

Dividing Fees and Expenses

Recent ABA Opinion Raises Questions About Division of Fees With Other Counsel

Lawyers have an ethical obligation to hold certain funds in a trust/IOLTA/escrow account. While some aspects of this obligation are clear, American Bar Association Center for Professional Responsibility Formal Opinion 475 (“Safeguarding Fees That Are Subject to Division With Other Counsel”) creates confusion about how the applicable Rules of Professional Conduct apply to Pennsylvania lawyers. The Opinion, which was issued on Dec. 7, 2016, provides general guidance to all attorneys, and is not *per se* binding upon lawyers in Pennsylvania or any other states. It does, however, raise questions about how attorneys administer their escrow accounts and potentially adds layers of bureaucracy for some firms.

The Opinion interprets Model Rule of Professional Conduct 1.15, which differs dramatically from Pa.R.P.C. 1.15, and focuses on the situation where a lawyer in one firm receives earned fees that must be divided with an attorney in another firm, and concludes:

When one lawyer receives an earned fee that is subject to such an arrangement and both lawyers have an interest in that earned fee, Model Rules 1.15(a) and 1.15(d) require that the receiving lawyer hold the funds in an account separate from the lawyer’s own property, appropriately safeguard the funds, promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.

While this conclusion seems obvious, when you dig a little deeper, and consider some alternative fact patterns, it becomes



more confusing, and lawyers who have not operated in the manner suggested by the Opinion should, at a minimum, review the Opinion to determine if they believe it applies to them. The Opinion clearly applies in two scenarios: (1) when two lawyers jointly represent a client but one lawyer handles the billing on behalf of both, and, (2) when a lawyer receives a settlement check (often in personal injury matters) from which the client, referral counsel and others such as lienholders are paid. In both situations, a lawyer receiving the fee check must deposit the funds into an escrow account. After the check clears, and the client signs a Statement of Distribution if relevant, the lawyer may distribute the funds to the client, referral counsel and any other parties entitled to a share of the funds.

Opinion 475 contemplates these scenarios, noting that “Rule 1.15 applies in many situations including fee advances, advances of costs, receipt of settlement funds, holding client funds to which creditors have claims, and fee disputes between the lawyer and the client. Whatever the context, Rule 1.15

requires the safekeeping of any property that comes into the lawyer’s possession in connection with the representation of a client in which the client or any ‘third person’ has an interest.” Pennsylvania’s version of Rule 1.15 does not contain the same language.

The Opinion focuses on situations where “two or more lawyers have an agreement that satisfies Rule 1.5 regarding a division of fees.” Pa.R.P.C. 1.5 (Fees) and the comparable ethics rules in most other states, apply, however, not only to fees generally, but also to referral fees, *i.e.*, fees divided among attorneys not on the basis of the work performed, but based on a separate agreement approved by the client. When the fees are merely a one-time payment, such as a personal injury settlement, lawyers must deposit the fees into their escrow accounts.

But when the funds involve other matters, such as workers’ compensation claims, where fees are received periodically, lawyers traditionally process fees in two ways. Some attorneys deposit the fees into their escrow accounts and pay referral counsel

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Consider the following example: A lawyer represents injured workers and regularly receives fee checks that must be divided with referral counsel. The lawyer receives the fees weekly or biweekly, as required by the Pennsylvania Workers' Compensation Act. Based upon this Opinion, the question arises whether lawyers must (1) deposit all fees in an escrow account, (2) promptly notify the other lawyers to whom referral fees are due, (3) promptly deliver the portion of the fees due to the other lawyers and (4) provide a full accounting, if requested.

Pa.R.P.C. 1.15 does not provide clear guidance for Pennsylvania attorneys in this situation. As noted above, the

Pennsylvania Rule is dramatically different from the Model Rule. For example, Rule 1.15(m) requires lawyers to deposit "All Qualified Funds which are not Fiduciary Funds [] in an IOLTA Account." The funds in the hypothetical do not qualify as Fiduciary Funds.

In addition, Rule 1.15(a)(9) defines "Qualified Funds" as "Funds which are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient income will not be generated to justify the expense of administering a segregated account." Rule 1.15(a)(10) defines "Funds" as "which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary,

or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such."

The fees received in the workers' compensation example do not appear to meet the definition of Rule 1.15 funds. However, the authors of Opinion 475 would argue that the requirement to escrow funds applies because a lawyer receiving a referral fee is a "third person" under Model Rule 1.15.

In addition to the differences between the Model Rule and Pennsylvania's version, the ABA Opinion imposed additional burdens on a lawyer. Instead of depositing the fees into his business account, and paying the referral fees periodically (typically, monthly or quarterly), a lawyer must deposit the fees into an escrow account, notify every referral lawyer every time a check is received, and make "prompt" payment; Opinion 475 never defines "prompt." Is monthly "prompt;" is quarterly not "prompt?" Opinion 475 never mentions referral fees, although it implicitly implicates them by applying the Opinion to a situation when "two or more lawyers have an agreement that satisfied Rule 1.5 regarding a division of fees."

Pennsylvania lawyers should examine the ABA Formal Opinion and compare it with Pa.R.P.C. 1.15 to determine how, if at all, it impacts their practices. ■

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