



ETHICS ADVISORY OPINION

09-13

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 represented Client in an action against Landlord for Landlord's failure to make repairs to her apartment. After that action was filed, but before it came up for trial, Landlord filed an eviction action against Client for failure to pay rent. At the eviction hearing, the parties agreed to continue the eviction proceedings and have both actions heard at the same time. Prior to the second hearing, Attorney collected one month's rent from Client and deposited it in Attorney's trust account. At the hearing, the judge ruled in favor of Landlord on Client's action for damages, but did not rule on the issue of rent owed to Landlord.

Landlord has requested that Attorney release the one month's rent from Attorney's trust account to Landlord. Client has instructed Attorney not to disburse the funds to Landlord because (1) the issue of unpaid rent was not ruled upon at the hearing, and (2) Landlord has not filed an action to recover unpaid rent from Client. Client has requested that Attorney release the funds to her.

Questions Presented:

Should Attorney release the funds at issue from his trust account? If so, to whom? If not, how long must Attorney hold the funds in his trust account?

Summary:

Pursuant to Rule 1.15 of the South Carolina Rules of Professional Conduct, if Landlord's claim to the rent funds in Attorney's trust account does not appear to be frivolous, then Attorney has an affirmative duty to retain those funds in trust until Landlord's claim is resolved.

Opinion:

Rule 1.15 of the South Carolina Rules of Professional Conduct ("Safekeeping Property") provides guidance in this situation. Rule 1.15(e) states:

When in the course of representation a lawyer is in possession of property in which two or more persons . . . 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.

SCRPC 1.15(e). Comment [4] explains that “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.” SCRPC 1.15, comment [4]. A “claim” for purposes of Rule 1.15(e) need not be a formal “claim” in the way of a lawsuit; rather, a “claim” need only be an assertion of an interest in the specific property at issue. However, the mere assertion of a claim by a third party is not in and of itself enough to freeze the property in the lawyer’s possession. Comment [4] clearly limits the application of Rule 1.15(e) to **non-frivolous** claims. Black’s Law Dictionary defines “frivolous” as “[l]acking a legal basis or legal merit; not serious; not reasonably purposeful.” Black’s Law Dictionary 303 (3d pocket ed. 2006); see also 20 C.J.S. COSTS § 17 (2009) (“A claim . . . is frivolous if its proponent can present no rational argument to support it or failed to make a reasonable inquiry into its basis . . .”). Additionally, if there is a “claim” within the scope of Rule 1.15(e), the question arises as to how that claim may be resolved. Comment [4] states: “A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.” SCRPC 1.15, comment [4].

Applying Rule 1.15(e) here, if Landlord’s claim to the rent funds is not frivolous under applicable law, Attorney has a duty to retain those funds in trust until such time as that claim is resolved.