ETHICS ADVISORY OPINION

08-10

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:

Lawyer maintains a trust account at an FDIC-insured financial institution. Lawyer conducts monthly reconciliations and maintains the account ledger by client. Many of the lawyer's clients have trust account balances in excess of $100,000 at any given time.

The maximum insurance coverage available per account through the FDIC in the event of the failure of the financial institution is $100,000; however, research into the FDIC requirements convinces the lawyer that if the records of the trust account are properly maintained, the funds of each client in his trust account should be insured at up to $100,000 per client.

Question Presented:

Does the lawyer have an obligation under Rule 1.15 or otherwise to provide insurance, over and above the maximum available pursuant to the FDIC, in order to discharge his duty to preserve client funds? In other words does a lawyer breach an obligation to his client if the depository bank fails and a client's funds in excess of $100,000 are lost?

Summary

No. The lawyer only has the obligation to take reasonable steps to protect client's funds. In addition to FDIC insurance, numerous federal agencies regulate financial institutions for the purpose of guarding against bank failures. It cannot be presumed that these federal agencies are not making reasonable efforts to safeguard these financial institutions, and it is certainly clear that these agencies have greater expertise than any given attorney. There is no requirement in the rules that the attorney maintain insurance on his trust account for amounts in excess of $100,000.

Opinion

Rule 1.15 (a) defines the ethical obligation to hold and disburse client funds. It states that a lawyer shall hold property of clients "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 properties shall be identified as such and appropriately safeguarded." Comment [1] states that a lawyer should hold properties of others with

the care required of a professional fiduciary. The sentence in Rule 1.15 (a) relating to "other property" seems to be discussed in comment [1] where it is stated that securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances.

When an individual acts as a fiduciary, he must act as if he were dealing with his own property. In cases wherein more than $100,000 is in the trust account, it is often the case that the attorney's own fee is in the trust account as well, and the reason that the money is in the trust account is that it is pending approval of a regulatory authority, or simply pending the check's clearing.

There is no requirement in the rules for an attorney either to insure funds in excess of $100,000 or to place funds in numerous different banks. To impose such a requirement would be an unreasonable burden on the practicing attorney in most cases. Rule 1.15 defines a lawyer's ethical duties with respect to safekeeping the property of clients and third-parties. Insuring bank deposits in excess of $100,000 is a business decision and is not specifically included in those duties.