

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2014-01
Issued February 21, 2014**

FACTS

The inquiry concerns the disbursement of escrowed funds which were earmarked for the replacement of a deck in a condominium building. The deck in question was attached to the condominium unit owned by the inquiring attorney's clients (Clients). The inquiring attorney is holding the escrowed funds. The facts relating to the escrowed funds span some twelve years, and are as follows.

The Clients' condominium unit had a wooden deck adjacent to their unit. The deck sat on a tar-and-gravel roof. The deck was removed incident to the replacement of the entire roof on the condominium building. Clients obtained an estimate from a contractor to rebuild the deck. Six of seven unit owners voted to replace Clients' deck, and agreed to a special assessment for its construction in amounts equal to their respective percentage ownership in the common areas. It was agreed that the owners would mail checks for their assessments to the inquiring attorney who, upon receiving the funds, established Clients Deck Account in a local bank. The total amount of the escrow is about \$17,500.

Meanwhile, conflicts arose. Clients sued the condominium association alleging that the association had not properly authorized the work by the roofing contractor. A superior court justice ruled in favor of the association. The condominium association then sought the historic commission's approval of the design for the replacement of two decks, one being adjacent to Clients' unit. Clients objected because the design deviated from the design of the original deck. The historic commission approved the association's proposed design. Five of seven condominium owners thereafter voted to rescind the special assessment for the replacement of Client's deck. Clients appealed from the commission's decision but the decision was affirmed. Their remedies exhausted, Clients filed an application of certificate of appropriateness with the historic commission for replacement of the deck. The condominium association refused to submit a letter supporting Clients' application and the application was rejected. Clients wanted the construction done by a construction company of their choosing; the condominium association wanted the job to be put out to bid.

The condominium association demands that the Deck Fund be transferred to it, after which time the association will issue a conformance letter for the installation of a deck adjacent to Clients' condominium unit. Clients no longer want the deck replaced, but insist that they are entitled to the Deck Fund. The inquiring attorney wonders

whether the funds should be returned to the individuals who contributed to the fund. Additional facts will be included in the Panel's discussion.

ISSUE PRESENTED

The inquiring attorney asks whether he/she should transfer the escrowed funds to his/her clients, to the condominium association, or to the individual unit owners who contributed to the fund.

OPINION

Rule 1.15(e) requires the inquiring attorney to protect the disputed funds. The inquiring attorney must retain the funds in the Deck Fund account that he/she established, until resolution. The inquiring attorney may file a court action to seek a judicial determination of the ownership of the funds and an order relating to the disbursement of the funds.

REASONING

Resolving who is entitled to the Deck Fund requires the resolution of questions concerning substantive law outside the area of legal ethics and discipline, and outside the jurisdiction of the Panel. Unless the parties come to an agreement, resolution is a matter for judicial determination.

Certain facts should sufficiently guide the parties. The ballot on the special assessment states, "In the event [Clients' Unit's] deck is not approved by the Historical Commission, or for any reason [Clients' Unit] is not replaced, the monies generated from this special assessment will be returned to each unit owner as listed below." The special assessment was thereafter rescinded. The deck in question is a "common element" as defined in the condominium association's declaration of condominiums. Individual unit owners are entitled to exclusive use of the deck adjacent to their units, but they do not have individual ownership of the decks.

Despite facts which in the Panel's view would lead reasonable minds to but one conclusion, there exists a dispute concerning who is entitled to the funds. Clients demand that the inquiring attorney disburse the monies to them. The condominium association demands that the inquiring attorney disburse the funds to it. Pertinent to this inquiry is Rule 1.15(e) which state as follows.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The

lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The Panel concludes that Rule 1.15(e) requires the inquiring attorney to protect the disputed funds. The inquiring attorney does not have an obligation to disburse the disputed funds to his/her clients. He/she must retain the funds in the Deck Fund until resolution. The inquiring attorney may file a court action to seek a judicial determination of the ownership of the funds and an order relating to the disbursement of the funds.