

ETHICS ADVISORY OPINION

12-01

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.

Factual Background:

Law firm is hired by one client for two matters. Law firm received retainer funds on the first matter and deposited the funds into one of its trust accounts. Law firm did not receive retainer funds on the second matter. Work was performed by law firm on both matters. Law firm does not expect to perform any further services on either matter.

There remains a surplus in the trust account on the first matter. There is an unpaid balance in the second matter. The unpaid balance is greater than the surplus. Client ceased all communication with law firm. Law firm has attempted to reach client through email messages, voice mail messages, text messages and US mail, without success.

Law firm wishes to apply the surplus funds of the first matter to the balance of the second matter and write off the difference as an uncollected fee, closing out both matters.

Questions Presented:

1. Is it permissible for the law firm to apply the trust account proceeds in the first matter to the unpaid balance in the second matter?
2. If not, how should Law Firm disburse the surplus funds to the client?

Summary:

The law firm is not authorized to use the funds received as a retainer in the first matter to cover a portion of the amount due on the second matter. The law firm should treat the additional funds

held in the trust account for the first matter as it would any other client funds, taking appropriate steps to notify the client of its right to recover the surplus. If the lawyer's fee agreement sets forth that any funds remaining in trust may be applied to other matters, then the lawyer may apply the remainder to those matters.

Opinion:

Client funds that have been advanced as payment for unearned legal fees must be deposited in a client trust account, to be withdrawn only as fees are earned. Rule 1.15(c). Upon termination of representation, a lawyer must refund "any advance payment of fee or expense that has not been earned or incurred." Rule 1.16(d). The question posed by this inquiry is whether unearned legal fees may be withdrawn to satisfy a debt to the lawyer arising from a transaction other than the matter in connection with which the funds were advanced.

Generally speaking, fee advances or retainers are either general or special, and either refundable or non-refundable. General retainers are funds advanced for payment of any fees generated in connection with work for the client; special retainers are funds advanced for use in a particular matter. Retainers are generally presumed to be refundable unless counsel and the client arrange otherwise in advance and retention of the fee is fair based on the factors set forth in Rule 1.5(a). Rule 1.5, Cmt. 4; Rule 1.16(d). Had the lawyer's fee agreement set forth that any funds remaining in trust may be applied to other matters, then the lawyer would be able to apply the remainder to those matters.

Based on the facts set forth above, it is apparent that the retainer in the first matter is a refundable special retainer. Specifically, the inquirer states that the retainer was received in connection with a particular matter and placed in a client trust account. The inquirer does not suggest that there was any agreement that the retainer or any portion thereof was to be treated as non-refundable. Thus, it is apparent that the surplus funds left over from the first matter are client funds.

As a matter of fairness and expedience, there is some appeal to the argument that counsel should be able to offset overpayment on one matter against underpayment on another. However, review of the Rules cited above suggests that an unearned fee remains an unearned fee, even if the lawyer has an equitable claim to the funds by virtue of having performed uncompensated work on another matter.

In Opinion No. 88-08, this committee considered a somewhat similar question regarding whether the amount of overpayment of one invoice could be applied to another unpaid invoice for the same client. This committee advised that use of the overpayment amount to pay off another invoice was permissible, provided the client "makes no claim to the amount of the overpayment" and the funds are promptly moved to an escrow account in the event of a subsequent dispute. In that opinion,

we cautioned that “a prudent law firm” would go a step further and get client approval in advance, but made clear that this was not required.

At first blush, Opinion No. 88-08 appears to support the view that a lawyer is not prohibited from using client funds paid for one matter to offset unpaid fees on another matter, even without advance client consent. However, the facts underlying that Opinion are distinct from the facts provided by the inquirer here.

In this case, the relevant funds have already been deposited into a client trust account. They would need to be withdrawn in order to be used. Given that Rule 1.15(c) expressly states that unearned legal fees are to remain in a client trust account, “to be withdrawn only as fees are earned,” we do not believe the Rule contemplates withdrawing the funds for any purpose other than (1) payment for services rendered in connection with the matter for which they were designated or (2) refunding unearned fees to the client. (It does not appear that the current Rule 1.15(c) was in place when Opinion No. 88-08 was written.) Thus, withdrawing funds from a client trust account to pay off a shortfall on another matter is not permissible.

As to the question how to disburse the surplus funds to the client, this matter should be handled as would any other return of client property. In Opinion No. 02-05, we addressed methods for returning client funds when the relevant clients cannot be contacted by ordinary means. We believe that discussion applies to this scenario as well.