

ETHICS OPINION 2014-01

Rules: 1.15; 1.6; 3.3; 3.4; 4.1

Subjects: Trust account management; confidentiality

Summary: A lawyer must give all persons with a claim to funds held in trust a full accounting of those funds and their disposition; where disputed claims exist, a lawyer may disclose those claims as necessary to provide an accounting and make an appropriate distribution

Husband and wife divorced. The court hearing the divorce action treated an LLC, of which Wife was the sole member, as a marital asset and ordered that proceeds of its sale be divided equally between Husband and Wife. Lawyer was retained to act as a closing agent on the sale of LLC and distribution of the proceeds. Lawyer represents neither party in the divorce.

Lawyer deposited the LLC sale proceeds into Lawyer's trust accounts and has paid off all LLC debts and liens. Lawyer now seeks to make a final distribution to Husband and Wife from Lawyer's trust account. Wife has directed Lawyer to divide the sale proceeds in a manner inconsistent with the divorce decree. She indicates Husband has agreed to an alternate distribution of the proceeds. Lawyer wants to obtain written confirmation of that from Husband. Wife has "strictly prohibited" such contact. Wife has also threatened disciplinary action against Lawyer if her directions are not followed.

Lawyer has asked the following:

- 1) Can Lawyer make a distribution of the sale proceeds in conformity with Wife's directions?
- 2) May Lawyer pursue alternative means to make a proper distribution without breaching duties of confidentiality to Wife?

The Committee answers both questions in turn below. For several reasons, Lawyer cannot ethically act as Wife directs, but can distribute the proceeds by other means consistent with Lawyer's ethical obligations.

- 1) Lawyer must provide both Husband and Wife an accounting of the sale proceeds in Lawyer's trust account and may only make a distribution in proper amounts as set by court order or informed consent of both Husband and Wife.

Wife has directed Lawyer to distribute property in a manner inconsistent with a controlling court order. Wife has further directed Lawyer not to obtain Husband's consent to that modified distribution or otherwise contact Husband. While Lawyer's client is the LLC, Wife is the sole member of the LLC, and hired Lawyer on behalf of the LLC.

The requirements for trust accounts in Rule 1.15 preclude Lawyer from following wife's direction to distribute the proceeds from sale of the LLC in a manner inconsistent with the divorce decree

without notice to, and agreement from, Husband. Rule 1.15(b) requires that any lawyer who receives funds to which “a client or third person has an interest,” “shall” promptly provide notice to all individuals with an interest therein. Lawyer is further obligated to distribute proceeds in proper amounts and provide both Husband and Wife an accounting upon request.

While there may be a dispute as to what interest Husband and Wife each hold, it is indisputable that the divorce decree gives both some interest in the sale proceeds in Lawyer’s trust account. Lawyer cannot ethically comply with Wife’s directives as a result. Both Husband and Wife have an interest in the proceeds; therefore neither can be kept in the dark as to proceeds from its sale or the distribution of those proceeds.

Rule 1.15(c) clarifies how to proceed on disputed claims. Lawyer must maintain disputed proceeds separately until the dispute is resolved. Lawyer “shall promptly distribute” funds only “as to which the interests are not in dispute.” Here, Lawyer cannot proceed to distribute funds in a manner inconsistent with a court order without Husband’s informed consent. Confirmation in writing is not required, but is prudent.

While Rule 1.15 is dispositive of Lawyer’s question, other rules are implicated by this scenario. While the Committee will not expound on their application, under the facts of this case Rules 3.3 regarding candor to the tribunal, 3.4 regarding fairness to opposing parties, and 4.1 regarding truthfulness in statements to others may preclude the course of action Wife requests. Because Rule 1.15 flatly precludes that course, additional discussion is not necessary.

2) Lawyer may disclose information about the proceeds, distribution, and disputed claims without violating the duty of confidentiality. Lawyer’s second question is, given that the course demanded by Wife is ethically precluded, what pathways to resolution remain open. While the Committee will not provide substantive advice, it can address some ethical concerns from likely options Lawyer may pursue. In particular, Lawyer has asked if other alternatives will violate his duty of confidentiality.

First, withdrawal is an option. The Committee has addressed this situation in an earlier opinion issued to Lawyer.

Second, Lawyer may decide to simply generate a proposed closing statement outlining the division of proceeds and provide it to Husband and Wife. Either party may object to or both may agree with the division. To do so would not violate Lawyer’s duty of confidentiality under Rule 1.6. Under the circumstances, it is permissible under Rule 1.6(b)(5) for Lawyer to disclose Wife’s claims to the proceeds, which are different from the court’s earlier divorce decree, to comply with the court order of division of the sale proceeds.

Third, if no agreement is reached by the parties, lawyer could pursue payment of the funds into court pursuant to SDCL § 15-6-67(c) for the court to adjudicate distribution. The act of submitting the funds and stating that there are disputed claims to those funds would likewise not violate the duty of confidentiality under Rule 1.6. Disclosure would again be necessary to comply with, or at least avoid violating, the earlier court order.

CONCLUSION:

Wife has asked Lawyer to make an improper division of funds held in trust to which both Husband and Wife have a claim. Lawyer is obligated to provide a full accounting to both Husband and Wife as individuals with a claim to those funds and to make the distribution only in conformity with their proper shares as determined by court order or agreement. Because Lawyer must comply with these obligations, Lawyer would not violate a duty of confidentiality to disclose the amounts held in trust, information regarding payments from the proceeds or proposed distributions, or the claims to the funds made by Husband or Wife.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota