



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 □ PH 518.463.3200 □ www.nysba.org

New York State Bar Association Committee on Professional Ethics

Opinion 1060 (6/12/15)

Topic: Escrow account; attorney special account; delegation to nonlawyer employee

Digest: Law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts, and to transfer funds from a sub-account to the master escrow account, in name of a lawyer admitted in New York State and under that lawyer's direction, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

Rules: 1.15(b), (c), (d) & (e); 5.3.

FACTS

1. A law firm wishes to have a staff member of the law firm, who is not a lawyer, direct a bank to open individual sub-accounts under a master lawyer escrow account maintained by that bank for the law firm. The law firm also wishes to authorize the nonlawyer staff member to direct the bank to transfer funds from any sub-account to the master escrow account.

2. The law firm would permit distributions from the master escrow account to be initiated and authorized only by a lawyer in the law firm licensed to practice in New York. Authority of the non-lawyer staff would be limited to transferring funds from a sub-account to the master escrow account, and the nonlawyer could only make such transfers at the direction of a lawyer licensed to practice in New York. Transfers from the sub-accounts may be made only to the master escrow account. The only authorized method to withdraw funds from the master escrow account or any of the sub-accounts would be at the express direction of a lawyer in the law firm admitted to practice in New York, and upon the signature of a lawyer in the firm admitted to practice in New York. The nonlawyer would have no authority to move funds out of the master escrow account.

QUESTIONS

3. May a law firm or lawyer ethically authorize and instruct a nonlawyer staff member of the law firm to direct its bank to open individual sub-accounts under a master lawyer escrow account maintained by the bank for the law firm?

4. May the law firm or lawyer ethically instruct the nonlawyer staff member to direct a bank to transfer funds from a sub-account to a master escrow account, from which the funds would be distributed by a lawyer in the law firm, who would execute the checks?

OPINION

Rule 1.15(e): Requirements for Authorized Signatories on Lawyer Special Accounts

5. Rule 1.15 of the New York Rules of Professional Conduct (the “Rules”) governs the obligations of lawyers with respect to the funds of others that the lawyer has received “incident to the lawyer’s practice of law.” This includes the following obligations:

- Not to misappropriate such funds. Rule 1.15(a).
- To maintain such funds in one or more special bank accounts. Rule 1.15(b).
- To maintain records of all deposits in and withdrawals from the special bank accounts, that identify the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal or disbursement. Rule 1.15(d)(1)(i)
- To maintain records of the special accounts, including the source of all funds deposited and the persons for whom the funds are or were held. Rule 1.15(d)(1)(ii).
- To make accurate entries in their records of receipts and disbursements, special accounts and ledger books or similar records. Rule 1.15(d)(2).
- To ensure that special account withdrawals (i) are made only to a named payee and not to cash, (ii) are made by check or (with the approval of the party entitled to the proceeds) by bank transfer and – most important here – (iii) that all authorized signatories of a special account are lawyers admitted to practice law in New York State. Rule 1.15(e).

6. There are no comments to Rule 1.15 relevant to the questions presented.

Non-Lawyer employees of law firms

7. Rule 5.3(a) provides that “A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate.” Rule 5.3(a) further provides that “the degree of supervision required is that which is reasonable under the circumstances,” taking into account such factors as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter. However, what is reasonable in the circumstances of holding funds under Rule 1.15 may involve a higher standard of care than that required under other rules. For example, Rule 1.15(a) states that a lawyer in possession of funds belong to another person incident to his or her law practice is a fiduciary and Comment [1] to Rule 1.15 explains that the lawyer should hold such funds using the care required of a professional fiduciary. Moreover, as noted in paragraph 9, the lawyer may be responsible for the conduct of a nonlawyer employee that would be a violation of the Rules if engaged in by a lawyer. As noted in paragraph 13, we warned in N.Y. State 693 that, since the responsibility for client funds may not be delegated, the lawyer remains responsible to the client for errors. Finally, the courts, in evaluating the lawyer’s care of client funds for disciplinary purposes, may use an exacting standard. *See Matter of*

Galasso, *infra* (lawyer must use a *high degree of vigilance* to ensure that the funds [the clients] entrusted are returned to them upon request.)

8. Comment [2] to Rule 5.3 states that a law firm must ensure that nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, and that a law firm “should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules.”

9. Violations of the Rules by a nonlawyer employee may subject certain firm lawyers to professional discipline. Rule 5.3(b) provides that a “lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer” where the lawyer either (i) has “managerial responsibility in a law firm” or (ii) has supervisory authority over the nonlawyer and knew or should have known of the conduct at issue in time to take reasonable remedial action.

10. These principles were affirmed in *Matter of Galasso*, 19 N.Y.3d 688 (2012), which involved a disciplinary proceeding against a lawyer for failing to properly supervise a bookkeeper, resulting in the misappropriation of the funds of several clients from an escrow account and the firm’s IOLA account. Although Galasso and one of his partners were the only authorized signatories on the special account application, the bookkeeper apparently altered the account documentation to permit electronic funds transfers and to include himself as an authorized signatory.

11. The Court of Appeals in *Galasso* found several deficiencies in the firm’s policies and procedures regarding client funds. For example, the lawyer’s practice had been to review monthly financial reports generated by the bookkeeper rather than to review the account statements themselves (which might have disclosed that the bookkeeper was forging checks). In addition, the lawyer did not have personal contact with the bank and did not exercise sufficient oversight of the firm’s books and records. Finally, the lawyer ceded an unacceptable level of control over the firm accounts to the bookkeeper, thereby creating the opportunity for misuse of client funds. Indeed, when a client’s accountant pointed out a discrepancy in the escrow account, the lawyer did not resolve the discrepancy himself but rather allowed the bookkeeper to resolve it with the bank. The *Galasso* court stressed that attorneys are not prohibited from delegating tasks to firm employees, but also stressed that any delegation must be accompanied by an appropriate degree of oversight by a lawyer.

Establishing Sub-Accounts in the Special Account

12. No opinions of this Committee directly address the questions presented, but N.Y. State 693 (1997) is instructive. N.Y. State 693 discusses whether a lawyer may allow a paralegal to use a stamp bearing the lawyer’s signature to execute checks drawn on a client escrow account. N.Y. State 693 notes that DR 9-102(E) of the Code of Professional Responsibility, the predecessor to Rule 1.15(e), explicitly states that only a lawyer may be a signatory to such a special account. Even so, the opinion notes that the Code “contemplates that lawyers will

delegate tasks to nonlawyers,” and that, despite restrictive holdings from case authorities that lawyers may not give signatory authority to nonlawyers, a lawyer could ethically authorize a nonlawyer to use the lawyer’s signature stamp. Opinion 693 said:

[W]e believe that it is ethically permissible for a lawyer to authorize a paralegal to make use of the lawyer’s signature stamp on checks drawn from a special account at closings *under certain conditions and with proper controls*. As with the rest of a paralegal’s duties at a real estate closing ... the lawyer must consider in advance how the paralegal will use the signature stamp – including approving the purpose of the anticipated payments to be made by such checks, the nature of the payee and the authorized dollar amount range for each check to be issued – and review afterwards what actually happened to assure that the delegation of authority has been utilized properly. [Emphasis added.]

13. N.Y. State 693 warns that the “responsibility for client funds may not be delegated,” and that lawyers who authorize nonlawyers to use their signatures thus remain responsible to the client for any errors or misuse of the signature stamp. The opinion concludes that the delegation is permissible despite DR 9-102(E) “so long as the lawyer supervises the delegated work closely” and “exercises complete professional responsibility for the acts” of the nonlawyer.

14. In the inquiry here, the inquirer has assured us that transfers from sub-accounts can be made only to the master escrow account, not outside it, and that withdrawals can only be made by a lawyer licensed to practice in New York. In these circumstances, we believe a lawyer may delegate the two tasks described in the inquiry. Specifically, under procedures approved and closely supervised by the lawyer or law firm, the law firm may authorize a nonlawyer to direct the bank to set up the requested sub-accounts and to transfer funds from a sub-account to the master escrow account. Of course, pursuant to Rule 5.3(b), the supervising lawyer remains professionally responsible for any ethical violations by the nonlawyer.

CONCLUSION

15. A lawyer or law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts and to transfer funds from such an account to the master escrow account in the name and under the direction of a firm lawyer admitted in New York State, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer’s conduct.

(8-15)