

**Nebraska Ethics Advisory Opinion for Lawyers
No. 09-01**

AN ATTORNEY IS REQUIRED TO PROMPTLY NOTIFY A CLIENT UPON RECEIPT OF FUNDS IN SATISFACTION OF THE CLIENT'S JUDGMENT, AND TO DISBURSE THOSE FUNDS EXPEDITIOUSLY AT THE DIRECTION OF THE CLIENT, DESPITE THE OPPOSING PARTY'S PENDING APPEAL OF THE JUDGMENT.

Question Presented

Whether an attorney who collects on a judgment in favor of a client may distribute to the client the funds received in satisfaction of the judgment if an appeal of the judgment is pending but the appellant did not file a supersedeas bond.

Facts

An attorney represented a plaintiff in a tort case that resulted in a judgment for damages in favor of the client and against an uninsured defendant. After an unsuccessful attempt to have the judgment vacated, the defendant timely perfected an appeal of the judgment to the Nebraska Court of Appeals. The defendant did not file a supersedeas bond. The attorney anticipates that, through execution/collection efforts on the judgment, he soon will receive funds in partial satisfaction of the judgment. He believes that the likelihood of a reversal of the judgment and remand by the appellate courts is slim, but does exist.

Applicable Rule of Professional Conduct

RULE 1.15 SAFEKEEPING PROPERTY

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(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.

Discussion

Generally, whenever a lawyer takes possession of property a client is entitled to receive, the lawyer first must promptly notify the client and then deliver the property to the client expeditiously. Rule 1.15(d); ABA Lawyers Manual on Professional Conduct 45:1101. The

ABA Manual states that “there are few, if any, defenses or excuses that will justify a failure to promptly give notice of, deliver, and account for a client’s funds or other property.” *Id.* at 1102. Among the state ethics opinions the Manual cites in support of this proposition is Mississippi Ethics Opinion 121 (1986), which concluded that a lawyer who receives payment of a money judgment in favor of a client must pay the funds to the client at the client’s request, even though a pending appeal of the judgment may raise future claims concerning the funds.

The Mississippi opinion dealt with facts similar to those at hand. After the plaintiffs in a civil lawsuit were awarded a money judgment, the defendants appealed to the Mississippi Supreme Court, which affirmed the trial court’s judgment and denied the defendants’ application for a stay of execution of the judgment. The defendants then appealed to the United States Supreme Court, which denied two stay applications by the defendants but had not yet ruled on the merits of the appeal. While that appeal was pending, the defendants paid the judgment by delivering payment to the plaintiffs’ attorney. The plaintiffs demanded that the attorney turn the money over to them.

The Mississippi ethics committee noted that while it could not locate any precedent that squarely addressed the issue, Mississippi Code of Professional Responsibility DR 9-102(B), which was in effect at the time, directed that a lawyer shall “promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.” The Mississippi committee observed that whether the client was “entitled to receive” the funds was a question of law, and the committee was prohibited from rendering an opinion on a question of law. Assuming, without deciding, that the clients were entitled as a matter of law to receive the funds the lawyer had received in payment of the judgment, the committee determined that DR 9-102(B) required the lawyer to promptly pay the funds to the client.

The Mississippi committee recognized that the pendency of the appeal and possibility of future reversal, however unlikely, could raise future claims between the plaintiffs and defendants as to the funds. Nevertheless, it opined that if the clients were presently entitled as a matter of law to the funds and had requested payment from the lawyer, the rule commanded the lawyer to promptly pay the funds to the clients. The committee directed the lawyer to advise the clients, however, of the possibility of appellate reversal.

It appears no other state’s ethics committee, including this Committee, has addressed this same issue. The Washington Supreme Court, however, has discussed an attorney’s ethical duties under similar circumstances. *Ehsani v. McCullough Family Partnership*, 159 P.3d 401 (Wash. 2007). The *Ehsani* court held that an attorney who receives payment of a client’s judgment from a judgment debtor and distributes the proceeds as directed by the client is not liable in restitution to the judgment debtor when the judgment is reversed on appeal. The court based its holding, in part, on its interpretation of an attorney’s ethical duties under Washington’s Rule of Professional Conduct 1.15A, which mirrors Nebraska Rule 1.15(d) in relevant part.

In Ehsani, a judgment debtor paid the judgment to his trial opponents' attorney. The attorney, at the direction of his clients, distributed part of the funds to the clients' creditors and retained a portion of the funds as his fee. The judgment debtor appealed the judgment but did not file a supersedeas bond. Id. at 408.

The Washington Court of Appeals overturned the judgment. The judgment debtor then filed a motion in the trial court seeking restitution from the attorney under a Washington court rule that entitles a judgment debtor to restitution following a successful appeal "in appropriate circumstances." The trial court denied the motion for restitution, but the court of appeals held that the attorney must repay to the judgment debtor all funds the judgment debtor had paid to the attorney. Id.

The Washington Supreme Court reversed, siding with the attorney. Looking to the Restatement of Restitution for guidance, the supreme court determined that under the common law of restitution, an attorney who receives a monetary judgment on behalf of his clients and, upon request, disburses those funds to his clients' creditors, including himself, is not liable in restitution to the judgment debtor when the judgment is subsequently reversed on appeal. Id. at 411.

The court further observed that Washington Rule of Professional Conduct 1.15A imposes on attorneys "a professional duty to distribute trust account funds in accordance with their clients' wishes." Id. at 413-14. To hold attorneys involved in the execution process liable for restitution to a judgment debtor when a judgment is reversed on appeal would subject attorneys "to significant financial hardship merely for fulfilling their professional responsibilities." Additionally, an inherent conflict of interest would exist between attorneys and their clients as to the disbursement of client funds – clients will often want the funds distributed immediately, but attorneys would be motivated to delay distribution until after appeal to avoid becoming personally liable to the judgment debtor. The supreme court reasoned that reversing the court of appeals' decision "avoids these negative consequences for attorney-client relations." Id. at 414.

In a concurring opinion, two justices contended that the case should be resolved solely by interpreting the Rules of Professional Conduct, not common law restitution. Id. at 415. The concurring justices disagreed that common law restitution necessarily protected the attorney from liability for disbursing the funds at issue; rather "[i]t is the power and force of the Rules of Professional Conduct which compel an attorney to follow his or her client's directive to disburse funds from client trust accounts." Id. "The Rules of Professional Conduct require attorneys to distribute trust account funds at the behest of their clients," the concurrence reasoned. If an attorney faces liability for disbursing such funds, the incentive to comply with the Rules is diminished by the attorney's reasonable self-interest. "Exposing an attorney to liability for compliance with the Rules of Professional Conduct undermines the rules." Id. at 416.

This Committee agrees with the opinion of the Mississippi ethics committee and the Ehsani court's interpretation of the Rules of Professional Conduct. Like Mississippi's former Rule DR9-102(B) and Washington's Rule 1.15A, Nebraska's Rule 1.15(d) requires an attorney to promptly deliver to the client any funds that the client is "entitled to receive." Like the Mississippi committee, we cannot render an opinion on the legal question of whether your client is "entitled to receive" the funds. We assume, without deciding, that your client is legally entitled to receive the funds at the time the attorney collects them. Based on this assumption, the Committee is of the opinion that Rule 1.15(d) compels an attorney to notify the client upon receipt of the funds and to disburse the funds as directed by the client, despite the pending appeal of the judgment.

We note that, unlike the attorneys in the two opinions discussed above, the attorney will obtain the funds through execution proceedings rather than a voluntary payment from the judgment debtor. The Committee does not believe this fact results in a different obligation for the attorney under the Rules of Professional Conduct. Again, based on our assumption that the client is legally entitled to receive the funds once the attorney obtains them, the attorney has a duty under Rule 1.15(d) to notify the client and to disburse the funds as the client directs.

Like the Mississippi committee, we are of the opinion that the attorney should advise the client of the possibility of appellate reversal of the judgment and the legal consequences to the client of a reversal.

Conclusion

Rule 1.15(d) requires an attorney to promptly notify a client upon receipt of funds in satisfaction of the client's judgment, and to disburse those funds expeditiously at the direction of the client, despite the opposing party's pending appeal of the judgment. The attorney should advise the client of the possibility of appellate reversal of the judgment and the legal consequences to the client if a reversal occurs.