

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2016-08
Issued August 15, 2016**

FACTS

The inquiring attorney seeks the Panel's guidance about the return of excess retainer funds. The inquiring attorney was hired by a client to represent her in various matters. For one matter, the client agreed to pay the attorney a specified amount in advance, pursuant to a fee agreement. For the remaining matters, the client agreed to pay another specified amount in advance, pursuant to a second fee agreement. A family member and a nonprofit organization paid the inquiring attorney the amounts under the fee agreements.

The inquiring attorney's representation of the client has ended. After funds on account for this client were applied to attorney's fees, there remains a surplus. The client insists that the inquiring attorney should refund the surplus to her, and the organization claims that the surplus funds be refunded to it.

ISSUE PRESENTED

If a third party payor advances attorney's fees for a client, and there are excess funds at the conclusion of the representation, to whom must the inquiring attorney refund the excess funds?

OPINION

When an attorney receives funds for fees from a third-party payor, the third-party payor, and not the client, is entitled to the refund of excess fees at the conclusion of the representation, unless there are agreements specifying otherwise.

REASONING

The inquiring attorney submitted copies of the fee agreements to the Panel. Both agreements contained the following language:

Any amount remaining on deposit upon completion of this matter or termination of our services to you will be refunded, unless there is a dispute over fees, in which case it will remain until any dispute is resolved.

There are no terms in these provisions that specify to whom refunds would be made when one other than the client advances the fees.

A lawyer is required to refund unearned fees under Rule 1.16(d) of the Rules of Professional Conduct. The rule states:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. (Emphasis added.)

In the normal course, attorney's fees are typically advanced by the client. Under the facts of this inquiry, the attorney's fees were advanced by third parties, namely, the client's relative and an organization. This arrangement is ethically permissible provided the lawyer complies with Rule 1.18(f)¹ and Rule 5.4(c)².

The receipt of funds or other property from a client or a third party, and the return of such funds or property, are also addressed in Rule 1.15. In pertinent part, Rule 1.15 states:

(d) 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.

(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.

¹ Rule 1.8 (f) states:

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

² Rule 5.4(c) states:

- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

In determining who is entitled to surplus fees advanced by a third party, the Panel looks to Rule 1.16(d). The Rule requires lawyers to refund advanced fees that have not been earned. The Rules do not define “refund.” Merriam Webster’s dictionary defines it as “1: to give back or put back 2: to return (money) in restitution, repayment, or balancing of accounts.” “The concept of refund implies that the money be returned to its source, in this case the third party payor.” Cal. State Bar Formal Op. No. 2013-187 (2013).

In the instant inquiry, no funds were advanced by the client. All funds were advanced by the client’s relative and by the organization. These third-parties advanced the funds to the inquiring attorney for one purpose: the payment of legal services for the client’s representation. That purpose no longer exists as the representation has ended. The Panel believes that one, or possibly both, of the third-party payors are entitled to the refund of the surplus fees in this inquiry. See Cal. State Bar Formal Op. 2013-187 (2013); N.C. State Bar Formal Op. 12 (2006); S.C. Bar Ethics Advance Committee Op. 02-07-(2002). Absent agreements which provide otherwise, the client is not entitled to a refund of surplus fees that she did not advance.

The inquiring attorney asks the Panel how the excess funds should be disbursed. He/she has submitted to the Panel entries in the client’s register which show the dates of deposits from the third parties, the dates of the inquiring attorney’s bills, and running balances. It appears from these entries that the client’s relative advanced the agreed-upon amount for the first matter. When these funds approached depletion, the organization advanced additional funds for the first matter. At a later date, the organization advanced the agreed-upon amount for the remaining matters. With these entries and the dates of service for each matter, the inquiring attorney is in the best position to calculate the refund to one or both of the third parties.

Finally, should a dispute over the surplus fees continue notwithstanding the Panel’s opinion today, the inquiring attorney should not unilaterally decide the dispute. Rather, in that instance, the Panel advises the inquiring attorney to retain the disputed amounts in his/her trust account until resolution by the interested parties or by the appropriate court. See Rule 1.5(e).

The Panel concludes that when an attorney receives funds for fees from a third-party payor, the third party payor, and not the client, is entitled to the refund of excess fees at the conclusion of the representation, unless there are agreements specifying otherwise.