

THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Opinion 2016-5  
(September 2016)

The inquirer's firm deals with cases where recoveries come from Bankruptcy Trusts. The fee agreement with each client provides that the client pays costs from the client portion of recoveries. Previously, for many individual clients a settlement was made with a defendant Bankruptcy Trust. In the firm's letter accompanying the Statement of Settlement the firm advised those clients, where applicable, that there were costs that exceeded the amount of the settlement. The firm indicated, at the time of initial settlement proceeds distribution, via a letter to each client that it would take some of the costs from that settlement and would look to future recoveries, if any, to secure the remainder of the unreimbursed costs. These letters were not signed by the client.

Thus, the clients received some money from the settlement in spite of the outstanding unreimbursed costs. Each client signed the Statement of Settlement and the proceeds were distributed in accordance with the Statement of Settlement.

Sometimes years later, a defendant trust will send the firm a much smaller supplemental payment in each of the cases previously settled with that defendant. Having not recovered all of the outstanding costs in the cases, the firm proposes to use these modest supplemental payments to help reduce the amount of unreimbursed expenses in each case and inform each client by letter of this action, after this has been done, without providing an additional Statement of Settlement signed by the client for the supplemental payment. The inquirer asks if the firm's proposed course of conduct regarding these supplemental payments is ethical.

Although letters explaining how supplemental payments would be handled were provided to the clients at the time of distribution of the monies they received, they were not signed by the clients. Thus the issue becomes whether client consent at the present time is necessary in order for the inquirer to proceed as proposed.

Pennsylvania Rule of Professional Conduct ("Rules") 1.5 **Fees** provides in part that:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 1.15 **Safeguarding Property** provides in part that:

(d) Upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law. ...

(e) Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property; ...

The Committee advises that the funds received by the inquirer are in fact Rule 1.15 funds. These rules require that the lawyer notify the client of the receipt of the funds, and prepare an accounting and proposed statement of distribution before taking any action with respect to the funds. Letters should be sent to the clients indicating that these subsequent recoveries will be used towards the outstanding costs, along with a proposed statement of distribution before obtaining the client's endorsement of the instrument paying the distribution. While the rules do not require that the client execute the statement of distribution, it is certainly advisable to secure execution to demonstrate the client's informed consent to the course of action **before** the money is so used.

While communication was made to the clients about how the law firm intended to handle subsequent recoveries, the clients did not affirmatively agree to this course of action. While it does not appear that the clients have objected to this course of action, nevertheless, in an abundance of caution, the Committee believes that keeping such recoveries in escrow<sup>i</sup> pending receipt of consent or objection to such use by the client is appropriate.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

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<sup>i</sup> This presumes that the inquirer has the authority to endorse the client's name to the instrument assuming the check is made payable to both the inquirer and the client.