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Hot Money:
Disputed Funds in Trust

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Lawyers occasionally find themselves in a very uncomfortable position: holding money in their trust accounts over which two (or more) persons are disputing ownership. Although multiple claimants to funds held in trust can occur in many scenarios, a common example is a plaintiffs' lawyer who settles a case for a client and then the client's prior lawyer in the same matter asserts a statutory attorney lien for fees under ORS 87.445 over a portion of the client's recovery being held in the current lawyer's trust account. RPC 1.15-1(e) provides very useful direction and generally requires a lawyer to hold the disputed funds pending resolution of the dispute. Associated Oregon State Bar ethics opinions suggest interpleader as an alternative. In this column, we'll first look at the available guidance for Oregon lawyers and then survey the potential risks if they don't follow that guidance.

Guidance

RPC 1.15-1(e) outlines generally what must be retained in trust and what is to be disbursed when there are competing claims to the same funds:

> "When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

If the law firm holding the funds anticipates that the dispute may take a long time for the competing claimants to resolve, the firm should ordinarily move those funds into a separate, interest-bearing account for the ultimate owner under RPC 1.15-2(c)—which generally requires that funds capable of earning net (*i.e.*, above account costs) interest be deposited into an account separate from the firm's IOLTA account. OSB Formal Opinions 2005-52 (rev 2016) and 2005-68 (rev 2016) counsel that as an alternative to holding the funds, the firm can also interplead them into an appropriate court—such as in our opening example the court in which the underlying matter was filed. ORCP 31 addresses interpleader and the 2020 Multnomah County Circuit Court Attorney Reference Manual discusses the logistics of depositing and disbursing funds with the court.

Formal Opinion 2005-52, in turn, offers prudent advice on what a lawyer holding disputed funds should *not* do: assume the role of arbitrator over the competing claims. Formal Opinion 2005-52 quotes Comment 4 to analogous ABA Model Rule 1.15 on this point:

> "'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.'"

Formal Opinion 2005-52 predicates this advice on the dispute between the claimants being "nonfrivolous" and notes that a lawyer is permitted to release funds to a person or entity "entitled to receive" them in the vernacular of RPC 1.15-1(d). For example, in *In re Garley*, 25 DB Rptr 97 (Or 2011), a Disciplinary Board trial panel dismissed regulatory charges against a lawyer who disbursed funds to which an asserted claimant had no right. But, as we'll discuss in the next section, the penalties for "guessing wrong" on entitlement can be significant.

Risks

There are two principal risks if a lawyer is later found to have incorrectly sided with one of the parties fighting over the disputed funds.

The first risk is regulatory. Oregon has several disciplinary cases where lawyers were sanctioned for violating RPC 1.15-1(e)—including *In re Goff*, 352 Or 104, 280 P3d 984 (2012), *In re Petersen*, 26 DB Rptr 186 (Or 2012), and *In re Arneson*, 22 DB Rptr 331 (Or 2008).

The operative word in RPC 1.15-1(e) is "shall." Therefore, a lawyer who wades into the dispute is at disciplinary risk unless the claimant is simply not entitled to the funds involved as in *Garley*. OSB Formal Opinion 2005-52 parses several scenarios involving claimants who were not entitled to funds being held in

trust and warrants close review if a lawyer is considering simply disbursing funds notwithstanding potentially competing claims.

The second risk is civil. OSB Formal Opinion 2005-52 also quotes Comment d to Section 45 of the *Restatement (Third) of the Law Governing Lawyers* (2000):

> "'When it is unclear who is entitled to property in the lawyer's possession, the lawyer is not required to deliver the disputed property to either claimant; indeed, if the lawyer delivers the property to one claimant, the lawyer can later be held liable to the other.'"

In *Hetzel v. Parks*, 971 P2d 115 (Wash. App. 1999), for example, the Washington Court of Appeals concluded on the pleadings that a complaint stated a claim for breach of fiduciary duty when the defendant lawyer mishandled a non-client's funds that had been deposited into the lawyer's trust account. The title to RPC 1.15-1 underscores the duty involved: "Safekeeping Property." The unremarkable notion is that if we are holding someone's property in trust, we have a fiduciary duty to safeguard the property involved. As the *Restatement* notes, if we try to arbitrate a dispute between competing claimants over disputed funds and choose the wrong side, we may be held liable to the claimant later held to be entitled to the funds.

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