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Unwelcome Visitor: Garnishment of Trust Accounts

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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 targets for creditors trying to collect against clients. The phenomenon is by no means unique to Washington. Recent cases from around the country reflect this unusual trend, including Arizona (*Sports Imaging of Arizona, L.L.C. v. Meyer Hendricks & Bivens, P.A.*, 2008 WL 4516397 (Ariz. App. Oct. 2, 2008) (unpublished)), Colorado (*In re Marriage of Rubio*, 313 P.3d 623 (Col. App. 2011), and Ohio (*Hadassah v. Schwartz*, 966 N.E.2d 298 (Ohio App. 2011)).

In this column, we'll look at a lawyer's duties when confronted with a writ and the exceptions.

Lawyer's Duties

Lawyers who have not had the unhappy experience of having a writ of garnishment served on them sometime assume that client funds in trust accounts are "off limits." There is, however, no general exemption for such funds under either statutory law (*see* RCW Chapter 6.27, which governs garnishments) or the RPCs (*see* RPC 1.15A, which defines duties for safekeeping client or third party property). The Washington Court of Appeals noted the ability to garnish a trust account in *Mayers v. Bell*, 2012 WL 1299327 (Wn. App. April 16, 2012) (unpublished). Although recent economic times have increased the use of trust account garnishments, they have found their way into several appellate decisions over the years (*see, e.g., A & W Farms v. Sunshine Lend and Lease, Inc.*, 2003 WL 21513626 (Wn. App. July 3, 2003) (unpublished); *Columbia Val. Credit Exchange, Inc. v. Lampson*, 12 Wn. App. 952, 533 P.2d 152 (1975)).

The general idea is that client funds held in a trust account, by definition, remain the client's until earned or otherwise distributed. WSBA Advisory Opinion 2220 (2012) addresses trust account garnishments and put it this way, citing Comment 12 to the fee rule, RPC 1.5: "Advanced fee deposits provided by a client to an attorney are fees for specific services not yet earned, and so the deposits are property of the client."

Advisory Opinion 2220 also defines the steps a lawyer must take under RPC 1.15A when confronted with a writ of garnishment:

> "If the client does not dispute the validity of the writ of garnishment, the lawyer is required to distribute the funds in accordance with garnishment procedures. RPC 1.15A(f). However, if the client disputes the validity of the writ of garnishment and instructs the lawyer not to distribute the funds to the creditor, this dispute triggers the lawyer's safekeeping duties under RPC1.15A(g).
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> "A dispute between the client and the creditor with respect to a writ of garnishment triggers a lawyer's safekeeping duties because the writ of garnishment is specific to funds in the lawyer's possession, and has a valid legal basis; namely, the underlying judgment, which is presumptively well-founded and represents a legal obligation from client to creditor. In the event of a dispute, the lawyer is required to maintain the client funds in trust until the issuing court determines the rights of the judgment creditor and debtor with respect to the client funds, or the client and creditor otherwise resolve their dispute."

Exceptions

Advisory Opinion 2220 and case law outline three principal exceptions.

First, a writ of garnishment by a creditor of the firm—as opposed to a creditor of one of the firm's clients—should not typically extend to the firm's trust account. *In re McGrath*, 178 Wn.2d 280, 308 P.3d 615 (2013), addressed this general principle and disciplined a lawyer for using his trust account to improperly (and unsuccessfully) hide personal assets from his own creditor.

Second, Advisory Opinion 2220 notes that in some circumstances the confidentiality rule—RPC 1.6—may preclude a lawyer from even acknowledging whether a person is a firm client. Generally, the identity of a client and the simple fact of representation are not protected by at least the attorney-client privilege (*see* generally R. Aronson & M. Howard, *The Law of Evidence in Washington* (5th rev. ed. 2016) § 9.05[8][a]) when they are matters of open public record as in our opening hypothetical. In some cases, however, even the identity of a client and the fact of representation are confidential. The duty of confidentiality under RPC 1.6, moreover, extends beyond privilege to include "information relating to the representation of a client[.]" Depending on the circumstances, the very fact that a lawyer has funds held in trust for a client and the amount involved may be considered confidential. In that event, WSBA Advisory Opinion 194 (2009 amd.) counsels that a lawyer should decline to reveal confidential information unless required to do so by court order. Although confidentiality issues in the writ context can be difficult, case law suggests that the far more common scenario involves creditors who have issued writs precisely because the creditor already knows of the attorney-client relationship and perhaps even the fact that funds are being held in trust. *Pagh v. Gibson*, 2014 WL 1018320 (Wn. App. Mar. 17, 2014)

(unpublished), for example, involved the garnishment of a trust account on an appeal in a practice area where advance fee deposits are the norm.

Third, fees that have been earned by the lawyer but not yet withdrawn from trust may not be subject to the writ. For example, a lawyer may have done work on a matter during the current month but not yet billed for it and withdrawn the amount involved. The attorney lien statute, RCW 60.40.010(3), makes a lawyer's "charging" lien over an action "superior to all other liens." Therefore, the lawyer with earned, but unbilled, fees may be one of the parties with a claim to a portion of the garnished funds under RPC 1.15A(g).

Parting Thoughts

Case law in this area underscores two related practical points.

First, lawyers need to resist the temptation to "reclassify" garnished funds after-the-fact to avoid the writ. In *Mayers*, for example, the law firm initially responded to a writ by contending that the funds concerned were a "nonrefundable litigation retainer." When the creditor then filed a fraudulent transfer claim against the law firm, the firm then took the position that the funds were indeed property of the client. That led to a pithy comment from the Court of Appeals: "Legal proceedings are not a shell game, and money received from a client by a law firm cannot be both refundable and nonrefundable." Because

representations about the status of funds are being made to both the creditor and the court that issued the writ, lawyers need to be appropriately truthful in their answers.

Second, the fact that an advance fee deposit on which a representation was predicated is lost to a creditor should not ordinarily excuse the client from replenishing the agreed deposit. The practical problem, of course, is that the client may not have any more money. In *State v. Cook*, 265 P.3d 342 (Alaska App. 2011), for example, a criminal defense lawyer who had predicated representation on a substantial advance fee deposit was unwilling to proceed with the planned representation when the client was unable to come up with the deposit because his assets were attached by a judgment in a related civil case. A lawyer in this situation needs to promptly assess whether the advance fee deposit will be excused or, if not, whether the lawyer will withdraw if the client cannot make good on replenishing the funds that were garnished.

ABOUT THE AUTHOR

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