NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1143 (1/18/2018)

Topic: IOLA accounts**;** court appointed referee; deposit of third-party funds

Digest: An attorney who is appointed as a referee to conduct foreclosure sales pursuant to Part 36 of the Rules of the Chief Judge may deposit funds received from those sales into an IOLA account or special account maintained by the lawyer's firm or by the lawyer.

Rules: 1.15, 5.1.

FACTS

1. The inquirer is an attorney who is occasionally appointed as a referee to conduct foreclosure sales pursuant to Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Most often, when the inquirer conducts these foreclosure sales, a bank representative is present at the sale to receive any sale proceeds, which are typically owed to a third party. At other times, no bank representative is present, so the sale proceeds are left in the possession of the inquirer.

2. The inquirer is a member of a law firm. The inquirer wishes to deposit the excess funds from foreclosure sales into the law firm's Interest on Lawyer Account ("IOLA"), but the inquirer's firm is reluctant to permit a deposit into the firm's IOLA account because only the inquirer, not the firm, was appointed as referee.

QUESTION

3. When an individual member of a law firm, and not the law firm itself, is appointed pursuant to 22 NYCRR Part 36 as a referee to conduct a foreclosure sale, may the attorney/referee deposit sale proceeds funds owed to a third party into the IOLA account of the individual attorney's law firm?

OPINION

4. Rule 1.15(b)(1) of the N.Y. Rules of Professional Conduct (the "Rules"), which addresses the handling of client and third-party funds in the possession of an attorney, says in relevant part:

> A lawyer who is in possession of funds belonging to another person *incident to the lawyer's practice of law* shall maintain such funds in a banking institution within New York State. . . Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a *special account* or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and

> separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited. [Emphasis added.]

5. An IOLA account is one such "special account." *See* Judiciary Law § 497. Our Committee opines only on ethical issues arising under the Rules and not on questions of law. Thus, we offer no view on whether the Judiciary Law, 22 NYCRR Part 36, or any other statute or rule relating to foreclosure sales, address the question presented. If so, then the requirements of law would govern. But if the law is not to the contrary, we see no reason under the Rules why the proceeds of a foreclosure sale belonging to a third party may not be placed into the IOLA account of the inquirer's law firm. (For convenience, we refer to trust accounts or escrow accounts as "special accounts" except when reference to IOLA accounts – a species of special accounts -- is appropriate.)

6. By way of background, the appointment of a referee is usually set out in a judgment of sale entered following foreclosure. That judgment dictates the distribution of proceeds, which typically the referee computes. The referee cannot alter the terms of the judgment of foreclosure and sale. On the day of the sale, the referee announces the sale and reads its terms aloud. Following the sale, the referee is responsible for executing a referee's deed, obtaining the purchase deposit (or price), executing the memorandum of sale and the report of sale, calculating the final amount due, and distributing the funds in accordance with the judgment. Familiarity with these requirements is integral to service as a referee. Thus, although a person need not be a lawyer to act as a referee, courts often name lawyers to serve in that position.

7. Such service, in our view, is "incident to the lawyer's practice of law" within the meaning of Rule 1.15(a) even though non-lawyers are legally eligible to serve as foreclosure referees. The Rules may apply to a lawyer (or law firm) when engaged in activities that a non-lawyer may provide. We find support for this conclusion in our prior opinions applying the Rules to lawyers acting as referees in foreclosure matters. For instance, in N.Y. State 924 ¶¶ 4, 6 (2012), we concluded that an attorney could act as a referee in a mortgage foreclosure proceeding in which a client held a judgment on the mortgaged property, provided that the lawyer complied with the confidentiality provisions of Rules 1.6 and 1.8(b), as well as the conflicts provisions of Rules 1.7 and 1.9. Similarly, in N.Y. State 893 ¶ 5 (2011), we said that a prosecutor could accept appointment to a panel of foreclosure referees provided that the lawyer complied with the conflicts provisions of Rule 1.7. *Cf.* N.Y. State 979 (2013) (lawyers acting as mediators may be subject to the Rules). In light of the prevalence of lawyers appointed to referee foreclosure sales, we have no difficulty concluding that service as such is "incident to" the practice of law, and hence that Rule 1.15 applies.

8. It follows that a lawyer in possession of third-party funds yielded by the sale must assure their safekeeping in a special account segregated from the firm's own business or operating accounts. We know of no reason in the Rules why these funds may not be deposited into an IOLA account maintained by the firm of which the inquirer is a member if the funds qualify for deposit there under applicable laws and regulations. Rule 1.15(a) specifically says that funds so qualifying may be held in special accounts either "in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member." This means that, while the inquirer is not

obligated to place the funds into a firm IOLA account, the inquirer is free to do so and the firm is free to accept them.

9. Alternatively, a lawyer in the inquirer's situation may set up a special account (including an IOLA account) in the lawyer's own name. We recognize that some law firms may have their own rules or agreements on such matters – for instance, a partnership provision prohibiting members of the firm from setting up special accounts in the lawyer's own name – but we have not been told of any such provision here. No ethics violation arises if a lawyer sets up a special account only in the lawyer/referee's name. But the inquirer need not do so if the firm will allow him to deposit the money into the firm's IOLA or other special account.

10. Under all circumstances a lawyer or law firm in possession of funds due a third party must maintain a special account to hold the third-party funds. Whichever course is selected, we note that, under Rule 5.1(a), the firm and its members are responsible to make "reasonable efforts to ensure that all lawyers in the firm conform" to the Rules, including proper maintenance of IOLA accounts and other special accounts.

CONCLUSION

11. An attorney who is appointed as a referee to conduct foreclosure sales, and who is in possession of funds belonging to a third party received from those sales, may ethically deposit funds into either the attorney's firm's IOLA account or into a special account set up by the attorney/referee individually. In any case, the attorney or the law firm must hold such third-party funds in a special account separate from the firm's business or operating account.

(27-17)