



ETHICS ADVISORY OPINION

12-05

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:

Attorney works for a Texas-based law firm as the sole employee of the firm's Columbia, South Carolina office. Attorney opened an IOLTA account in South Carolina. A Partner of the firm has instructed Attorney to send the checks for the IOLTA account to Virginia, where Partner is based and where the law firm's accounting office is located. Partner is licensed in Texas, Virginia, and D.C. but not in South Carolina. It is contemplated that Attorney will deposit client funds in the account and inform Partner of such deposits. Attorney will submit disbursement requests to Partner, and Partner will have sole ability to write checks drawn on the South Carolina IOLTA account. Attorney has informed Partner of South Carolina record keeping requirements. Partner agrees to abide by these requirements and to send regular reports of deposits and withdrawals.

Question Presented:

Is the proposed accounting arrangement permissible under RPC Rule 1.15 and Rule 412, SCACR?

Summary:

The proposed arrangement appears to comply with Rule 1.15 and Rule 412, but it does not comply with Rule 417, SCACR, as recently amended.

Opinion:

Rule 1.15(a) of the Rules of Professional Conduct (“Safekeeping Property”) provides:

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.... 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. A lawyer shall comply with Rule 417, SCACR (Financial Record-keeping). Rule 417, in turn, imposes record keeping requirements with respect to all client trust accounts, including but not limited to IOLTA accounts established under Rule 412, SCACR.

The proposed arrangement appears to comply with the requirements of Rule 1.15 and Rule 412, SCACR. However, the proposed arrangement does not comply with Rule 417. In September 2011, the South Carolina Supreme Court adopted a revised version of Rule 417. The revision includes new Rule 2(a), which provides that “only a lawyer admitted to practice law or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account.” The Comment to Rule 2 emphasizes the lawyer’s “nondelegable duty to protect and preserve the funds in a client trust account” and makes clear that nonlawyer access to a trust account “should be limited and closely monitored.” The Committee believes that the term “nonlawyer,” as used in Rule 2, includes persons like Partner in the proposed arrangement, i.e., lawyers admitted to practice in jurisdictions other than South Carolina.

The proposed arrangement does not comply with Rule 417(2)(a) because Partner is not admitted to practice in South Carolina and is not under Attorney’s direct supervision in either a geographical or hierarchical sense. Geographically, Partner is hundreds of miles away. Hierarchically, Attorney appears to be subordinate to Partner. Cf. Rule 5.2 (Responsibilities of a Subordinate Lawyer).