

DRAFT ISSUE OUTLINE

22-0001 [re Attorney as Expert Witness and Handling of Retainers and Fees]

- I. Issue: Must lawyers who serve as expert witnesses deposit advance fees in a client trust account?
 - a. Rule: Cal. Prof. Code Section 1.15:
 - i. 1.15(a) refers to both “client” and “other person”: (a) All funds received or held by a lawyer or law firm* **for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty**, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled “Trust Account” or words of similar import, maintained in the State of California, . . .
 - ii. However, other provisions are limited only to “client”:
 - 1. “or, **with written* consent of the client**, in any other jurisdiction where there is a substantial* relationship between **the client or the client’s business** and the other jurisdiction.”
 - 2. 1.15(b): “Notwithstanding paragraph (a), **a flat fee paid in advance for legal services** may be deposited in a lawyer’s or law firm’s operating account, provided: (1) the lawyer or law firm* discloses **to the client** in writing* (i) that **the client** has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that **the client** is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed . . .
 - b. Is the person/entity retaining the expert a “client” under Rule 1.15?
 - i. ABA Formal Opinion 97-407: not an attorney/client relationship
 - 1. “The Committee previously has stated that, as a general matter, a client-lawyer relationship can “come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations.”
 - 2. “The Committee believes, however, as long as the lawyer’s role is limited to service as a testifying expert and this is

explained at the outset, the client of the law firm which has engaged the testifying expert's services cannot reasonably expect that the relationship thus created is one of client-lawyer."

- a. Presented as objective; may have to testify adversely if "frankness" so dictates
- b. "A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert."
- c. Confidential information is subject to disclosure for testifying experts

ii. Cal. Interim Opn. 20-0001 [Lawyer as Expert Witness]:

1. "[A]n expert witness generally is not engaged in the practice of law and does not enter into an attorney-client relationship solely by offering opinion testimony."
2. No fiduciary relationship (fn. 5)
3. "Because no attorney-client relationship is formed by a lawyer acting solely as an expert witness and the Expert lawyers are not engaged in the practice of law, the conflict of interest rules would not generally apply."
4. If we find that 1.15 applies – is it inconsistent with this opinion?

c. Is the person/entity retaining the expert an "other person" under Rule 1.15?

1. Oregon State Bar Opinion 2005-135: Funds received by an arbitrator or mediator are not property of a client because no lawyer-client relationship exists. OSB Formal Ethics Op No 2005-101 (rev 2015). Nevertheless, such funds constitute "property of third persons." By its plain language, then, Oregon RPC 1.15-l(a) applies to advance fees received by a lawyer acting as an arbitrator, even though a nonlawyer arbitrator or mediator would not be required to hold such fees in a separate account
2. Comparison to other states/ABA
 - a. ABA Model Rule 1.15: "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. . . ." Therefore, funds held for benefit of client or other person must be connection with representation. CRPC does not have same limitation.

- b. Oregon: (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. 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 five years *after termination of the representation*.
- c. New York: "A lawyer in possession of any funds or other property belonging to another person, where such possession *is incident to his or her practice of law*, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own . . ."

3. What about the other provisions of Rule 1.15 limited to "client"?

d. Does the policy underlying Rule 1.15 mandate application to lawyer/expert fees?

- i. If Rule 1.15 does not apply, is the lawyer entitled to deposit advance fees in the operating account even though the fees are not yet earned?
- ii. If Rule 1.15 does apply, does it create an attorney-client relationship/fiduciary duty which may risk impeachment based on bias?

- iii. Comparison to non-lawyer experts – should there be a heightened standard for lawyer experts?
- II. If CRPC 1.15 does not apply (i.e., expert fees are neither from a “client” or “other person”) *may* an attorney/expert deposit advance expert fees in the trust account?
 - i. Is it commingling? CRPC 1.15 (c) Funds *belonging to the lawyer* or the law firm shall not be deposited or otherwise commingled with funds held in a trust account except:
 - 1. funds reasonably sufficient to pay bank charges; and
 - 2. funds belonging in part to a client or other person and in part presently or potentially to the lawyer or the law firm, in which case the portion belonging to the lawyer or law firm must be withdrawn at the earliest reasonable time after the lawyer or law firm’s interest in that portion becomes fixed. However, if a client or other person disputes the lawyer or law firm’s right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.
 - ii. Do the fees “belong to the lawyer” before they are earned?