

OPINION 2010-1

Synopsis: In order to determine whether an attorney may pay his fees from funds held in his Trust Account, a determination must first be made as to who is legally entitled to the funds. With client consent, an attorney may withhold his or her fees due from client funds in the attorney's possession. An attorney may not withhold fees from funds in the attorney's possession if those funds are the property of someone other than the attorney's client and that party does not consent.

Facts: Attorney A represented a Seller in a real estate closing. Prior to Attorney A's involvement, Attorney B had negotiated an arrangement with the Seller's mortgage lender (the "Lender"). As a result of Attorney B's efforts, the Lender had agreed to provide a Mortgage Discharge for less than the full mortgage debt. Unbeknownst to Attorney A, the Lender had also approved the payment of fees to Attorney B. When Attorney A presented his bill, the Lender refused to pay it. At that point, Attorney A had expended substantial effort on the Seller's behalf.

For a number of reasons that are not necessary to relate, Attorney A has additional funds in his IOLTA Account that the Lender will claim. In addition, he suggests a number of grounds upon which the Seller could challenge the Lender's claim. Regardless of which party is entitled to the funds, Attorney A inquires whether he may deduct his fees before releasing the balance.

Discussion: Rule 1.15 governs the safeguarding of property held by an attorney for his client or a third party

RULE 1.15. SAFEKEEPING PROPERTY

(a) (1) 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 accordance with Rules 1.15A and B. 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 six years after termination of the representation ...

As we understand it, the funds held in the Trust Account either belong to the Lender or they belong to the Seller.

If the fund belongs to the Lender, Attorney A may not ethically deduct any amount from the fund without the Lender's consent. Any attempt to send the Lender less than the full amount must be accompanied by an explanation of the disposition of the funds.

In the alternative, if the Fund is the property of the Seller, then Attorney A may deduct Attorney's fees before paying the balance to his Client, provided, Client consents to the deduction and Attorney's fees are reasonable under the criteria set forth in Rule 1.5.

If there is a dispute as to the ownership of the account, the Attorney can seek to resolve the issue by means of an action in interpleader.