALLY ASSUME TO ARBITRATE A DISPUTE BETWEEN THE CLIENT AND THE THIRD PARTY, BUT, WHEN THERE ARE SUBSTANTIAL GROUNDS FOR DISPUTE AS TO

THE PERSON ENTITLED TO THE FUNDS, THE LAWYER MAY FILE AN ACTION TO HAVE A COURT RESOLVE THE DISPUTE.

Applying Rule 1.15(e) to the facts here, it is clear that Lawyer A has come into possession of funds in which both her Client and Lawyer B have disputing interests, so it is necessary for Lawyer A to keep those funds separate from her own funds. Rule 1.15(a) indicates that all such funds must be kept in a trust account. Here, Lawyer A acted in accordance with the Rules.

The next question is what is to then be done with the funds? Because Lawyer A is of the belief that Client has taken an unreasonable and legally unsupportable position, it would be her duty to advise her Client that the Client has taken an incorrect position under the law and should relent. Importantly, merely because a lawyer believes her client is completely unreasonable and incorrect in the decision to withhold disbursement of funds does not permit the Lawyer to ignore the client's wishes. Here, Lawyer A has already advised her Client that his position is untenable and that Lawyer B is entitled to the funds, but Client remains adamant.¹ At that point, Lawyer A must advise her Client that, under the Rules of Professional Conduct, she will be unable to release the funds to Client until the dispute has been resolved. Under Rule 1.15(d), Lawyer A must also formally advise both Client and Lawyer B that the funds are in her possession, with full knowledge that in addition to the duties owed to her client, a lawyer possessing disputed funds also acts as a fiduciary to the third party with respect to those funds. See Comment 1, Rule 1.15 ("A lawyer should hold property of others with the care required of a professional fiduciary.")

Once the disputed funds are identified and segregated by the lawyer, then Lawyer must decide what to do with the funds. Much of the time, the client and third party claiming an interest to funds will resolve their dispute and the Lawyer will soon be provided agreed instructions on disbursement of the money. The Lawyer needs to be careful about getting too involved in assisting these parties in resolving their dispute. Because the Lawyer owes certain duties to both the Client and the third party regarding the funds, Comment 4 to Rule 1.15 cautions that "[a] lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party".

Assuming a quick resolution of the dispute between the Client and third party is not forthcoming, the Lawyer will likely not want to carry the long-term burden of keeping the funds and owing duties to conflicting parties. In such an instance, filing of an interpleader action under 735 ILCS 5/2 409 by the Lawyer may be the most appropriate way to protect the Lawyer and all persons involved. ISBA Op. No. 93-03. "The purpose of an interpleader action is to permit a neutral stakeholder to seek a judicial determination of the rights to a specific fund of money where there are conflicting or disputed claims to that fund." *Kovitz Shifrin Nesbit, P.C. v. Rossiello*, 392 Ill. App. 3d 1059, 911 N.E.2d 1180, 1188 (1st dist. 2009). If Lawyer A would file

¹ If the third party's claim on the funds is not an arguably lawful, valid claim, then a lawyer may justifiably conclude that Rule 1.15(e) is not implicated and segregation of the funds is not required. See Maryland St Bar Assn Ethics Op. Docket No. 2018-03.

an interpleader complaint, then the court would likely have her transfer the funds at issue from her trust account to an account of the court clerk. At that point, she no longer has the problem of being in the middle of conflicting parties, and it will be left to the court to decide the substantive issues between the Client and the third party.

In the above fact scenario, the Committee suggests that Lawyer A file an interpleader action and encourages its use by others in such situations.

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