

PROFESSIONAL GUIDANCE COMMITTEE  
PHILADELPHIA BAR ASSOCIATION  
Opinion 2016-2  
(March 2016)

Inquirer represented Spouse in a divorce. Spouse settled a personal injury case using the services of Attorney A. A would not release the funds directly to Spouse, but rather only by check made payable to both Spouse and Other Spouse. Other Spouse's divorce attorney would only permit Other Spouse's endorsement of the settlement check if those funds were deposited into an Escrow Account in which Other Spouse's divorce attorney and the inquirer were the co-agents. The funds could only be released by agreement of the parties, or by Order of the Court.

As requested by Spouse, the inquirer facilitated a loan through a Funding Company ("Company") using the escrow money as security. Spouse entered into a contract with Company, and the inquirer signed an "Acknowledgement of Authorization" which required that none of the money held in the escrow account was to be distributed to Spouse until the Funding Company was paid in full. The Acknowledgement also provided that "no further authorization from... [Spouse] is necessary."

Prior to the finalization of the divorce, Spouse fired Inquirer. While Inquirer so advised Company, and also advised Spouse's new lawyer about the loan, Inquirer never advised opposing counsel or the Court about the loan. In addition, Inquirer remained as co-agent on the escrow account.

At the divorce trial, Spouse was awarded the escrow account funds. Spouse does not agree to release of any of the escrowed funds to Company.

Company sued Spouse in small claims court. While Company won a judgment, Company filed an Appeal for a Trial de Novo to the Court of Common Pleas. However, the matter was dismissed without prejudice, and there is no final court order resolving the issue.

Inquirer and the co-agent have agreed that no funds will be released absent an agreement between Spouse and Company, or by an order of court, but nonetheless asks if the Inquirer and the co-agent can now release any funds to Company consistent with the terms of the Contract entered by Client with Company.

Inquirer and the other co-agent of the escrow account, by agreeing to serve in such a

capacity, may have placed themselves in the position of fiduciaries as to the funds in the account. As such their obligations may be impacted by the substantive fiduciary law of Pennsylvania. Any analysis under such substantive fiduciary law is beyond the scope of what this opinion will address. There is however, one ethical issue that arises under the Pennsylvania Rules of Professional Conduct (the “Rules.”)

Rule 1.15 **Safekeeping Property** provides in part that

...

(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute.

The Comment to Rule 1.15 provides in part that

(1) A lawyer should hold property of others with the care required of a professional fiduciary. The obligations of a lawyer under this Rule apply when the lawyer has come into possession of property of clients or third persons because the lawyer is acting or has acted as a lawyer in a client-lawyer relationship, or when the lawyer is acting as a Fiduciary, **or as an escrow agent**, a settlement agent or a representative payee, or 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. [Emphasis Added]

...

(8) 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 unless the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. 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.** [Emphasis Added]

The ethical duties of the inquirer are clear. There is a claim by Company which is clearly not “frivolous under applicable law” but about which there is a dispute. The

conditions that were required under the original escrow agreement, that funds will not be released absent agreement between the parties or a court order directing that the funds be released may have been met as regards the respective rights of Spouse and Other Spouse, but because of the claim of Company, the provisions of Rule 1.15 have been triggered and the disputed funds must remain in escrow until the dispute between Spouse and the Company have been resolved. The inquirer and the other co-agent are free to file an action to allow them to pay the funds into the Court so as to remove themselves from the position as co-escrow agents.

**Caveat:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.