

## **State Bar of South Dakota**

### **Ethics Opinion 98-3**

April 28, 1998

- **Rule: 1.15**
- **Subject: Trust account disbursements; Attorney's liens**
- **Summary: Where third party has lien on settlement received on behalf of client, attorney must determine if there is "dispute" as to third party's interest in the proceeds before releasing funds to third party.**

#### **FACTS**

You represented a plaintiff in a personal injury action. Your client moved out of South Dakota. In another state, your client authorized a lien on the proceeds of her South Dakota claim in favor of other attorneys representing family members in unrelated legal matters. (Hereinafter "foreign attorneys"). The lien was served upon you and you were satisfied it was a valid lien.

You settled the South Dakota personal injury action. You sent a trust account check to the foreign attorneys, made payable jointly to your client and the foreign attorneys. You copied your client on the transmittal letter forwarding the check.

The foreign attorneys are unable to locate your client for endorsement of your trust account check. The foreign attorneys now request that you stop payment on the check and send them a new one payable only to the foreign attorneys.

You asked the Committee whether you may honor the request from the foreign attorneys under these circumstances.

#### **OPINION**

SDCL 16-18 Appx. Rule 1.15, in pertinent part, provides:

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. 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 person any funds or property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation, a lawyer is possession of property in which both the lawyer and another person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

A comment to Rule 1.15 states:

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and third party.

Your request appears to turn on whether there is a "dispute" concerning the foreign attorney's interest in the proceeds. Rule 1.15(c). If your client authorized the lien, this suggests that there is no "dispute." However, the validity of the lien is only one source of potential "dispute" and insufficient facts are presented to determine whether other possible sources of "dispute" between your client and the foreign attorneys exist. In addition, the sources of potential "dispute" are matters of substantive law upon which this Committee may not opine. See, Ethics Committee Guidelines.

It is the opinion of the Committee that if you are satisfied by your communication with your client that no "dispute" exists, you are permitted to stop payment on the original check and issue one made payable to the foreign attorneys. On the other hand, if you are not satisfied that no "dispute" exists between your client and the foreign attorneys, you must retain possession of the proceeds until your client and the foreign attorneys resolve the "dispute." Rule 1.15(c). For an example of the hazards inherent in unilaterally erroneously resolving a "dispute," see, e.g. *Leon v. Martinez*, 638 NE2d 511 (NY 1994).

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