

118

HANDLING OF FUNDS DISPUTED AFTER PROPER WITHDRAWAL FROM TRUST ACCOUNT

Adopted February 12, 2008.

Syllabus

If a lawyer properly withdraws client funds from the lawyer's trust account to apply to the lawyer's fees, in accordance with Colo. RPC 1.5 and the lawyer's agreement with the client, and the client subsequently disputes the lawyer's fee, the lawyer is not required or permitted to return the disputed amount to the lawyer's trust account that holds funds of any clients. Although the lawyer is not required to, the lawyer may place the disputed amount in a separate trust account that holds only the disputed amount.

Facts

Lawyers are required to safeguard client property and hold retainers and advance payments in the lawyer's trust account until earned. Client property and funds must be held separately from the lawyer's own property. Typically, a lawyer withdraws funds from the lawyer's trust account for the lawyer's fees on or after sending a statement to the client respecting those fees. The question has arisen whether a lawyer may or must return funds to the lawyer's trust account if the client disputes a fee after the lawyer sends a statement and withdraws funds from the lawyer's trust account to satisfy the statement.

Analysis

Colo. RPC 1.15(a) states:

In connection with a representation, an attorney shall hold property of clients or third persons that is in an attorney's possession separate from the attorney's own property.

Colo. RPC 1.5(f) states:

Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyers' trust account pursuant to Rule 1.15(f)(1) until earned.

If a lawyer withdraws funds from the lawyer's trust account in good faith, in payment of a statement in accordance with the lawyer's agreement with the client, the withdrawal is proper under Colo. RPC 1.5(f). If the client then disputes the lawyer's fee, the question is whether the withdrawn funds can be characterized as property of the client simply because the client subsequently disputes the lawyer's fee.

Applying language substantively identical to the quoted language of Colo. RPC 1.15(a), Oregon State Bar Formal Ethics Opinion No. 2005-149 concluded that a lawyer was not required to replenish the lawyer's trust account if a client disputed a fee after the lawyer had withdrawn the fee from the trust account, but also concluded that if the lawyer did replenish the trust account, the lawyer would not be considered to have commingled the lawyer's property with that of the client. For support, the Oregon Opinion cites a California decision, *Guzzetta v. State Bar of California*.¹ However, *Guzzetta* involved the restoration of an amount wrongfully withdrawn from a trust account.

More recently, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2006-171,² concluding:

[F]unds properly withdrawn from a [client trust account] . . . and later disputed by the client neither retain nor regain their trust account status, and therefore do not need to be re-deposited into the attorney's [client trust account]. Based on a plain reading of [the California equivalent to Colo. RPC 1.15], such funds bear none of the indicia of trust account status at the moment of withdrawal, i.e. the withdrawn funds do not belong to the client, are not subject to a joint interest of attorney and client, are not subject to a joint interest of the client and any third party, and are not being held by the attorney as part of the subject representation. The fact that the client later

expresses remorse, regret, or other dissatisfaction with the amount of [the] attorney's fee is a matter of contract to be resolved by an analysis of the engagement agreement and the respective performance of the parties.

The California Opinion does not address whether the attorney could return the disputed amount to the attorney's client trust account. The California Opinion also distinguished situations in which a lawyer misappropriates funds in a client trust account.

The Oregon and California opinions are consistent with the view expressed in the comments to Restatement (Third) of The Law Governing Lawyers:

A lawyer holding client funds as an advance fee payment may withdraw them for fees as earned, so long as there is no existing dispute about the lawyer's right to do so. In such instances, the lawyer acts rightly in retaining the money even though, for example, the client might later claim that the fee was unreasonable.³

Applying different language, the Vermont Bar Association (VBA) reached a different conclusion. VBA Advisory Ethics Opinion 1998-05 quotes Vermont DR 9-102(a)(2):

[T]he portion [of the trust account] belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.⁴

VBA Ethics Opinion 1998-05 concludes that if the lawyer knows of no dispute, the lawyer may withdraw an earned fee immediately, without any waiting period after the lawyer renders a statement to the client; however, in the event a dispute arises after the lawyer withdraws a fee from the trust account, "the immediate re-deposit of the funds into the trust account places the lawyer or law firm in compliance with the Rule."⁵

Property of Client

Once a lawyer properly withdraws funds from the lawyer's trust account, it seems difficult to characterize the withdrawn funds as property of the client notwithstanding that the client subsequently disputes the fee. If such funds are characterized as property of the lawyer, as the Colorado Bar Association Ethics Committee believes is proper, to return the funds to a trust account that held property of clients would be commingling, in violation of Colo. RPC 1.15(a).

Accordingly, the Committee does not believe that a lawyer should be required or permitted to return a disputed amount to a trust account of the lawyer that holds funds of any client, if the client does not dispute the lawyer's fee before the lawyer withdrew the funds for payment of the fee from the lawyer's trust account in accordance with Colo. RPC 1.5(f) and the lawyer's agreement with the client.⁶ However, the Committee also believes that, if a client disputes a lawyer's fee, a lawyer may deposit the disputed amount in a separate trust account that will hold no funds other than the disputed amount but is not required to do so.

Separate Trust Account

The Committee believes that the lawyer is permitted, but not required, to place a disputed fee amount in a separate trust account, notwithstanding the requirement of Colo. RPC 1.15(c) that:

[W]hen in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The Committee believes, based on the commentary to Colo. RPC 1.15(c), that the requirement of Colo. RPC 1.15(c) is limited to property in which both the lawyer and a nonclient third-party claim an interest.

Disputed Amount

The situation may arise in which a client disputes a fee that a lawyer has paid by a withdrawal from the lawyer's trust account and the lawyer, after reviewing the matter, determines that the client is correct. For

example, the client may have been charged for the same services twice, or may not have received credit for a previous withdrawal from the trust account due to a bookkeeping error. In this situation, the Committee believes that the lawyer clearly would have an obligation to return the mistakenly transferred funds to the trust account, unless the problem otherwise will be promptly resolved, for example, by direct payment to the client or, with the client's consent, a reduction in the next bill if the client is being billed monthly.

NOTES

1. 43 Cal.3d 963, 741 P.2d 172 (1987).
2. State Bar of California Formal Opinion No. 2006-171, available at [www.calbar.ca.gov/calbar/pdfs/ethics CAL%202006-171.pdf](http://www.calbar.ca.gov/calbar/pdfs/ethics%20CAL%202006-171.pdf).
3. Restatement (Third), The Law Governing Lawyers (2000) § 44, comment f.
4. Available at 69.39.146.6/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Client%20Property/98-05.pdf.
5. *Id.* at 2.
6. *Accord* State Bar of California Formal Opinion No. 2006-171, *supra* note 2.