

Ethics Opinion 2020-04

Issues Presented: Whether a lawyer will violate the Rules of Professional Conduct by maintaining possession of and slowly distributing client funds to the client after representation has concluded, even at the client's direction, when lawyer believes client may be using this process to violate the law?

Answer: It is possible this will violate the Rules; and the lawyer should distribute the remaining funds to the Client immediately, or set a deadline for the Client to receive the funds before the lawyer will take other steps to dispose of the funds.

Rules Implicated: 1.16, 1.15, and 8.4

FACTS

Lawyer was retained by Client in Client's capacity as personal representative for an estate, at least initially. However, Client was also an estate beneficiary, so Lawyer came to have funds in Lawyer's trust account that belong solely to Client. Client likely believes Lawyer represents Client individually regarding the estate matter, and Lawyer would not disagree. Although the estate matter remained pending, Lawyer wanted to distribute the Client's funds to Client. Client said this was not feasible because Client did not have a bank account or other means to cash such a large check. Client thereafter would periodically request small disbursements of the funds in cash, which Lawyer honored. Meanwhile, Client expressed the intent to open a bank account and a desire to set up a trust to hold the funds.

However, before Lawyer could set up the trust and disburse the funds, a warrant was issued for Client's arrest. Lawyer has instructed Client to surrender to law enforcement, but Client has refused. Lawyer has also attempted to reach Client's criminal defense attorney but has been unsuccessful.

The estate matter has concluded so Client's role as personal representative has ended. This was the sole purpose for Lawyer's original retention, so Lawyer believes the attorney-client relationship either has terminated or should terminate, and wants to distribute Client's funds. But Client wants Lawyer to keep the funds and keep distributing them in small periodic installments.

Lawyer has four primary inquiries: (1) whether the piecemeal distributions made before the Client's criminal issues arose were improper; (2) whether further similar distributions would violate the Rules; (3) whether Lawyer's receiving and talking to Client at Lawyer's office while Client remains "at large" is improper; and (4) what Lawyer should do with the Client's funds.

Lawyer is primarily concerned about violating Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

DISCUSSION

Questions regarding client funds usually involve Rule 1.15, Rule 1.16(d), or both. Rule 1.15(b) provides:

- (b) Upon receiving funds or other property in which a client or third party has an interest, a lawyer shall promptly notify the client or third party. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third party any funds or other property that the client or third party is entitled to receive and, upon request by the client or third party, shall promptly render a full accounting regarding such property.

Rule 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

Termination of Representation is *required* if “the representation will result in violation of the Rules of Professional Conduct or other law” (Rule 1.16(a)(1).)

Termination is *permitted* under Rule 1.16(b)(2), (3), (4), or (7) if

the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent . . .the client has used the lawyer’s services to perpetuate a crime or fraud . . .the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement . . or other good cause for withdrawal exists.

- 1. Lawyer’s previous disbursement of Client’s funds on a periodic basis was permissible, but Lawyer should not continue this practice once representation has been terminated unless an alternative and otherwise permissible distribution schedule has been agreed to in writing.**

A lawyer’s retention of a client’s funds after receipt may be permitted “by agreement” with the client. Lawyer’s retention and periodic disbursement of Client’s funds during the representation and at Client’s behest was permissible and likely warranted given Client’s situation.

However, the estate matter has terminated. If this terminated the representation, Lawyer must surrender the funds to the Client. Admittedly, the policy behind this rule (i.e., ensuring the client is promptly given property in Lawyer’s possession upon termination of representation) does not appear to be implicated here, because *Client* wants the funds to remain in *Lawyer’s* possession.

However, the Committee can find no provision of the Rules or its Comments that allows for a different result than the one contemplated by Rule 1.16(d).

Although the Lawyer and Client both appear to understand Lawyer represents Client personally, a representation that may not have terminated, there is a question whether it must be terminated, and the funds released. Lawyer is now aware Client is evading law enforcement, so Lawyer must analyze whether retaining Client's individual funds under the circumstances will violate Rule 1.16(a)(1) by helping Client violate the law, because Lawyer may not engage in conduct that could be deemed, under substantive law, to be assisting Client in doing so. This might violate Rule 8.4(c)'s proscription against "conduct that is prejudicial to the administration of justice."

The closest similar fact patterns the Committee could locate in ethics/disciplinary matters have involved lawyers permitting clients to keep funds in the lawyers' trust accounts to avoid creditor claims to the clients' funds. *See, e.g., In re Pritikin*, 959 N.Y.S.2d 162, 164-65 (Sup. Ct. App. Div. 1st 2013) (tax liens); *In re Kaplan*, 976 N.Y.S.2d 461 (Sup. Ct. App. Div. 1st 2013) (various claims); *Coppock v. State Bar*, 749 P.2d 1317 (Cal. 1988). The Committee is not suggesting these cases are identical to Lawyer's inquiry. The decision-makers in those cases placed a heavy emphasis on the lawyers' intent to aid their clients' misdeeds, whereas here, Lawyer is seeking advice from the Committee to avoid similar missteps. Moreover, this would be a substantive determination outside of the Committee's purview. These cases are simply provided as a warning that, in the event of a substantive ruling Lawyer assisted Client in evading law enforcement, the Lawyer could be found to have violated Rule 8.4(c) and perhaps other Rules.

2. Meeting with Client while Client is "at large" does not, standing alone, violate the Rules.

The Committee agrees merely meeting with Client at the Lawyer's office is, of itself, not impermissible, so long as the Lawyer is not advising Client to remain at large, assisting Client in remaining at large, or otherwise advising the Client about his criminal case, for which Lawyer should defer to Client's criminal defense attorney (unless Client formally retains Lawyer in that regard). The safest course would be for Lawyer to limit any discussion(s) to the subject of the return of Client's funds.

3. Lawyer should set a deadline for Client to accept and deposit the funds elsewhere, or Lawyer will take other steps to ensure Lawyer complies with the Rules.

On that topic, Lawyer's primary inquiry appears to be what Lawyer should do about the situation. On the one hand, Lawyer likely has an obligation to return the funds to Client. On the other, Client is refusing to accept them, or at least refusing to accept them all at once.

Two earlier opinions from this Committee provide guidance.

In Opinion 98-11, a lawyer represented a client who died before completion of the representation, leaving funds in the client's trust account and uncertainty regarding the existence of heirs or creditors. The Committee determined the lawyer had to maintain what appeared to be abandoned client property "until a lawful claim is made to it or it escheats to the state" or "pursuant to an order of a court of appropriate jurisdiction." The Committee recently applied this rationale in Opinion 2019-05, stating that a lawyer unable to communicate with or find a client who left funds in the lawyer's possession should either comply with substantive law regarding abandoned or unclaimed property or obtain an order from a court about what to do with the funds.

Client here is alive, well, and communicating, but has left Lawyer in a situation functionally-identical to the ones addressed in these opinions involving deceased, missing, or unresponsive clients.

It is the opinion of the Committee Lawyer has an obligation to deliver the funds to Client, but no obligation to continue delivering them in small portions. Lawyer should, both orally and in writing, if possible, communicate Lawyer's ethical obligation to Client and Lawyer's inability to continue disbursing Client funds in small increments, and demand Client accept the funds. If Client still will not do so, Lawyer should send or hand-deliver a letter to Client enclosing a check for the funds stating that (1) Lawyer's representation of Client has terminated; (2) Lawyer has an obligation to deliver the funds to Client because the representation has concluded; (3) Lawyer can no longer distribute the funds in anything less than the full amount, which Lawyer is attempting to do with the check; and (4) if Client refuses to cash or deposit the check or otherwise receive the entirety of the funds, Lawyer will eventually have to treat the funds as abandoned or unclaimed under applicable law, or seek a court order about what to do with them.

As noted in Opinion 2019-05, the Committee cannot opine regarding how long Lawyer must retain the funds before they are properly deemed abandoned or unclaimed, because that is an issue of substantive law, but does note, as it has in the past, that SDCL Chapter 43-41B appears to govern this area of the law. If Lawyer remains uncertain about that issue of substantive law, Lawyer still may seek a Court order regarding proper disposition of the funds.

CONCLUSION

Lawyer's periodic disbursements of Client funds to Client during Lawyer's representation of Client, and before Client's criminal law issues arose were permissible under the Rules. Lawyer is not per se violating the Rules by continuing to meet with Client at Lawyer's office, but Lawyer should confine those discussions to the remaining issue, i.e., the need for Client to take possession of Client's funds. If Client will not do so, Lawyer should provide written correspondence to Client with a check for the funds clarifying the representation is terminated; stating that Lawyer has an obligation to return the funds; clarifying that Lawyer can no longer distribute the funds in small amounts; and warning that Lawyer will treat the funds as abandoned

or obtain a Court order about what to do with them if Client does not deposit or cash the check within a reasonable time. If Client still refuses, Lawyer should follow one of those two paths unless and until Client accepts the funds.