

September 2012 *Multnomah Lawyer Ethics Focus*

Unwelcome Visitor: Garnishment of Trust Accounts

**By Mark J. Fucile
Fucile & Reising LLP**

Imagine this scenario:

You recently took on a new client in a litigation matter. The client's case is definitely not front page news, but notice of the case itself is available in many public databases. You are handling the case on an hourly fee basis. You asked the client to pay an advance fee deposit, which you deposited into your trust account. Shortly after that, you receive a writ of garnishment from a third party creditor of the client based on an unrelated judgment that the creditor obtained against the client before you ever took on the client. The creditor's lawyer learned of the client's present case by seeing it in a public database report and guessed correctly that you might be holding an advance fee deposit in your trust account. Because you just got the case in, the amount sought remains less than the fees that you were planning to charge against the deposit at the end of the month. What now?

A perverse by-product of the tough economic times over the past few years is that law firm trust accounts have become a target for creditors trying to collect against clients. The phenomenon is by no means unique to Oregon. Recent ethics opinions and cases from around the country reflect this unusual trend.

Lawyers who have not had the unhappy experience of having a writ of garnishment served on them sometimes assume that client funds in trust accounts are "off limits." There is, however, no general exemption for such funds under either statutory law (see ORS 18.618, which defines exemptions to garnishment) or the RPCs (see RPC 1.15-1, which defines duties for safekeeping client or third party property). Again, Oregon is by no means unique in this

approach. Recent cases from Washington (*Mayers v. Bell*, 2012 WL 1299327 at *3 (Wash App 2012)), Alaska (*State v. Cook*, 265 P3d 342, 346 (Alaska App 2011)), and Colorado (*In re Rubio*, 2011 WL 3613710 at *2 (Colo App 2011)) make the same point under their respective lien statutes and professional rules. The general idea is that client funds held in a trust account, by definition, remain the client's until earned or otherwise distributed.

RPC 1.15-1(d) and (e) define our obligations when presented with a claim by a third party to funds held in trust for a client. The former provides, in relevant part, that “a lawyer shall promptly deliver to . . . [a] third person any funds or other property that the . . . third person is entitled to receive[.]” The latter requires that “[w]hen in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved.”

Oregon State Bar Formal Ethics Opinion 2005-52 addresses third party claims against trust accounts generally. It analyzes RPC 1.15-1(d) and (e) and succinctly summarizes (at 124) a lawyer's obligations when put in this difficult spot:

“As a matter of law, Secured Creditor's valid and perfected security interest entitles Secured Creditor to receive funds to the extent necessary to satisfy the security interest. That being so, the funds subject to Secured Creditor's valid and perfected security interest are funds that a third person—Secured Creditor—is entitled to receive and that may be properly paid only to Secured Creditor and not to client . . . pursuant to

Oregon RPC 1.15-1(d). The same would be true if Secured Creditor's lien were statutory rather than contractual in origin. If there is a nonfrivolous dispute with regard to the amount to which Secured Creditor is entitled, Lawyer would be obligated by Oregon RPC 1.15-1(e) to retain the disputed portion, or perhaps implead it, until the dispute was resolved, but must pay the undisputed portion to Secured Creditor."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.