



## ETHICS ADVISORY OPINION

19-01

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

### **South Carolina Rules of Professional Conduct: 1.15(e)**

**Factual Background:** On or about January 31, 2018, clients entered into a contingency fee agreement with Law Firm A. At some point in August of 2018, clients terminated their relationship with Law Firm A. Law Firm A had not submitted a demand packet to the defendant's insurance company and no negotiations for settlement had commenced prior to clients' terminating Law Firm A.

On or about September 9, 2018, clients entered into a contingency agreement with Law Firm B. Law Firm B commenced negotiations with defendant's insurance company on October 23, 2018. At that time, defendant's insurance company notified Law Firm B of a charging lien asserted by Law Firm A for costs and "15% of any and all gross recovery" for attorney's fees. Law Firm B settled all claims with defendant's insurance company on November 5, 2018, and agreed to keep the funds associated with Law Firm A's charging lien in its trust account.

Law Firm B notified clients of the charging lien being asserted by Law Firm A. Clients requested Law Firm A remove the 15% charging lien relating to attorney's fees. Law Firm A told clients, "The division of the attorney fees will have to be worked out between [Law Firm A] and [clients'] new attorney. It will not cost [clients] more money, and there should be no increase in what [clients] pay in total fees, but there will have to be a division of the attorney's fees amongst the attorneys in this case."

At no time before being terminated did Law Firm A enter into a written fee sharing agreement with Law Firm B that was confirmed by clients pursuant to Rule 1.5(e) of the Professional Rules of Conduct. With the permission of clients, Law Firm B contacted Law Firm A on November 12, 2018, regarding the charging lien, and Law Firm A requested Law Firm B share a percentage of its contingency fees to satisfy the charging lien. Law Firm B rejected this request but agreed to forward the costs to Law Firm A associated with its representation upon receipt of the settlement funds. Law Firm A authorized Law Firm B to disburse all monies due to the clients to avoid any delay and to hold Law Firm B's contingency fee in trust.

Law Firm A continues to assert a charging lien against Law Firm B based on the contingency agreement clients signed with Law Firm A. Law Firm A continues to demand Law Firm B hold its entire contingency fee in trust.

**Questions:**

1. What is Law Firm B's ethical responsibility regarding Law Firm A's charging lien?
2. What is Law Firm B's ethical responsibility regarding holding the entirety of its contingency fee in trust?

**Summary:** Law Firm B's ethical responsibilities in this matter are governed by Rule 1.15(e) rather than Rule 1.5(e). See the last sentence of Comment 8 to Rule 1.5. Law Firm B must hold in trust an amount equal to the amount being claimed by Law Firm A until the dispute with Law Firm A is resolved, unless Law Firm B determines that Law Firm A's charging lien claim is frivolous under applicable law.

**Discussion:** As a preliminary matter, while the inquirer has posed two separate questions, the Committee believes that the questions can be considered together for purposes of this opinion, since the same analysis applies to both. Rule 1.15(e) reads, "When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute." The facts presented imply that Law Firm B has disbursed the clients' portion of the settlement amount to the clients so as to comply with the second sentence of Rule 1.15(e). Thus, the dispute is limited to the fifteen percent (15%) being claimed by Law Firm A as it relates to the balance being held by Law Firm B.

**Question 1:** Law Firm B's ethical responsibility regarding Law Firm A's charging lien is limited to holding an amount in trust equal to the amount of Law Firm A's charging lien claim until the dispute is resolved, unless Law Firm B determines that Law Firm A's claim is frivolous under applicable law. This result is mandated by the express language of Rule 1.15(e), specifically, "... the property shall be kept separate by the lawyer until the dispute is resolved," and by the following language from Comment 4 to Rule 1.15: "...when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved." Two of this Committee's prior opinions, 06-04 and 16-01, are instructive and consistent with the foregoing analysis. In this case, the clients have presumably been paid the clients' share of the settlement proceeds, but the quoted language from Comment 4 would nevertheless apply to the remaining amount being held by Law Firm B to the extent of Law Firm A's claim, based on the language of Rule 1.15(e).

**Question 2:** Consistent with the answer to Question 1, Law Firm B need not hold the entirety of its contingency fee in trust. Only an amount equal to the fifteen percent (15%) charging lien claim

of Law Firm A is required to be held, assuming that Law Firm B determines that Law Firm A's claim is not frivolous.