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COMMITTEE ON PROFESSIONAL ETHICS AND THE UNAUTHORIZED PRACTICE OF LAW

Informal Opinion 25-3

LAWYER'S OBLIGATIONS UNDER RULE 1.15 UPON RECEIVING FUNDS SUBJECT TO A LETTER OF PROTECTION ISSUED BY THE LAWYER

A request for an opinion prompts the Committee to address a lawyer's obligations under Rule 1.15 upon receiving funds subject to a letter of protection issued by the lawyer. In the course of doing so, we take the opportunity to review more generally a lawyer's obligations to safeguard and protect funds or other property that come into the lawyer's possession as to which one or more third parties assert a claim.

As the Committee has previously explained, a letter of protection, commonly used in personal injury matters, is an agreement between a lawyer and a healthcare provider that the provider will be paid for its services to a client from the proceeds of the client's claim, if any, in exchange for the provider's forbearance on any collection effort. *See* Connecticut Bar Association, Standing Committee on Professional Ethics, Informal Opinion 95-18, *Letters of Protection* (1995) (a letter of protection "is a letter written by a lawyer – acting in the course of representing a client – to a provider of goods and services to or for the benefit of that client in which the lawyer undertakes to pay the provider for those goods and services out of funds the lawyer anticipates receiving for the client"). A lawyer may provide such a letter only when the lawyer has the client's informed consent to do so. *Id.*

The Rule 1.15(f) Threshold Inquiry: Is there an "Interest" Within the Meaning of the Rule?

When a lawyer receives funds from a settlement or judgment that are subject to a letter of protection issued by the lawyer, the lawyer's obligations are governed by Rule 1.15. That is because the letter of protection creates a cognizable "interest" within the meaning of Rule 1.15(f).

Rule 1.15(f) sets forth a lawyer's obligation to segregate and safeguard property in which a client and a third party have an interest:

(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.

Where a third party asserts a right to payment from funds or other property received by a lawyer on behalf of a client, the analysis of the lawyer’s obligations under Rule 1.15(f) necessarily begins with a threshold determination of whether the third party’s claim amounts to a cognizable “interest” that is subject to protection under Rule 1.15(f). If the attorney determines that the third party has an “interest” within the meaning of the Rule, subsection (f) dictates that the attorney “keep separate” any portion of the funds or property that is subject to conflicting claims until the dispute is resolved.

Not every assertion of a claim by a third party qualifies as an “interest” that must be safeguarded and protected under Rule 1.15.¹ As subsection (g) of Rule 1.15 provides: “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.” Thus a general creditor, for example, does not have a protected legal interest in client property held by a lawyer. Connecticut Bar Association, Standing Committee on Professional Ethics, Informal Opinion 95-20, *Extent of Lawyer’s Obligation to Third Parties Pursuant to Rule 1.15(b) and (c)* (1995) (Rule 1.15 “does not apply to claims of a client’s general creditors”).² See also *Silver v. Statewide Grievance Committee*, 42 Conn.App. 229, 237 (1996) (“Rule 1.15 does not create third party interests, but, rather, requires an attorney to safeguard only those interests that otherwise exist at law.”), *certification dismissed as improvidently granted*, 242 Conn. 186, 189 (1997).

In Informal Opinion 95-20, this Committee concluded that only “legal interests are protected under Rule 1.15,” and that the lawyer was not required to protect the claims of third parties “except in three limited circumstances”: a judgment, a lien, or a letter of protection concerning the funds or property in the lawyer’s possession. The Committee subsequently recognized a fourth exception: a “written assignment, signed by the client.” Connecticut Bar Association, Standing Committee on Professional Ethics, Informal Opinion 01-08, *Extent of a Lawyer’s Obligation to Third Parties, Pursuant to Rule 1.15(b) and (c) (Revising Informal Opinions 95-20 and 99-6)* (2001).

The four “limited circumstances” have been codified in the Commentary to Rule 1.15, as follows:

The word “interest(s)” as used in subsections (e), (f) and (g) includes, but is not limited to, the following: a valid judgment concerning disposition of the property; a valid statutory or judgment lien, or other lien recognized by law, against the property; a letter of protection or similar obligation that is both (a) directly related to the property held by the lawyer, and (b) an obligation specifically entered into to aid the lawyer in obtaining the property; or a written assignment, signed by the client, conveying an interest in the funds or other property to another person or entity.

Therefore, when a lawyer receives funds from a settlement or judgment that are subject to a letter of protection that meets the requirements described in the Commentary – that is, the letter of protection is “directly related” to the funds or other property held by the lawyer and the lawyer undertook the

¹ Notably, in 2015, the Rules Committee approved and adopted an amendment of Rule 1.15(f) that changed the requirement that a lawyer “keep separate” property in which two or more persons “*claim* interests” to a requirement that a lawyer “keep separate” property in which two or more persons “*have* interests” (emphasis added). The amendment went into effect January 1, 2016.

² In its consideration of the reach of Rule 1.15, the Committee noted that Rule 1.15 must be construed so as to protect a client’s due process rights, and therefore should not be interpreted as permitting “an unconstitutional deprivation of the client’s property by seizing it for an indefinite period without any provision for a judicial determination of the claimed ‘interest.’” Informal Opinion 95-20.

“obligation specifically . . . to aid the lawyer in obtaining” the funds or property – the lawyer must segregate and safeguard the portion of the funds covered by the letter until any dispute concerning the obligation is resolved.

The Lawyer’s Obligation upon Receiving Funds Subject to a Letter of Protection

When a lawyer receives funds, typically from a settlement or judgment, in which a third party has a cognizable interest under Rule 1.15, including such an interest arising from a letter of protection issued by the lawyer, the lawyer must promptly notify the third party. Rule 1.15(e).

The lawyer should take whatever reasonable steps are necessary to determine the amount(s) claimed by any and all third parties with a cognizable interest in the received funds, including those subject to any letters of protection issued by the lawyer. This information is vital in order to advise the client of any and all claims that must be paid from the proceeds of a settlement or judgment; the amount that must be held by the lawyer to pay those claims; and the exact amount of the "net proceeds" that will be disbursed to the client from the proceeds. In some situations, it will be appropriate for the lawyer to negotiate for reduction of the amounts owed to lien holders, healthcare providers with letters of protection, and/or other claimants with legal interests protected under the Rule. Such considerations dictate that the lawyer has an obligation to take reasonable measures to ascertain the amount of any claimed interest in the proceeds of the client’s matter, and, in fact, must do so in order to determine the amount the lawyer is obligated to protect from disbursement until any conflicting claims are resolved.

When the “property” in which the client and one or more third parties assert an “interest” is monetary funds, any amount of those funds that is *not* subject to dispute must be disbursed to the client and the third parties. Rule 1.15 (f) (“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.”). The Rule does not require that the lawyer segregate and safeguard any portion of the funds beyond the amount(s) subject to dispute.

In rare instances, a provider to whom a lawyer has issued a letter of protection may fail to identify or substantiate the amount it claims under the letter or protection. Rule 1.15 does not impose an obligation on the lawyer to determine what payment is owed to the provider. However, in issuing the letter of protection, the lawyer assumed an obligation to protect the provider’s fees for services to the client. The fact that the total amount of those fees is unclear does not extinguish the lawyer’s obligation to honor the letter of protection or other valid interest. If the lawyer has information or documentation relevant to that determination, or could obtain such information from the client, the lawyer may be obligated to use such information in order to determine what portion of the funds must be segregated to meet the obligation the lawyer undertook in issuing the letter of protection.³

In the situation where the lawyer has information sufficient to calculate the monetary value of the services provided to the client under the letter or protection, the lawyer should communicate that information to the service provider to determine whether the provider agrees to that sum. If neither the client nor the provider disputes the amount, then that amount should be paid to the provider. If the client

³ The request asked us to assume that a healthcare provider’s computer billing system had been compromised so that the client’s medical bills were no longer within that computer’s database. However, this fact alone does not preclude the healthcare provider from using other means to establish the amount of a claimed interest by, for instance, using the client’s medical records and the provider’s customary billing rates to determine the amount of the claim.

or the provider disputes the amount, then the lawyer should hold funds under the Rule in the amount the lawyer determined was subject to the letter of protection.

If the lawyer has insufficient information to make the necessary calculation, and the service provider to whom the lawyer issued the letter of protection has not specified the specific dollar amount of a claim, the lawyer may: (1) advise the provider that the failure to provide a dollar amount may result in the funds being distributed to the client; and (2) again request that the provider specify the amount claimed under the letter of protection. If, however, the provider does not respond, or otherwise fails to specify the amount claimed, within a reasonable time and the lawyer lacks information that would enable the lawyer to independently calculate a specific amount subject to the letter of protection, the Committee's view is that there is no "dispute" under the Rule about what may be owed to the provider, and the lawyer may disburse the funds directly to the client.

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." Connecticut Bar Association, Standing Committee on Professional Ethics, Informal Opinion 01-11, *Payment Dispute Between Client and Physician* (2001). Fixing the amount of the debt owed is simply one aspect of negotiating a resolution of conflicting claims to the funds or other property. If a negotiated resolution is not possible, the lawyer may be obligated to seek judicial determination of interests in the funds or other property by way of an interpleader action. Rule 1.15, Commentary ("[W]hen 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.").

Rule 1.15(g): When the Validity of the Interest Is Uncertain

There are some instances in which the lawyer may be uncertain about the validity of a third party's claimed interest. Subsection (g) of Rule 1.15 provides that when a lawyer has notice of a third party's 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 . . . 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 . . . fails to comply with such a request within sixty days, the lawyer may distribute the funds in question to the client.

Subsection (g) has been in effect since January 1, 2016. It is the Committee's understanding that in adding subsection (g) to Rule 1.15, the Rules Committee intended to relieve lawyers of the obligation to hold funds for an indefinite period when those funds were subject to the claim of a third party who could not substantiate the existence of a valid interest in the funds.⁴

If the lawyer makes a written request for information substantiating the validity of a claim to an interest in the funds or other property held by the lawyer, and does not receive substantiation within 60

⁴ Subsection (g) is triggered when the lawyer has a concern about *the validity* of a claimed interest. It is not triggered where there is a valid interest, such as a letter of protection, and it is only *the amount* of the debt that is uncertain.

days of making such a request, the lawyer may, pursuant to subsection (g), distribute the funds or other property to the client, and may do so without fear of being in violation of the Rule.

In such a situation, the lawyer should, however, advise the client that while the lawyer is not required to hold the funds or other property for longer than the 60 day waiting period, this does not mean that the client's obligation to the claimant, if any, is extinguished, and the client may still be responsible for payment of any valid obligation.

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Stuart C. Johnson

BY Stuart Johnson, Chair