

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 606**

May 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct is a lawyer permitted to continue to hold in the lawyer's trust account unearned fees paid by a client and otherwise repayable to the client if continuing to hold the unearned fees is based only on the lawyer's belief, in the absence of a claim asserted, that the client may have improperly or illegally obtained the funds paid by the client?

STATEMENT OF FACTS

A lawyer is retained to defend a client accused of a crime in a state court. The client and lawyer enter into a fee agreement providing for a fee to be paid upon the commencement of the representation and for the fee to be earned in agreed portions as the lawyer provides specified services with respect to the matter. The amount paid by the client is deposited in the lawyer's trust account. While the state criminal matter is pending, the lawyer becomes concerned that the money used by the client to pay the agreed fee may have been obtained fraudulently by the client. Subsequently and while the state criminal matter remains pending, a United States Department of Justice prosecutor advises the lawyer that the money paid to the lawyer by the client may have been obtained through criminal activity. No federal charges are filed against the client and the lawyer has no further contact with the federal prosecutor.

After the lawyer has provided only limited services with respect to the matter, the State drops the charges against the client. Under the terms of the fee agreement between the lawyer and the client, a portion of the amount initially paid by the client is required to be repaid to the client. Because of the lawyer's concern as to the origin of the funds used by the client to pay the fee and in view of the communication from the federal prosecutor concerning the funds, the lawyer believes he may have civil or criminal liability if funds from the trust account are paid to the client and a claim is later made to the funds by a government authority or private party. Based on this belief, the lawyer proposes to continue to hold in his trust account the full amount paid by the client and to contact the federal prosecutor to determine if the federal government is planning to assert a claim to some or all of the funds.

DISCUSSION

Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct requires a lawyer to pay over promptly funds to which a client is entitled:

“Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property 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 such property.”

The basic requirements of Rule 1.14(b) are modified by the requirements of Rule 1.14(c) in cases where two or more persons, which may include the lawyer concerned, assert a claim to the same funds. In such cases, as provided in Rule 1.14(c), the funds or property in dispute must be kept separate until the dispute is resolved:

"When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and other person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately."

Under these provisions of the Texas Disciplinary Rules, unless another person has asserted a claim, the lawyer must promptly deliver to the client that portion of a prepaid fee that is initially deposited into the lawyer's trust account and that is required to be repaid to the client under the fee agreement between the lawyer and the client.

The requirements of Rule 1.05 of the Texas Disciplinary Rules concerning lawyers' obligations with respect to clients' confidential information do not permit a lawyer to make inquiries as to the existence of unasserted claims to funds otherwise belonging to the client. No requirement for such inquiries is imposed by the Texas Disciplinary Rules. Moreover, the Committee is aware of no provision of state or federal law that would require inquiries in these circumstances. Accordingly, the exception provided in Rule 1.05(c)(4) for disclosures of clients' confidential information when required by another Rule or by other law will not permit the lawyer to make such inquiries.

Thus, in the factual situation here considered, since there has been no claim made by the federal prosecutor's office or any other person regarding the funds held in the lawyer's trust account relating to the client's matter, the lawyer is required to return the portion of the funds to the client as required under the fee agreement. In addition, if requested by the client, the lawyer is required under Rule 1.14(b) to provide a full accounting concerning the funds initially paid by the client and the amount repaid to the client. Rules 1.14(b) and 1.14(c) also permit the lawyer to transfer from the trust account to the lawyer's own account amounts of the prepaid fee that have been earned under the terms of the fee agreement between the lawyer and the client.

This opinion addresses only a lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct. Because it is beyond the authority of this Committee to address issues with respect to the application to Texas lawyers of other state or federal laws in the circumstances presented, the Committee expresses no opinion on such matters.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is not permitted to continue to hold in the lawyer's trust account unearned fees that are otherwise repayable to a client under the fee agreement between the lawyer and client if continuing to hold the unearned fees is based only on the lawyer's belief, in the absence of a claim asserted, that the client may have improperly or illegally obtained the funds paid by the client. The lawyer is not permitted to communicate with possible claimants to determine the existence of unasserted claims to funds to which the client is otherwise entitled.