

ETHICS ADVISORY OPINION

13-04

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. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

A third-party, nonprofit organization (NPO) wants to retain Attorney to represent Client in a legal matter. The nonprofit deposits money into the Attorney's trust account to cover the expenses related to Attorney's representation of Client.

Questions Presented and Summary:

1. Who owns the funds in Attorney's trust account? The NPO payor or Client?

The ownership of the funds in Attorney's trust account must be determined by and between the payor and client; Attorney must not arbitrate disputed funds.

2. Who can direct Attorney as to how to use the funds in the trust account?

Attorney will determine how to use the funds to best achieve the goals of the representation, and Attorney must not allow the third party payor to direct the representation of Client.

3. Is Attorney obligated to tell the client that a third party has paid for all the legal expenses and keep the client informed as to the amount and status of those funds?

Yes

- A. Can the NPO place any limitations on the use of the funds it deposited with Attorney for Client's benefit?

Only to the extent of requiring funds to be used only for client's actual expenses for representation as to a particular matter. Attorney cannot allow a third-party to direct his professional judgment.

Opinion:

There have been several Ethics Advisory Opinions issued over the years addressing a scenario wherein the attorney is retained by, connected with, or otherwise paid by a third-party for the benefit of the attorney's client.

In Ethics Advisory Opinion 04-03, we determined that a non-profit organization may refer its donors to a lawyer for purposes of drawing up the estate plans for the donor, "provided that the lawyer makes full disclosure to the donor/client of the relationship with the nonprofit (including the fee payment structure with the nonprofit), and obtains the donor/client's written permission to proceed" with the representation. So, Attorney must assure the client that the receipt of such payment from the NPO payor will not interfere with Attorney's independent judgment (See also Rule 2.1) or with the client-lawyer relationship; Attorney must protect the confidentiality of client's information (See also Rule 1.6).

More specifically, Rule 1.8(f) requires Attorney to fully inform the client that some or all of his expenses related to the representation are being paid by the NPO, and he must receive client's consent to that arrangement. Even if the expenses for Someone Else are paid to Attorney by NPO, it is Someone Else that is the client and whose interest the lawyer must protect and to whose goals Attorney must attend. Rule 1.8(f)(2) underscores the lawyer's duty to ensure there be "no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship", even when compensation is received from somebody other than the client. Similarly, Rule 5.4(c) states "a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." So, while the NPO payor can limit the use of the funds to a particular matter involving the client, it may not limit the Attorney's discretion on the application of the money to that matter.

Likewise, the NPO payor cannot instruct Attorney on the goal of his representation of client. Rule 1.2(a) requires the lawyer to abide by the client's decisions regarding the objectives of the representation, and must take all necessary precautions to ensure that he does not permit the NPO to direct or regulate his professional judgment in rendering legal services to the client, Someone Else.

Addressing the issue of ownership over the funds paid by a third party for the benefit of a client, Rule 1.15 of the Rules of Professional Conduct gives attorneys direction as to how to handle that money. The comments to the rule anticipate the scenario where a lawyer will receive funds from third parties from which a fee or expenses will be paid. Comment 4 to Rule 1.15 places a duty upon the lawyer to ensure that the client does not misuse funds appropriated by a third party. "A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client." If the situation arises that both NPO payor and client Client are demanding a refund of the money in trust, Attorney must leave the funds in his trust account and tell the claimants to work it out amongst themselves.