

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2007-7**

Issued December 7, 2007

*[Not current-subsequent rule amendments to Prof. Cond. Rule 1.15(d) and Comment [4] thereto of the Ohio Rules of Professional Conduct, eff. 1/1/2010.]*

**SYLLABUS:** A lawyer's duty of safekeeping funds in the lawyer's possession extends not only to clients but also to third persons. A lawyer has an ethical duty of safekeeping funds for a third person when the lawyer knows a third person has a lawful claim to funds in the lawyer's possession. *Not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15.* Examples of lawful claims are provided in this opinion.

When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.

When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer is unclear whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession. But, when a dispute arises as to funds in a lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to

arbitrate a dispute between a client and a third person. If efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking a court to resolve the dispute.

**OPINION:** This opinion addresses a lawyer's ethical duties as to safekeeping funds in the lawyer's possession when a third person claims an interest.

1. Under Rule 1.15(d) and (e), when does a lawyer have an ethical duty of safekeeping funds in the lawyer's possession for a third person claiming interest in the funds?
2. Under Rule 1.15(d) and (e), when a dispute arises what are a lawyer's safekeeping duties to a client and a third person claiming interest in funds in the lawyer's possession and how should a dispute be resolved?

## Introduction

A lawyer's duty of safekeeping funds in the lawyer's possession extends not only to clients but also to third persons. Upon adoption of Rule 1.15(d) and (e) of the Ohio Rules of Professional Conduct, effective February 1, 2007, this duty is axiomatic.

Ohio lawyers seek clarification of when the duty of safekeeping funds for third persons arises and how disputes between clients and third persons regarding funds in a lawyer's possession should be resolved. Proceeds of a personal injury settlement or judgment are a common example of funds that come into a lawyer's possession during representation of a client for which disputes may arise.

## Applicable Rules of Professional Conduct

### Rule 1.15 Safekeeping Funds and Property

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

Comment [4] to Rule 1.5 is also pertinent to this opinion.

Division(e) also recognizes that 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 until the claims are resolved. 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.

A lawyer's safekeeping duties under Rule 1.15(d) and (e)

A lawyer is required by Rule 1.15(d) to do the following: (1) *to promptly notify* a client or third person claiming an interest in the funds, upon receiving the funds; 2) *to promptly deliver* the funds which a client or third person is entitled to receive; and 3) *to render a full accounting* when requested by a client or third person. A lawyer is required by Rule 1.15(e) to *hold disputed funds* in a trust account until entitlement to the funds is resolved.

Under Rule 1.15(a) there are three exceptions to the duty to promptly deliver the funds in a lawyer's possession to a client or a third person: 1) the exceptions stated in the rule; 2) the exceptions permitted by law; and 3) the exceptions permitted by agreement with the client or third person, confirmed in writing.

A determinative issue for a lawyer is what constitutes an "interest" that triggers a lawyer's safekeeping duties to a third person.

The rule does not define "interest," but Comment [4] to Rule 1.15 provides insight into the meaning of "interest" and the application of the rule. "[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 may have a *duty under applicable law* to protect such third party-claims against a 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 until the claims are resolved.” [Emphasis added].

ABA Comment [4] to ABA Rule 1.15 is identical to Ohio’s Comment [4] to Rule 1.15. Professors Hazard and Hodes state that use of the phrases “lawful claims” and “duty under applicable law” “suggest that the third party must have a *matured* legal or equitable claim, such as a lien on specific funds, in order to trigger the lawyer’s duty to hold the funds apart from *either* claimant, pending resolution of the dispute.” Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, §19.6 (3d ed. Supp. 2005-2).

This Board’s view of the meaning of an “interest” sufficient to trigger safekeeping duties under Ohio’s Rule 1.15 is guided by Comment [4]. A *lawful claim* of a third person against *specific funds in a lawyer’s custody* that is *not frivolous under applicable law* is an *interest* subject to a lawyer’s ethical duty of safekeeping for which *a lawyer may have a duty under applicable law to protect*. In short, a lawful claim of a third person to specific funds in a lawyer’s possession is an “interest” for purposes of Rule 1.15.

A third person’s lawful claim is an “interest” subject to safekeeping

*Not every claim of a third person triggers a lawyer’s safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15.* “ ‘[K]nows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Rule 1.0(g): Terminology.

What constitutes a lawful claim is a matter of substantive law. Examples of lawful claims of third persons subject to safekeeping by a lawyer are as follows.

- A lawful claim includes a valid statutory subrogation right as to the specific funds in the lawyer’s possession.
- A lawful claim includes a valid judgment lien or other order of a court regarding the specific funds in the lawyer’s possession.

A lawyer as an officer of the court is required to comply with court orders. As required by Rule 3.4(c), a lawyer shall not “*knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists.”

- A lawful claim includes a written agreement signed by a client promising payment or authorizing the lawyer to make payment to the medical provider from the proceeds of a settlement or judgment. These agreements are known by various names, such as assignments, security agreements, or a doctor’s lien.

See *Hsu v. Parker* (1996), 116 Ohio App.3d 629, 633; *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 301, 2005-Ohio-1327.

- A lawful claim includes a letter from a lawyer to a medical provider promising to uphold the client's agreement to pay the medical provider for services from proceeds of a settlement or judgment. These letters are known as letters of protection. These letters in essence promise to honor an assignment made by a client, or as sometimes stated are said to honor a doctor's lien.

See *Solon Family Physicians, Inc. v. Buckles* (1994), 96 Ohio App.3d 460, 462-63. See also, OhioSupCt., Bd Commr's on Grievances & Discipline, CPR Op. 95-12 (1995).

- A lawful claim includes a written agreement between an insured individual and a health-benefits provider, entered into prior to the payment of medical benefits, to reimburse the health benefits provider for any amount recovered through settlement or satisfaction of judgment upon claims arising from a third party's act.

See *Northern Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 192, 2004-Ohio-4886.

- A lawful claim includes a secured claim by a creditor that is specific to the funds in a lawyer's possession. It is not a lawyer's responsibility to pay general unsecured creditors of a client, including judgment creditors who have not attached or garnisheed the funds.

See Comment [4] to Rule 1.15 which provides as an example of a lawful claim, a lien by a creditor on funds recovered in a personal injury action.

This Board's view is that a claim by a creditor must be a secured claim and it must be specific to the funds in the lawyer's possession in order to be subject to a lawyer's safekeeping under Rule 1.15. It is implausible that a lawyer would be required to protect all claims of all creditors of a client. A claim by an unsecured creditor that is not specific to the funds in the lawyer's possession is not a Rule 1.15 "interest" in the funds in the lawyer's possession.

Advice offered by other states as to the application of Rule 1.15

For purposes of understanding how other states approach application of the duty of safekeeping funds of third persons, the views of other states are reviewed.

The Connecticut Bar Association advises there are four exceptions to the principle that a lawyer has a constitutional obligation to deliver property of the client to the client, on demand, despite third-party claims: (a) If the lawyer knows of a valid judgment concerning disposition of the property; (b) If the lawyer knows of a valid statutory or judgment lien against the property; or (c) If the lawyer knows of a letter of protection or similar obligation that is both: (i) directly related to the property held by the lawyer; and (ii) an obligation specifically entered into to aid the lawyer in obtaining the property; (d) The lawyer knows of a written assignment, signed by the client, conveying an interest in the funds or other property to another person or entity. Connecticut Bar Assn., Informal Op. 01-08 (2001) (Revising Informal Opinions 95-20 and 99-6).

The District of Columbia Bar advises that “[i]n general, a ‘just claim’ that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer’s possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client.” District of Columbia Bar, Op. 293 (Revised) (adopted 1999, revised 2000). The committee notes that problems most commonly arise in the context of disbursement of settlement funds or proceeds of a transaction. Several types of claims that are illustrative of “just claims” that require the lawyer to give notice, make disbursements promptly when there is no dispute, and safeguard funds in the event of a dispute until the dispute is resolved are: 1) an attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer, regardless of whether the attachment or garnishment is related to the matter being handled by the lawyer; 2) a statutory lien that applies to the proceeds of the suit being handled by the lawyer; 3) a court order relating to the specific funds in the lawyer’s possession; 4) a contractual agreement made by the client and joined in or ratified by the lawyer to pay certain funds in the possession of the lawyer to a third party, regardless of whether such an agreement arises from the matter being handled by the lawyer. *Id.*

The State Bar of Nevada notes that their rule does not create third party interests in funds, but requires the lawyer to honor the interests that the law recognizes. State Bar of Nevada, Formal Op. 31. The opinion does not list or identify all of the claims that give rise to an “interest” but provides examples: a common law assignment of such funds; an attachment or garnishment upon the specific funds, a statutory attorney’s lien, and a court order relating to specific funds. The opinion notes that a medical provider may have an interest when there has been no formal assignment of the funds to the medical provider, such as obligations created by a letter of protection. Other examples provided are medical liens, hospital liens, and subrogation liens. *Id.*

The Utah State Bar renders the following advice in Op. 00-04 as to a lawyer’s ethical duties to a third person who claims an interest in the proceeds of a personal injury settlement or award received by the lawyer.

When a lawyer receives funds or property and knows a third person claims an interest in the funds or property, the lawyer must first determine whether the third person has a sufficient interest to trigger the duties stated in Rule 1.15(b). Only a matured legal or equitable claim—such as a valid assignment, a judgment lien, or a statutory lien—constitutes an interest within the meaning of Rule 1.15 so as to trigger duties to third persons under Rule 1.15. If no such interest exists, the lawyer may disburse the funds or property to the client. If such an interest exists, the lawyer must comply with the duties stated in Rule 1.15. Where the client does not have a good-faith basis to dispute the third person's interest, the lawyer must promptly notify the third person, promptly disburse any funds or property to the third person to which that person is entitled, and render a full accounting when requested. If the client has a good-faith basis to dispute the third person's interest, and instructs the lawyer not to disburse the funds or property to the third person, the lawyer must promptly notify the third person that the lawyer has received the funds or property and then must protect the funds or property until the dispute is resolved.

Utah State Bar, Op. 00-04 (2000).

### Conclusion to Question One

In summary, the Board's advice as to Question One is as follows.

A lawyer's duty of safekeeping funds in the lawyer's possession extends not only to clients but also to third persons. A lawyer has an ethical duty of safekeeping funds for a third person *when the lawyer knows a third person has a lawful claim to funds in the lawyer's possession*. Not every claim of a third person triggers a lawyer's safekeeping duty, *only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15*. Examples of lawful claims are provided in this opinion.

### Safekeeping duties when a dispute arises

Comment [4] to Rule 1.15 explains a lawyer's duties when a dispute arises regarding a lawful claim of a third person. Although Comment 4 is set forth earlier in this opinion, Comment [4] is set forth again to assist the reader of this opinion.

Division (e) also recognizes that 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 until the claims are resolved. 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.

Under Rule 1.15(d) and (e) a lawyer has an ethical duty not to give in to a client's demands for delivery of all of the funds to the client when a lawyer knows of a third person's lawful claim to the funds. This ethical duty respects the legal duties a lawyer may have under applicable law to protect a third person's interest in funds.

Likewise, under Rule 1.15(d) and (e), a lawyer has an ethical duty not to give in to a third person's demands for delivery of funds when the lawyer knows that the client disputes the lawful claim. This ethical duty respects the lawyer's duty of loyalty to a client.

A lawyer's safekeeping duties under Rule 1.15 are summarized in these guidelines. These guidelines arise from Rule 1.15(d) and (e) and Comment [4].

- When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.
- When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.
- When a lawyer is unclear whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.
- When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

Resolving disputes

Resolution of a dispute is guided by both Rule 1.15(e) and Comment [4].

A lawyer's duties as to resolution of a dispute require a lawyer to hold disputed funds to which a third party has a lawful claim in a trust account until resolution of the dispute, but a lawyer must disburse promptly the portion of the funds not in dispute.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession.

When a dispute arises as to funds in the lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to arbitrate a dispute between a client and a third person.

If such efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking a court to resolve the dispute.

### Conclusion to Question Two

In summary, the Board's advice as to Question Two is as follows.

When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty under Rule 1.15(d) is to promptly notify and deliver the funds to which a client or third person is entitled.

When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty under Rule 1.15(e) is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer is unclear as to whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.

When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

Ideally, a lawyer will try to resolve any known disputes between a client and a third person before disputed funds come into the lawyer's possession. But, when a dispute arises as to funds in a lawyer's possession, a lawyer should encourage the client and the third person to resolve the dispute through discussion. If appropriate, a lawyer may suggest to the client and the third person that they mediate or arbitrate the dispute. A lawyer should not unilaterally assume to arbitrate a dispute between a client and a third person. If efforts among the client, the third person, and the lawyer do not resolve the dispute and there are substantial grounds for the dispute, a lawyer may file an interpleader action asking a court to resolve the dispute.

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