

PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-10
(November 2009)

The inquirer's client obtained a judgment in excess of \$400,000 in District Court. The case is on appeal. The defendant has not posted an appeal bond. The inquirer obtained a Writ of Execution and took approximately \$84,000 from one of the defendant's bank accounts. The inquirer is now holding that money in his IOLTA account. The inquirer notes that the low interest rate available and the difficulty in determining how to title an interest-bearing account, especially since there is acrimony between the parties, has led him to keep the money in his IOLTA account instead of a separate interest bearing account.

The inquirer's client would like to receive a distribution of \$4,000 from the funds the inquirer is holding. The inquirer recognizes that there is a risk that his client could lose the pending appeal, but notes that he truly believes that risk is very low. The inquirer asks if he can distribute the \$4,000 to the client.

The inquirer further advises that since the judgment was obtained, he has had various conversations with the defendant's counsel and in the course of those conversations, the filing of a bond has been discussed several times. However, to date, no bond has been filed.

Pennsylvania Rule of Professional Conduct (the "Rules") 1.0 **Terminology** provides in part that:

(e) "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.4 **Communication** provides in part that:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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

(a)...

(9) *Qualified Funds*. Qualified Funds are Rule 1.15 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.

(10) *Rule 1.15 Funds*. Rule 1.15 Funds are funds 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. When the term "property" appears with "Rule 1.15 Funds," it means property of a client or third person which the lawyer receives in any of the foregoing capacities.

...

(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.

...

(h) A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.

...

(k) All Nonqualified Funds which are not Fiduciary Funds shall be placed in a Non-IOLTA Account or in another investment vehicle specifically agreed upon by the lawyer and the client or third person which owns the funds.

Comment 8 to Rule 1.15 provides that:

(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.

While the Committee usually does not address issues of substantive law, in this inquiry it must do so since that analysis is necessary to understand the ethical advice contained within this opinion.

When defense counsel chose not to file a bond along with his appeal, a writ of supersedeas, which is automatic with the filing of the bond, was **not** issued. The effect of the writ is to put the final holding of the lower court, (in this case that the money is owed to the inquirer's client), in abeyance. Without issuance of the writ, the court's final judgment stands as an adjudication of the parties' rights. The funds were collected by a valid execution on a judgment. This would not be possible if that final judgment of the court did not function to transfer ownership rights from the defendant to the inquirer's client. Legally, the money being held in escrow now belongs to the client.

The first ethical question to be addressed is whether the situation as described by the inquirer is one which triggers any obligation on his part to protect the funds by keeping them in escrow and not distributing them to his client. The basic question is whether the filing of the appeal, where there is no supersedeas writ, in any way triggers the requirements of Rule 1.15f. The issue of filing the bond has been openly discussed with defense counsel but to date no bond has been filed. Defense counsel knows what to do to protect his client's interests and has not chosen to do so. Money has been legitimately taken pursuant to court procedures from one of the defendant's bank accounts. While Comment 8 to the Rule provides that it is not up to the inquirer to unilaterally determine the legitimacy of a third party claim, in this situation, the considerations involved do not even get to that point. Legally, the money belongs to the inquirer's client, and as such there is no legitimate claim by the defendant to the money that would trigger the requirements of Rule 1.15f.

In addition, since the funds belong only to the client, they are no longer "qualified funds" as defined by Rule 1.15a9, and must be removed from the IOLTA account. Absent the client's direction, based on informed consent, to continue to escrow some of the money (in a separate escrow account and not an IOLTA account), all of the client's funds must be distributed now. In order to avoid any co-mingling of funds as prohibited by Rule 1.15h, any fees earned by the inquirer which are contained in those funds must at this time also be removed from the IOLTA account and placed in an account of the inquirer's.

While the funds belong to the client and must be distributed to her, the fact that an appeal has been filed does place some obligation on the inquirer to discuss certain issues with his client when making the distribution. As required by Rules 1.4a1 and 1.4b the inquirer has a duty to effectively communicate whatever risk there might be to the client in her taking the funds and spending them now, *i.e.* that should the

appeal be won she will have to pay them back and if she does not she could be sued for them.

The inquirer notes that issues regarding use of a taxpayer identification number as well as lower interest rates have led him to retain the funds in his IOLTA account until this time. The Committee notes that under Rule 1.15k, since the funds are no longer "qualified funds," the client may give her informed consent as defined by the Rules, to have the attorney continue to retain the funds in order to protect herself from having to pay back the money should the defendant succeed on appeal. Normally these funds would have to be in a separate interest bearing account. However, with informed consent, under Rule 1.15k the client may agree to have her funds placed in a non-interest bearing account. This will avoid any controversy as to whom the interest would be taxed if the judgment is reversed. However, again as part of providing adequate information to the client and communicating effectively all information that the client needs to make an informed choice, the inquirer must determine, whether the client will be liable for interest should the judgment be reversed. The lawyer must so advise the client prior to the client making a decision about escrowing the funds and if so in what type of escrow account. The inquirer must respect the client's decision whatever that may be.

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.