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Standing Committee on Professional Ethics

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Informal Opinion 17-02

A Lawyer's Obligations When Third Parties Assert Claims to Property in the Lawyer's Possession (Rule 1.15: The Safe Keeping of Property)

The Committee takes this opportunity to address the recently amended Rule 1.15 and the safekeeping of property in the lawyer's possession.

Attorneys, of course, have an unambiguous obligation to protect client funds in their possession, and violation of that obligation will generally lead to a heavy disciplinary penalty. But there also are circumstances in which an attorney will have an obligation to safeguard funds or other property that come into the lawyer's possession where a third party, and not just the client, has an interest. In regard to such obligations, Rule 1.15 (The Safe Keeping of Property) provides, in pertinent part, as follows:

- (e) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (f) 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) have interests, the property shall be kept separate by the lawyer until any competing interests are resolved. The lawyer shall promptly distribute all portions of the property as to which the lawyer is able to identify the parties that have interests and as to which there are no competing interests. Where there are competing interests in the property or a portion of the property, the lawyer shall segregate and safeguard the property subject to the competing interests.
- (g) The word "interest(s)" as used in this subsection and subsections (e) and (f) means more than the mere assertion of a claim by a third party. In the event a lawyer is notified by a third party or a third party's agent of a claim to funds held by the lawyer on behalf of a client, but it is unclear to the lawyer whether the third party has a valid interest within the meaning of this Rule, the lawyer may make a written request that the third party or third party's agent provide the lawyer such reasonable information and/or documentation as needed to assist the lawyer in determining whether substantial grounds

exist for the third party's claim to the funds. If the third party or third party's agent fails to comply with such a request within sixty days, the lawyer may distribute the funds in question to the client.¹

The analysis of whether an attorney must continue to hold funds or other property in his or her possession when a client and a third person each claim an interest begins with the threshold question of whether the third party has an “interest” sufficient to trigger the obligation to hold the funds.² If the attorney determines that the third party has an interest within the meaning of the Rule, subsection (f) dictates that the attorney hold that portion of the funds or property subject to the dispute until the dispute is resolved.

The Committee has previously identified four specific situations in which an attorney is required to hold funds or property in which a third party claims an interest: when

- (1) the lawyer knows of a valid judgment concerning the disposition of the property;
- (2) the lawyer knows of a valid statutory or judgment lien against the property;
- (3) the lawyer knows of a letter of protection or similar obligation that is both:
 - (i) directly related to the property held by the lawyer; and
 - (ii) an obligation specifically entered into to aid the lawyer in obtaining the property;

or

- (4) the lawyer knows of a consensual security agreement or assignment concerning the property.

See Informal Opinions 99-06, 99-39, 01-05, 01-08, and 02-02.

The Official Commentary to Rule 1.15 now reflects similar limitations on what constitutes a valid interest within the meaning of the Rule.

¹ Subsection (g), discussed below, is a recent addition to Rule 1.15.

² Often, a Rule 1.15(b) question will require a threshold determination of what legal right, if any, a third party has to property, often a mixed question of law and ethics. *See e.g. Silver v. Statewide Grievance Committee*, 242 Conn. 186 (1997) (dismissing appeal where certification improvidently granted). In *Silver*, Justices Berdon and McDonald concurred in the decision, but wrote separately to emphasize their disapproval of the Statewide Grievance Committee attempting to use attorney discipline “for the benefit of . . . insurance companies [claiming lien rights in personal injury settlement recoveries and] to wield the grievance process in order to accomplish what could not be accomplished through law or equity” because the claimed liens were not mature or otherwise judicially enforceable. *Id.* at 199-200.

The requirement that an attorney segregate and retain client funds to which a third party asserts a claim sometimes leaves attorneys in the difficult position of having to decide between compliance with the Rule 1.15 duty to safeguard funds on behalf of a third party and compliance with a client's demand to be paid what the client believes he or she is entitled to receive. The addition of subsection (g) to Rule 1.15 (in effect as of January 1, 2016) was intended to address this dilemma.

First, subsection (g) codifies within the Rule itself that "the mere assertion of a claim by a third party" is not enough to establish an "interest" within the meaning of the Rule. Second, subsection (g) provides that an attorney faced with a third party's claim to have an interest in funds held by the attorney may make a written request for documentation to substantiate the claimed "interest." If the attorney has not received such substantiation within 60 days of making the written request, he or she may distribute to the client the funds claimed to be subject to the dispute, and may do so without fear of being in violation of the Rule.³

The comments to Rule 1.15 provide that: "a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party." This is not to say that an attorney may never resolve a dispute. As the Committee has previously written: "It is important that the lawyer not decide who should receive the funds unless both the client and the physician (or other third party), have agreed that he may do so and the lawyer has determined that he can ethically do so under Rule 1.7 and other applicable rules." Informal Opinion 01-11 (emphasis added).

If, however, an attorney determines that a third party has a valid interest in the property and the dispute cannot be resolved through the attorney's reasonable efforts, the attorney should inform the third party and the client, in writing, that: (1) the attorney may not unilaterally assume to arbitrate the dispute between the client and the third party; (2) the funds will be held in an interest bearing account until the dispute is resolved; and (3) the funds money will remain there until the attorney receives a copy of a judgment or arbitration decision in favor of either party or a signed stipulation or agreement.

Rule 1.15 also expressly addresses, in subsection (f), exactly what the attorney is obligated to segregate and safeguard: only that portion of the property that is subject to the dispute. For example, in an opinion concerning a question about a fee dispute, the Committee opined that the attorney was obligated to hold only the portion in dispute and not the entire amount of the fee. Informal Opinion 02-02.

Rule 1.15 does not, however, provide a basis for civil enforcement of a claimed right to property held by an attorney, nor may it properly be invoked in defense of one attorney's claim against another for recovery of a fee the attorney earned. As our Supreme Court has noted, the rules of conduct are to "provide guidance and structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the

³ Attorneys should keep in mind that duties arising from other law may impose additional obligations on a lawyer in handling other people's money. *See* Rule 1.15, Official Commentary ("The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services.").

purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” *Gagne v. Vaccaro*, 255 Conn. 390, 403 (2001) (quoting Scope section of the Rules of Professional Conduct).

THE COMMITTEE ON PROFESSIONAL ETHICS

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