NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1188 (05/06/2020)

Topic: Attorney Trust Accounts; Deposit of Estate Funds in Attorney Trust Accounts

Digest: A lawyer who receives estate funds solely as co-executor of an estate may not use an attorney trust account to hold or disburse such funds

Rule: 1.15(b)(1)

FACTS

1. The inquirer is a New York attorney who, together with a family relative, was designated in a will as a co-executor of an estate. The two co-executors were issued Letters Testamentary, and had been co-signers on an estate bank account. The inquirer uncovered unauthorized transactions in the estate account, and upon queries to the bank the account was frozen. The inquirer is not counsel to the estate, but acting through such counsel the inquirer has applied in the Surrogate's Court for removal of the co-executor, an application that remains pending. In the interim, the estate faces assorted time-sensitive expenses to preserve estate assets, but the co-executor has refused to open a new estate bank account that would require both to co-sign on all withdrawals. As an alternative, the inquirer proposes to use an attorney trust account through a separate sub-account for the estate to deposit funds payable to the estate and to pay emergency expenses on behalf of the estate; the co-executor has consented to this arrangement. The inquirer is concerned whether doing so comports with the N.Y. Rules of Professional Conduct (the "Rules").

QUESTION

2. May a lawyer use an attorney trust account to receive and disburse funds on behalf of an estate of which the inquirer is the co-executor when such funds come into the inquirer's possession solely as an executor of the estate and not as a lawyer for the estate?

OPINION

3. Rule 1.15(b)(1) provides, in relevant part, that 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."

4. Rule 1.15(b)(1) identifies two species of accounts that a lawyer may maintain when the

lawyer holds funds belonging to another. One is an account "incident to the practice of law" and the other is an account the lawyer holds in other fiduciary capacities, among them as an executor.

5. An attorney trust account is solely for funds received "incident to the lawyer's practice of law" and therefore should not be used to hold funds that an attorney receives in any other capacity. Yet we acknowledge that lawyers often do receive funds that are not incident to the lawyer's legal practice, and so the Rules recognize this fact. For instance, Comment [1] to Rule 1.15 says that "[s]eparate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities."

6. On our view, the inquirer's receipt of estate funds would not be considered incident to the practice of law. The estate has its own lawyer. It appears that the inquirer was designated as co-executor for reasons unrelated to any status as a lawyer, perhaps a familial one.

7. We have previously dealt with relationships that fall within the ambit of "incident to the practice of law." For instance, in N.Y. State 1143 (2018), we concluded that an attorney serving as a court-appointed referee to conduct foreclosure sales could ethically deposit sale proceeds into the firm's IOLA account because the referee's tasks -- executing a referee's deed, obtaining the purchase deposit, executing the memorandum of sale and the report of sale, calculating the final amount due, and distributing the funds in accordance with the judgment – constituted activity "incident to the practice of law" even though non-lawyers are legally eligible to serve as foreclosure referees. Similarly, in N.Y. State 907 (2012), we said that an attorney could use an attorney trust account to make an anonymous charitable donation on behalf of a client based on our view that the attorney was doing so incident to a legal practice, though we cautioned that, if the facts were otherwise, "it may be necessary for the attorney" to set up a separate account.

8. Finally, while questions of law are beyond the purview of this Committee, we note that controlling statutes may dictate the permissibility of the conduct in question without regard to the Rules. *See e.g.*, EPTL § 11-1.6(a) and SCPA § 719(7). As Comment [5] to Rule 1.15 notes, "The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services."

CONCLUSION

9 A lawyer who receives funds belonging to another may not use an attorney trust account to manage the funds if the funds were not received incident to the practice of law but instead solely in another fiduciary capacity as an executor of an estate.

(07-20)