Advisory Opinion: 202503

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RPCs: 1.1, 1.3, 1.4,1.7, 1.15A, 4.3

Subject: Disputed Funds Held in Trust

ISSUE

How should a lawyer handle disputed trust account funds?

SHORT ANSWER

Most of the duties owed by lawyers—including but not limited to the duties of competent representation and loyalty—are owed to clients rather than to nonclients. Nonetheless, there are also times when lawyers owe duties to nonclients. This Advisory Opinion addresses one set of circumstances in which such duties may be owed.

RPC 1.15A(f) requires that, "Except as stated in this Rule, a lawyer must promptly pay or deliver to a client or third person the property [including any funds] which the client or third person is entitled to receive." After this is done, RPC 1.15A(g) requires that the lawyer maintain in trust any property whose ownership is disputed until the dispute is resolved while also "tak[ing] reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds." Washington Comment [9] to RPC 1.15A adds by way of explanation that "the extent of the efforts that a lawyer is obligated to take to resolve a dispute depend on the amount in dispute, the availability of methods for alternative dispute resolution, and the likelihood of informal resolution."

To comply with these requirements, a lawyer must communicate with each potential claimant to determine the basis of that person's claim and that person's response to any claims made by others. Unless the lawyer already has this knowledge, the lawyer must also conduct at least a preliminary analysis of the strength of each person's claim, including whether there is documentation to support each claim.

As further explained below, the nature and extent of the lawyer's obligations after that point will depend in part on this assessment and in part on whether the lawyer's client or the lawyer are among the claimants. Nonetheless, it is not the lawyer's job to adjudicate material issues of fact or law.

ANALYSIS

There are many situations in which a lawyer may hold funds that are subject to multiple competing claims. Prior Advisory Opinions have addressed some of them:

- An insurance company asserting a contractual subrogation or other claim against funds held in trust for a client by a lawyer. [n.1]
- A lawyer who had received a deposit from a now-deceased client. [n.2]

- A creditor of a client asserting a claim based on the lawyer's guarantee [n.3] or a writ of garnishment. [n.4]

The General Principles section of this opinion below can be considered as a partial supplement to those opinions. Following the General Principles section, we will also address two further situations:

- A client and a third party who provided funds for representation of the client may dispute who is entitled to any remaining funds after the representation ends.

- Multiple clients who all contributed funds for a joint representation may dispute how to apportion among them funds remaining after the representation ends. [n.5]

General Principles

RPC 1.15A(g) governs situations in which a lawyer holds funds as a lawyer rather than in some other capacity: [n.6]

> If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

If, for example, the lawyer has received $100 and has determined that the lawyer has no personal claim to the funds and that there are no claimants other than the lawyer's client who claims $70 and a third party who claims $40. The lawyer must distribute $60 to the client and $30 to the third party since there is no dispute as to these amounts while keeping only the disputed $10 in trust. [n.7] The extent of the lawyer's further obligations depends on the nature of the dispute, the amount in dispute, the availability of methods for alternative dispute resolution, and the likelihood of informal resolution. Washington Comment [9].

For example, as noted in part in Comment [4] to ABA Model Rule 1.15:

> [T]hird 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 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.

It is not possible in the abstract to lay out a set of rules which describe how the lawyer must or may act in all imaginable disputed funds situations. Nonetheless, the following guidelines should prove helpful in addressing many such situations:

If the lawyer has not already done so, the lawyer will need to inquire, at least preliminarily, about the alleged factual and legal basis of each claimant's position—for

example, whether the claimant's position is based on a duly filed and protected medical lien or on representations allegedly made to the claimant either by the client or by the lawyer. Similarly, the lawyer will need to inquire, at least preliminarily, about each claimant's contentions regarding the claims by the other claimants.

If one of the claimants is a client of the lawyer, the lawyer must provide competent and diligent representation as required by RPC 1.1 and 1.3 and must communicate with the client about the representation as required by RPC 1.4, including an explanation of the potential effects of Rule 1.15A on what the lawyer may or may not do for the client. If, however, the lawyer and the client are both claimants, the lawyer should make clear to the client that the lawyer cannot represent the client because of their adverse interests in the dispute. [n.8]

The lawyer should make clear to claimants other than the lawyer's client that they are not the lawyer's clients and that they must look elsewhere for legal advice. [n.9] Unless there is some reason not to do so, the lawyer may ask the claimants whether they wish to try to resolve any differences by themselves, with or without the help of counsel. In suggesting this option, the lawyer may not make any misrepresentations of fact or law to any of the claimants about the strength or weakness of any claims.

If, following the lawyer's preliminary analysis or any further analysis that the lawyer may conduct, the lawyer concludes that more than one claimant has or may have a factually and legally nonfrivolous claim to the funds, the lawyer must not distribute any disputed portion of funds to any claimant. The lawyer must instead inform the claimants that if they cannot or choose not to resolve the dispute on their own, the lawyer will either continue to hold the funds in trust or will interplead them into court. [n.10]

The lawyer may also set a reasonable time limit on how long the lawyer may hold the funds before interpleading them. The lawyer may also inform the claimants that with their consent, the disputed funds may be transferred to another account, such as an interest-bearing account, pending resolution of the dispute. [n.11]

In assessing whether the claimants have nonfrivolous claims, the lawyer may consider that a decision by the lawyer to release disputed funds to one claimant will be subject to second-guessing in subsequent proceedings—whether by the client or by third parties. Nonetheless, the lawyer cannot ignore the obvious. If, for example, one claimant is the lawyer's client and the other is a third party with an unquestionably legally valid and enforceable statutory lien to which the client appears to have no response that is even potentially legally and factually cognizable, then the lawyer must honor the lien. If, on the other hand, the lawyer concludes that the lien is clearly invalid and that the third-party claimant is merely an unsecured creditor of the client to whom no commitments or promises about how the funds would be handled are alleged to have been made by or on behalf of the lawyer or the client, then the lawyer must give the funds to the client. If the lawyer is a claimant, the lawyer may also wish to consider the effects of the attorney lien provisions in RCW 60.40.010 *et. seq*.

Two Additional Situations

We now turn to the two additional situations noted at the outset of this opinion:

1. *A client and a third party who provided funds for representation of the client may dispute who is entitled to any remaining funds after the representation ends.*

This situation could arise if, for example, one family member paid an advance deposit to a lawyer for representation of another family member and, after the representation ended, the two family members disputed who should receive any amount remaining in trust. The represented family member might assert that the entire amount was intended as a gift, and the paying family member might assert that the funds deposited with the lawyer were always intended and understood to be contingent on the need to pay for legal services with any excess to be refunded to the paying family member after the conclusion of the legal services.

A factual and legal analysis of this situation would at least require the lawyer to ask both family members why they believe they are entitled to the funds and whether they are aware of any documentation that addresses the issue. The lawyer might also decide to conduct additional research or consult with another lawyer, for example, about the law of gifting and trusts. Absent a clear and unchallenged written agreement or a clear rule of law in favor of one side or the other, a reasonably prudent lawyer may well conclude under the circumstances that the situation is one that involves conflicting nonfrivolous claims. [n.12]

Given the lawyer's duties of competent representation, diligence, and communication under RPC 1.1, 1.3, and 1.4, as well as the duty owed to nonclients like the nonclient family member supplying the funds, it is worth noting that this type of dispute is foreseeable in this kind of situation. If so, it might have been prudent for the lawyer to have considered discussing with the client the preparation of a written agreement to be signed by the client, and perhaps also the family member, regarding the distribution of any remaining funds. This would have allowed both parties to have a clear understanding of their rights and anticipate and resolve questions of the client and the family member about what would happen in the event of a dispute.

2. *Multiple clients who contributed funds for a joint representation may dispute who is entitled to receive what portion of any funds remaining after the representation ends.*

This situation could arise if several plaintiffs or defendants had agreed to pool their resources and share counsel. If funds are left in trust after the representation ends, the former co-clients may have different understandings of how the excess should be distributed.

The lawyer will again have to conduct at least some factual and legal research or consult another lawyer to determine whether the clients had ever reached agreement and whether any of the clients have or may be able to make any nonfrivolous arguments that any agreement that may have been reached is not binding. However, because all the claimants here are the lawyer's clients, the lawyer's duty of competent representation suggests a responsibility to have encouraged the clients to agree in advance about how any extra funds would be distributed. If the lawyer does not do so, then the lawyer risks

violating the duties of competent representation, diligence, and communication. The lawyer would also face recusal and a conflict of interest under RPC 1.7.

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Endnotes

1. WSBA Advisory Op. 2166 (2007); WSBA Adv. Op. 2213 (2011, amended 2012).

2. WSBA Advisory Op. 2188 (2008), citing WSBA Informal Op. 1313 (1989).

3. WSBA Advisory Op. 185 (1990, amended 2010).

4. WSBA Advisory Op. 2220 (2012).

5. This Advisory Opinion assumes that the lawyer is aware of the identity of all claimants and can contact them. If not, the lawyer must act consistently with Washington Comment [6] to RPC 1.15A. Please note, however, that this Advisory Opinion does not consider any different or additional obligations that might be imposed on a lawyer under RPC 1.8(g), the aggregate settlement rule.

6. Washington Comment [3] to RPC 1.15A provides that:

> This rule does not apply to property held by a lawyer acting solely in a fiduciary capacity such as attorney-in-fact, trustee, guardian, personal representative, executor, or administrator, or in any similar capacity where the lawyer's investment duties as a fiduciary are controlled by statute or other law. If a lawyer is acting as both a fiduciary and as the lawyer for the fiduciary, the character of the funds controls whether the funds should be deposited in a fiduciary account of the lawyer's trust account. In some cases, it may be permissible to put funds received in either the lawyer's trust account or the fiduciary account. That determination depends in part on the substantive law of fiduciary obligations, which is beyond the scope of these rules. The conflict of interest rules determine whether it is appropriate for a lawyer who is the fiduciary to also serve as the attorney for the fiduciary. See generally RPC 1.7; RPC 1.8(a) & cmt. 8; *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 866 n.12, 64 P.3d 1226 (2003).

7. Continuing to hold the funds in the trust account after a dispute arises is compliant with RPC 1.15A(g), and the funds need not be further separated or transferred to another account:

> No funds belonging to the lawyer may be deposited or retained in a trust account except . . . funds belonging in part to a client or third person and in part presently or potentially to the lawyer must be deposited and retained in a trust account, but any portion belonging to the lawyer must be withdrawn at the earliest reasonable time. . . .

RPC 1.15A(h)(1)(ii); and see ABA Formal Op. 475 (2016) (discussing duty to safeguard fees subject to division with other counsel).

8. *See* RPC 1.7(a)(2); 1.7(b)(3).

9. *See* RPC 4.3; *Bohn v. Cody*, 119 Wash. 2d 357(1992).

10. For further information about interpleader actions, see Washington RCP 22, FRCP 22, and RCW 4.08.160. As noted in *Mack v. Kuckenmeister,* 619 F.3d 1010 (9th Cir. 2010), the stakeholder (in this instance, the lawyer who would file the interpleader), must identify the actual or potential claimants to the funds but is not required to resolve those claims. To the contrary, a party filing an interpleader action is asking the court to resolve those claims.

11. See Washington Comment [14] to RPC 1.15A ("If the client or third person requests that funds that would be deposited in a non-IOLTA trust account under paragraph (i)(2) instead be held in the IOLTA account, the lawyer should document this request in the lawyer's trust account records and preferably should confirm the request in writing to the client or third person.")

12. The lawyer might also be well advised to employ similar advance written clarification in one or more of the situations referenced in the prior Advisory Opinions cited at the beginning of this opinion.

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