

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 475**

**December 7, 2016**

## **Safeguarding Fees That Are Subject to Division With Other Counsel**

*A lawyer may divide a fee with another lawyer who is not in the same firm if the arrangement meets the requirements of Model Rule 1.5(e). When one lawyer receives an earned fee that is subject to such an arrangement and both lawyers have an interest in that earned fee, Model Rules 1.15(a) and 1.15(d) require that the receiving lawyer hold the funds in an account separate from the lawyer's own property, appropriately safeguard the funds, promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.*

Model Rule 1.5(e) provides for the division of fees between lawyers who are not in the same firm.<sup>1</sup> A division of a fee “is a single billing to a client covering the fee of two or more lawyers who are not in the same firm.”<sup>2</sup> Rule 1.5(e) provides that such agreements are permissible only if the division is proportionate to the services performed by each lawyer or both lawyers assume joint responsibility for the representation, the client agrees to the arrangement including the share each lawyer will receive, the arrangement is confirmed in writing, and the total fee is reasonable. Model Rule 1.15(a) provides in pertinent part that a lawyer “shall hold property of ...third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.”

When lawyers are dividing a fee pursuant to Rule 1.5(e), a question arises regarding how an earned fee received from a client by one of the lawyers must be handled when both lawyers have an interest in the paid fees. Should the other lawyer who holds an interest in the earned fees be treated as a third person under Rule 1.15? We conclude that for the purposes of a division of fees between lawyers, when one lawyer receives fees on behalf of all lawyers in the matter, the answer is yes.

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1. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. MODEL RULES OF PROF'L CONDUCT R. 1.5, cmt. [7] (2016).

Model Rule 1.15 provides the answer. It explains in relevant part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept 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 property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

...

(d) 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 other 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.

Rule 1.15 applies in many situations including fee advances, advances of costs, receipt of settlement funds, holding client funds to which creditors have claims, and fee disputes between the lawyer and the client. Whatever the context, Rule 1.15 requires the safekeeping of any property that comes into the lawyer's possession in connection with the representation of a client<sup>3</sup> in which the client or any "third person" has an interest.

Thus, if two or more lawyers have an agreement that satisfies Rule 1.5 regarding a division of fees, and one lawyer receives a payment that must be divided with the other lawyer pursuant to their agreement, the other lawyer is a "third person" for purposes of Rule 1.15. However, the designation of a person as a "third person" under Rule 1.15 addressing safekeeping property of others is limited to the purposes of Rule 1.15 (i.e., safekeeping the property of others). It is not

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3. Rule 1.15(a) explicitly applies to property in the lawyer's possession in connection with a representation of a client. Rule 1.15(d) does not contain this explicit limitation and some authorities have applied Rule 1.15(d) outside the context of a representation of a client. *See, e.g.,* Att'y Grievance Comm'n v. Johnson, 976 A.2d 245 (Md. 2009) (applying what is now Maryland Rule 1.15(d) to facts involving a lawyer serving as a settlement agent for a title company); State Bar of Arizona Comm. on Rules of Prof'l Conduct, Op. 04-03 (2004) (applying Arizona Rule 1.15(d) to facts involving funds delivered to a seller's former divorce lawyer by escrow agent in connection with a home sale in which the lawyer did not represent the former client).

necessarily indicative of the status of the person beyond the scope of Rule 1.15 (e.g., a lawyer who is co-counsel and a third person under Rule 1.15 for the purposes of safekeeping property is not a third person for the purposes of Rule 1.6).

The receiving lawyer, therefore, must, under Rule 1.15(a), deposit the funds in which co-counsel holds an interest in an account (typically a trust account) separate from the lawyer's own property.<sup>4</sup> Rule 1.15(d) requires the lawyer who receives the earned fees subject to a division agreement to promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.

Finally, if there is any dispute as to the interest of the receiving lawyer and the lawyer with whom the receiving lawyer is dividing a fee, Rule 1.15(e) requires that the receiving lawyer keep the disputed funds separate from the lawyer's own property until the dispute is resolved.

## **Conclusion**

A lawyer may divide a fee with another lawyer who is not in the same firm if the arrangement meets the requirements of Model Rule 1.5(e). When one lawyer receives an earned fee that is subject to such an arrangement and both lawyers have an interest in that earned fee, Model Rules 1.15(a) and 1.15(d) require that the receiving lawyer hold the funds in an account separate from the lawyer's own property, appropriately safeguard the funds, promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.

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4. Applicable state implementation of Rule 1.15 may require that the funds be deposited into an IOLTA (Interest on Lawyer Trust Accounts) account.

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## **AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

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