

ETHICS ADVISORY OPINION

10-02

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

Factual Background:

The Clerk of Court/Register of Deeds is beginning a system of e-recording for many documents involved in real estate transactions. Under the proposed procedure, the closing lawyer will scan the document to be recorded and email the document to the Clerk of Court/Register of Deeds Office. The Clerk or Register will add the date, time, Book and Page stamps to the document and email the document back to the closing lawyer. The closing lawyer will then print the emailed document, and this emailed version will become the original recorded document.

At the same time the document is received by the Clerk of Court/Register of Deeds Office, that office will debit an account of the transmitter for the recording and transfer fees. Since funds received in a real estate transaction pass through a lawyer's trust account, there is an objection to allowing the Clerk or Register to access the trust account for purposes of withdrawing funds for recording and transfer fees. Instead, the lawyer wants to establish an account separate from the trust account so that once a transaction is completed, the funds collected for recording and transfer fees will be deposited into that separate account. When the documents from that transaction are recorded, the Clerk or Register will then debit that separate account for the appropriate fees. If the money is not in that account, the Clerk or Register will reject the documents.

Questions Presented:

1. Would the account described be considered a trust account regulated under S.C. RPC 1.15 and S.C. ACR 417?
2. Can a lawyer share control of an account with a non-lawyer?

Summary:

An account that contains funds of a client or third party is a trust account subject to the provisions of SC RPC 1.15 and SC ACR 417.

As long as an account does not contain legal fees which could not be shared with a non-lawyer under SC RPC 5.4 or client funds which are subject to the safe-keeping requirements of SC RPC 1.15 and Financial Recordkeeping requirements of SC ACR 417, a lawyer may share control of an account with a non-lawyer.

Opinion:

A lawyer is under a duty to keep the property of his client safe and separate from that of himself and other clients. Rule 1.15 states (in part):

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

In addition, lawyers in South Carolina must maintain client trust accounts in accordance with the Financial Recordkeeping requirements of Rule 417 of the South Carolina Rules of Appellate Court Procedure. These requirements include, among other things, "ledger records for all trust accounts required by Rule 1.15 of the Rules of Professional Conduct, showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;" Rule 417 (a)(2), SC ACR. The failure to maintain client funds separate and apart has repeatedly been cause for discipline in South Carolina. See, eg., *In re Lattimore*, 361 S.C. 126, 604 S.E.2d 369 (S.C. 2004)(lawyer disbarred for, among other things, trust account violations and recording account practices); *In re Brown*, 041210 SCSC, 26802 (S.C. April 12, 2010)(lawyer suspended for six months for, among other things, failing to safe-keep client funds); *In re Ham*, 041210 SCSC, 26800 (S.C. April 12, 2010)(lawyer indefinitely suspended for misuse of client funds); *In re Witcraft*, 041210 SCSC,

26801 (S.C. April 12, 2010)(lawyer suspended for two years for misuse of client funds); In re David, 030110 SCSC, 26778 (S.C. March 1, 2010)(lawyer publicly reprimanded after self-reporting of trust account violations); In re Smalls, 382 S.C. 551, 677 S.E.2d 211 (S.C. 2009)(lawyer disbarred for numerous trust account violations); and In re Bowden, 613 S.E.2d 367 (S.C. 2005)(subordinate lawyer publicly reprimanded for trust account and recording account violations of the firm).

Our Committee has looked at a similar inquiry previously in SC EAC Opinion 2006-02. In that opinion, the question centered around the transfer of recording funds from the lawyer's client trust account into a recording account which then disbursed those recording funds to the Clerk of Court or Register. As we correctly pointed out, the client funds continue to be client funds even after being transferred from the trust account to the recording account. Unless the recording account is maintained in compliance with all trust accounting requirements under SC RPC 1.15 and SC ACR 417, this practice would be a violation of the lawyer's ethical obligations. That opinion went further to suggest that if the lawyer were to advance the cost of the recording and transfer fees from the lawyer's own funds, the reimbursement to the lawyer from the client trust account would be proper so long as disclosure was made according to RESPA requirements and other substantive law. SC EAC Op. 2006-02.

Under the fact scenario presented, if the shared recording account contains funds of the lawyer's clients, it would necessarily be a trust account and would be subject to all the recordkeeping requirements outlined above. The funds transferred from the lawyer's trust account to the "recording" account remain client funds until they are paid to the Clerk or Register. The only way to avoid this conclusion would be if the recording account contained the lawyer's own funds which were being advanced for the recording of the documents. Then the contents of the account would not be client funds or legal fees at all, but the lawyer's own funds. The lawyer would then be reimbursed for these advanced costs by a disbursement from the client trust account once recording had been accomplished. Rule 1.8(e) specifically permits a lawyer to advance court costs and expenses of litigation, but prohibits a lawyer from providing a client with any other financial assistance. The payment of recording and transfer fees would be analogous to court costs and expenses of litigation which are routinely permitted to be advanced in other areas of the law. (Federal court permits e-filing of actions using a credit card system similar to that being proposed by the Clerk of Court/Register of Deeds.) As long as the lawyer ensures that the shared account does not contain legal fees or client funds, the lawyer could participate in the Clerk or Register's e-recording procedure without violating any of the lawyer's ethical obligations.