



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.15(a) through (f). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 93-17
May, 1994

Topic: Commingling of funds: Payment of attorney's fees from client trust account.

Digest: An attorney must hold property of clients or third persons separate from the attorney's own property. All nominal or short-term funds of a client must be deposited into an interest bearing trust account, with the Lawyers Trust Fund of Illinois designated as income beneficiary. An attorney may transfer such funds to pay his attorney's fees only after reasonable notice to and consent by the client.

Ref.: Illinois Rules of Professional Conduct, Rule 1.15(a) through (d)
In re Ushijima, 119 Ill.2d 51, 518 N.E.2d 73 (1987)
In re Kitsos, 127 Ill.2d 1, 535 N.E.2d 792 (1989)
In re Joyce, 133 Ill.2d 16, 549 N.E.2d 232 (1990).
Upgrade Corp. v. Michigan Carton Co., 87 Ill.App.3d 662, 410 N.E.2d 159 (1980).
Stephanie Kanwit, "Attorneys' Liens: When Can You Retain Client's Files?" 79 Ill. Bar J. 274 (1991)

FACTS

Buyer and seller of Illinois real estate entered into a temporary lease agreement pursuant to which the sum of \$2,500 was paid by buyer and seller's attorney to be held in escrow. The lease

agreement was to be for a maximum term of six months and provided that all monies paid under the agreement were to be credited to the purchase price of the property by buyer from seller. One month after entering into the lease agreement, the real estate transaction closed. At the closing, seller asked attorney to deliver to him the \$2,500 and attorney indicated that he would do so promptly.

After approximately six months and further prompting by seller, attorney sent seller a check, drawn on attorney's trust account, in the amount of \$460. Accompanying the check was a letter indicating that said sum was the "net proceeds" after attorney's legal fees were deducted. Seller denies that any money was due attorney and asserts that attorney had already been paid in full for his services.

QUESTIONS

1. May attorney cash the check from buyer without depositing it into a separate trust account?
2. Does Illinois require that such trust accounts be interest-bearing and, if so, is seller entitled to some interest on the money?
3. Did attorney have the right to deduct his attorney's fees from the funds held in trust?

OPINION

1. Attorney must deposit it into a separate trust account. Rule 1.15 of the Illinois Rules of Professional Conduct prohibits an attorney from commingling his own property with that of his client. Rule 1.15(a) specifically provides as follows:

A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property....

2. Illinois requires that client trust accounts established for nominal or short-term funds be interest-bearing and that the interest be paid to the Lawyers Trust Fund of Illinois. See Rule 1.15(d), which provides:

All nominal or short term funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more pooled interest-bearing trust accounts established with a bank or savings and loan association, which the Lawyers Trust Fund of Illinois designated as income beneficiary....

Where funds held by the attorney constitute a substantial sum or where the funds will be held for an extended period, the attorney may open some other separate trust account, where the interest earned thereon may be paid to the client (or to the individual on whose behalf the funds are being maintained). It should be noted that Rule 1.15(d)(5) provides:

The decision as to whether funds are nominal in amount or expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm, and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's or law firm's judgment on what is nominal or short term.

3. Attorney could not deduct his attorney's fees from the funds held in the client trust account in this case as the attorney has not notified seller of his intent to do so nor has seller consented.

The Committee addressed this issue in Opinion No. 88-15. In that opinion, an attorney held certain sums in a trust account for his client. His client owed him attorney's fees in an amount in excess of the sums in trust. The question was whether the attorney could withdraw the money held in trust as payment toward his attorney's fees. The Committee was of the opinion that the attorney could transfer the funds to pay his attorney's fees provided the attorney gave written notice to the client of his intention to withdraw the money and the client affirmatively consented in writing (citing, In re Ushijima, 119 Ill.2d 51, 518 N.E.2d 73 (1987)).

The Illinois Supreme Court has addressed this issue on numerous occasions and has consistently condemned attorneys for misconduct involving the commingling of funds and what amounts to conversion of client funds. See, In re Kitsos, 127 Ill.2d 1, 535 N.E.2d 792 (1989), where the Illinois Supreme Court held that the commingling and conversion of a client's funds by directing that interest accruing on the client's escrow account with Chicago Title be delivered to the attorney in payment of his attorney's fees, without the client's consent, warranted a one year suspension from the practice of law. See, also, In re Joyce, 133 Ill.2d 16, 549 N.E.2d 232 (1990), where respondent was suspended from the practice of law for two years for failing to establish a client trust account, failing to provide an accounting to his client, and for appropriating the client's funds claiming that he was entitled to the money as a fee for his services.

Here, seller denies that attorney was entitled to any further attorney's fees and clearly did not consent, in writing or otherwise, to attorney's withdrawal of the funds held in trust. Therefore, under the principles set forth by the Illinois Supreme Court in Kitsos and Joyce, attorney's conduct was improper.

Under the circumstances, attorney should have promptly delivered the undisputed portion of the funds held in trust to seller. Attorney should have then retained the disputed portion in trust until the dispute was resolved. See subparagraphs (b) and (c) of Rule 1.15, which provide as follows:

- (b) ...Except as stated in this rule or otherwise permitted by law or by agreement with the client, 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (c) When 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.

Attorney's interest in the funds arises out of an attorney's right to a common law retaining lien. Such lien entitles him to retain possession of any property belonging to the client that comes into his possession as part of the professional relationship until amounts due him for services rendered have been paid. See, Upgrade Corp. v. Michigan Carton Co., 87 Ill.App.3d 662, 410 N.E.2d 159 (1980).

In closing, while this Committee recognizes an attorney's right to a retaining lien, the Committee notes that the court's have considered whether invocation of the retaining lien result in prejudice to the client or would adversely affect other parties or the public interest. See, Kanwit, "Attorneys' Liens: When Can You Retain Client's Files?"

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