

OHIO BOARD OF PROFESSIONAL CONDUCT

OPINION 2016-7

Issued October 7, 2016

Lawyer's Duty to Promptly Deliver Funds to a Client or Third Party

Syllabus of Opinion:

1. A lawyer may hold a client's funds in trust for a reasonable period of time to ensure that the check has cleared and the funds are available to distribute to the client or third party. Subject to the exceptions set forth in this opinion, a reasonable period of time consists of one week to ten days, given federal banking regulations and modern banking practices.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.

OHIO BOARD OF PROFESSIONAL CONDUCT

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.supremecourt.ohio.gov/boards/boc

PAUL M. DE MARCO

CHAIR

WILLIAM J. NOVAK

VICE- CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

HEIDI WAGNER DORN

COUNSEL

OPINION 2016-7

Issued October 7, 2016

Lawyer's Duty to Promptly Deliver Funds to a Client or Third Party

SYLLABUS: A lawyer may hold a client's funds in trust for a reasonable period of time to ensure that the check has cleared and the funds are available to distribute to the client or third party. Subject to the exceptions set forth in this opinion, a reasonable period of time consists of one week to ten days, given federal banking regulations and modern banking practices.

QUESTION PRESENTED: A lawyer seeks guidance regarding how long he may hold client funds in the firm's trust account to ensure that the check clears before distributing funds to the client, in light of Prof.Cond.R. 1.15 that requires lawyers to "promptly" deliver funds to a client or third party.

APPLICABLE RULES: Prof.Cond.R. 1.15.

OPINION: The determination as to how long a lawyer may hold client funds while waiting for a check to clear to ensure the funds are available to distribute to the client, must be analyzed under the Rules of Professional Conduct, the applicable federal regulations, and banking policies.

Professional Conduct Rule 1.15

Under Prof.Cond.R. 1.15(d), a lawyer is required to do the following with regard to client funds: (1) *promptly notify* a client or third person claiming an interest in the funds, upon receiving the funds; 2) *promptly deliver* the funds which a client or third person is

entitled to receive; and 3) *render a full accounting* when requested by a client or third person.

There are three exceptions to a lawyer's duty to promptly deliver funds in a lawyer's possession to a client or a third person: 1) those stated in the rule; 2) those permitted by law; and 3) those by agreement with the client or third person, confirmed in writing. Prof.Cond.R. 1.15(d). Additionally, a lawyer is required to hold disputed funds in a trust account until entitlement to the funds is resolved. Prof.Cond.R. 1.15(e). 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. *See*, Prof.Cond.R. 1.15, cmt. [4]; Adv. Op. 2007-7 (duty of lawyer to deliver funds/property when there is a dispute).

The Rules of Professional Conduct do not provide a definition as to what constitutes "promptly"¹ delivering client funds; however, case law provides some guidance as to what time period is considered appropriate to hold client funds. The Court has found that delays of five, six, and nine months are too long to wait to notify a client that the lawyer received a settlement and to deliver the funds to the client. *See*, *Cleveland Metro. Bar Assn. v. Toohig*, 133 Ohio St.3d 548, 2012-Ohio-5202 (failure to remit settlement proceeds to client for over five months violates rule); *Cincinnati Bar Assn. v. Walker*, 28 Ohio St.3d 102 (1986) (failure to return client funds for six months violates rule); *Disciplinary Counsel v. Leksan*, 136 Ohio St.3d 85, 2013-Ohio-2415 (failure to distribute settlement funds to client for nine months violates rule). The Court also has found that a lawyer's complete failure or a significant delay of several years to deliver client funds violates the rule requiring lawyers to promptly deliver client funds. *See*, *Disciplinary Counsel v. Folwell*, 129 Ohio St.3d 297, 2011-Ohio-3181 (failure to return client funds after two years violates rule); *Disciplinary Counsel v. Ranke*, 130 Ohio St.3d 139, 2011-Ohio-4730 (complete failure to return client funds violates rule); *Disciplinary Counsel v. Longino*, 128 Ohio St.3d 426, 2011-Ohio-1524 (failure to return client funds for over two years violates rule); *Columbus Bar Assn. v. Kiesling*, 125 Ohio St.3d 36, 2010-Ohio-1555 (failure to return client funds and property violates rule).

Conversely, problems may arise if a lawyer disburses funds to a client too quickly, before the bank has collected the funds. Disbursing client funds from the IOLTA before

¹ The dictionary defines "promptly" as "performed readily or immediately." *Merriam-Webster's Collegiate Dictionary*, 11th Edition (2003).

the check clears carries the risk of using funds belonging to another client to pay the check if the check is not honored. Lawyers in other jurisdictions have been disciplined in this type of situation. For example, the New Jersey Supreme Court issued a six-month suspension to a lawyer for misappropriating funds of one client to pay another because the lawyer disbursed funds to one client upon receipt of a check for that client, except that check was dishonored. *In re Moras*, 131 N.J. 164, 618 A.2d 1007 (1993); *see also, In re James*, 112 N.J. 580, 548 A.2d 1125 (1988). Lawyers also should be aware of internet and fraudulent check scams that could result in dishonored checks, and in turn, result in disbursing funds to one client that belong to another. *See, Iowa Supreme Court Atty. Disciplinary Bd. v. Wright*, 840 N.W.2d 295 (Iowa 2013) (lawyer violated professional conduct rules by failing to make competent analysis of purported bequest to client and by obtaining loans from that client and other clients to pay taxes allegedly owed on that bequest).

A lawyer is required to hold the funds of a client with the care of a professional fiduciary. Prof.Cond.R. 1.15, cmt. [1]. As such, a lawyer should be cognizant not only of the applicable Rules of Professional Conduct, but also of the federal rules and regulations and banking practices that apply to holding and disbursing client funds.

Federal Regulations and Bank Policies

Federal regulations, as well as banking practices, help determine what constitutes a reasonable time for a lawyer to hold client funds in trust and still promptly disburse those funds to the client.

Federal regulation 12 C.F.R. 229 governs the availability of funds for bank accounts, including lawyer trust accounts. Lawyers should be aware of 12 C.F.R. 229 and its requirements to ensure that client funds are “available” before distributing the funds to a client or third party. 12 C.F.R. 229.12 outlines an availability of funds schedule for when a check is honored or paid. If a check is not honored pursuant to 12 C.F.R. 229.30, banks are required to “expeditiously” return checks using one of two standards: 1) the two-day/four-day test, or 2) the forward collection test. Under the two-day/four-day test, a returned check is considered expeditious if a local check is received by the depository bank the second business day after presentment, and a non-local check, the fourth business day after presentment. 12 C.F.R. 229.30. Under the forward collection test, a returned check is expeditious if the paying bank returns a check in a manner that a

similarly situated bank would normally handle the check. 12 C.F.R. 229.31. Both the two-day/four-day test and the forward collection test ensure that checks that are not honored are returned “expeditiously,” which generally is within about one week².

Under 12 C.F.R. 229, et seq., banks are required to make deposited funds available to customers within certain timeframes, anywhere from one day to approximately one week from the date of deposit. In practice, although the funds are not physically in the bank, the funds are available for the customer to withdraw. This system works until there is a problem with a check and payment is refused. As a result, banks are required to return checks “expeditiously” using either the two-day/four-day rule or the forward collection test. 12 C.F.R. 229.30, 12 C.F.R. 229.31. A bank is required to provide notice of nonpayment if it determines not to honor a check of \$2,500 or more. 12 C.F.R. 229.33.

In addition to federal regulations, lawyers should be cognizant of the policies of the bank where the lawyer maintains his or her trust account. A lawyer should know his or her bank’s policies regarding when the bank is required to alert the account holder that a check will not be honored, especially in situations in which the lawyer has reason to question the check that he or she deposited into the trust account. This situation may be avoided through the use of certified checks or by wiring money to an account.

ANALYSIS: A reasonable time for a lawyer to hold client funds in trust prior to disbursement is dependent on Prof.Cond.R. 1.15 and the federal regulations governing the availability of funds. Based on the applicable federal regulations, a check clears and a bank is notified that a check will be dishonored usually within one week, or possibly longer if it is a foreign check. Therefore, a reasonable time period for a lawyer to ensure that a check clears and funds are available is seven to ten days. If the check is a foreign check, a longer period of time may be considered reasonable. A lawyer who disburses funds to a client from his or her trust account before the bank has collected the deposited funds runs the risk of using funds belonging to another client to pay the check if the check is not honored. Even if the lawyer has no dishonest or selfish motive, this action of using another client’s funds may constitute conversion or misappropriation of funds. As a result, a lawyer should be cognizant of his or her financial institution’s check-clearing procedures and when funds become available for withdrawal, and should wait a reasonable time before disbursing funds.

² This time may be longer for foreign checks.

A lawyer must inform and explain to his or her clients that simply because the federal regulations require banks to make funds available those funds actually may not be available until almost one week or longer, or perhaps not available if a check is denied for nonpayment.

A lawyer should take several precautions in practice when funds are received on behalf of a client. First, the lawyer should obtain a written, signed agreement with the client at the commencement of the representation, or shortly thereafter, that notifies the client of a possible delay of a week or two weeks in delivery of funds to the client due to banking regulations. Second, the lawyer should notify the client promptly upon receipt of any funds received on behalf of the client. Third, the lawyer should confirm in a letter to the client upon receipt of the funds the portion of the agreement regarding any delay in the distribution of client funds. Finally, if no prior agreement with the client exists regarding disbursement of the client funds, the lawyer should carefully explain to the client the lawyer's ethical obligations to hold the funds until the lawyer can confirm that the funds are available for distribution to the client.

CONCLUSION: In order to ensure compliance with Prof.Cond.R. 1.15, a lawyer who receives funds on behalf of a client should proceed with an abundance of caution and wait a reasonable period of time until the check clears and the funds are available before disbursing funds from the lawyer's trust account to the client. Subject to the exceptions set forth above, a period of one week to ten days is a reasonable period of time, given federal banking regulations and modern banking practices.