

## **Ethics Advisory Opinion**

**21-02**

**UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.**

**South Carolina Rules of Professional Conduct: 1.15**  
**South Carolina Appellate Court Rule: 412**

### **Factual Background**

In the course of representation of a client, attorney receives settlement funds which are subject to a valid lien. However, the exact amount of the lien has not yet been determined and will depend on future matters which is likely to take a year or longer to take place. The amount of the funds received is significant enough that it will accrue a substantial amount of interest until the amount of the lien is determined. The parties have voluntarily agreed not to disburse funds until the lien amount is determined.

The fee agreement provides that the lawyer will be paid a contingency fee of a specific percentage of the amount received in settlement, plus costs.

Please assume that because of some unique circumstances in this case, it has been determined that the money will not be disbursed at the present time because distribution at the present time might harm the client's interests. The client wishes to earn interest on the funds that will be held in trust until the matter is resolved.

### **Questions Presented**

1. Is the lawyer permitted to open up an additional trust account pursuant to South Carolina Appellate Court Rule 412, separate from his IOLTA account in an interest-bearing account?
2. Should the entire amount be placed in the account or should the entire sum minus the attorney's fees and costs be placed into the account?

### **Summary**

Under the facts in this case, the funds received are not nominal; and because they are expected to be tied up for more than a year, they are not short-term. Therefore the lawyer is permitted to open up a separate interest-bearing trust account.

A lien against the client's recovery is ordinarily not a lien against the lawyer's fees or costs. Therefore, the lawyer is free to disburse her fees and refund her costs in accordance with the fee agreement, assuming no other restrictions such as a pending court approval.

## **Discussion**

### Question One:

South Carolina Appellate Rule 412(a)(3) states that an "IOLTA account" means a trust account involving "pooled nominal or short-term funds of clients or third persons."

Additionally, Rule 412(a)(3) states that the account product may be an interest-bearing checking account, or even a money market account as long as the money market account is "solely invested in or fully collateralized by United States Government securities."

Similarly, Rule 412(b)(1) states that "all nominal or short-term funds belonging to clients or third persons" shall be deposited into one or more IOLTA accounts. Thus it is clear that an attorney may have more than one IOLTA account. However, there is no requirement that a long term trust account must be an IOLTA account.

Rule 412(d)(1) discusses how one determines if funds are nominal or short-term. It requires that a lawyer merely "exercise good faith judgment in determining upon receipt whether the funds of a client are nominal or short-term." 412(d)(1) then states: "Client or third person funds shall be deposited into a lawyer's or firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income."

If the funds can be invested in an interest-bearing account for the benefit of the client at an expense less than the costs of securing that income, then it is permitted.

Once the attorney has made a reasonable, good faith determination that the amount of funds at issue will draw an interest rate which producer income exceeding the costs of setting up the account, then the lawyer is permitted to set up the account assuming the funds are more than 2 nominal and not short-term. Under the facts in this case, the funds received are not nominal; and because they are expected to be tied up for more than a year, they are not short-term. Therefore the lawyer is permitted to open up a separate interest-bearing trust account.

Another issue is what type of interest-bearing account is permissible. Rule 412 does not answer this, but the discussion in Section (a) may be instructive. 412(a) states that an IOLTA account can be in an eligible bank or in an account which is a government money market fund that buys securities "solely invested or fully collateralized by United States Government Securities." This is not actually a requirement for a non IOLTA account, but since an attorney has a duty of keeping a client's funds secure, it would be the best practice for the attorney to follow similar practices in

establishing an interest bearing account. The funds should be invested in a Government insured account.

The attorney should be mindful that all of the Rules regarding trust account recordkeeping are applicable even though this is not an IOLTA account. The record-keeping Rules are the same; the only difference is that the lawyer is permitted to set up an account which will allow a client to earn interest on the funds until they are distributed.

Question Two:

A lien against the client's recovery is ordinarily not a lien against the lawyer's fees or costs. Therefore, the lawyer is free to disburse her fees and refund her costs in accordance with the fee agreement, assuming no other restrictions such as a pending court approval. In fact, once a lawyer's fee is earned and is not in dispute, leaving it in trust would amount to improper commingling in violation of Rule 1.15(a).