

Final

**ETHICS ADVISORY PANEL
OPINION NO. 96-33, REQUEST NO. 698
Issued November 14, 1996**

FACTS:

The inquiring attorney represented a client in a matter which was heard before a private arbitrator at several sessions. Prior to the arbitration, the attorney obtained from the client a sum of money for the arbitrator's fee and deposited the money in his/her client account. The client discharged the inquiring attorney before the conclusion of the arbitration hearing. The arbitrator has not yet submitted a bill for his/her services.

ISSUE PRESENTED:

The inquiring attorney asks whether the funds on deposit for the arbitrator should be paid to the arbitrator upon receipt of the arbitrator's bill or whether the funds must be returned to the client.

OPINION:

Rule 1.15(b) and Rule 1.17(d) of the Rhode Island Supreme Court Rules of Professional Conduct require the inquiring attorney to (1) return to the client that portion of the funds which exceeds the actual fee of the arbitrator; (2) pay the arbitrator if he/she has the client's authority to do so; and (3) if he/she does not have the client's authority to pay the arbitrator, the inquiring attorney must hold the disputed funds in trust until the dispute is resolved, or may pay them into the court registry in an interpleader action.

REASONING:

Rule 1.15(b) which addresses this inquiry states:

(b) 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 persons, shall promptly render a full accounting regarding such property.

Also pertinent to this inquiry is Rule 1.17(d) which 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 that has not been earned.

Under Rule 1.17(d), the client would be entitled to any unused portion of the funds escrowed for the arbitrator's fee. Therefore, the inquiring attorney must undertake efforts to determine from the arbitrator his/her actual fee to date, and then return to the client, with an accounting, the portion of the funds which exceeds the actual fee of the arbitrator. See Rhode Island Supreme Court Ethics Advisory Panel Opinion 94-76.

Rule 1.15(b) imposes a duty on an attorney who is in possession of funds in which a client or third person has an interest to promptly notify the client or third person. The Rule further requires the attorney to forward to the client or third person any funds that the client or third person is entitled to receive. Under an attorney's concomitant obligation to abide by his or her client's decisions concerning the objectives of representation, payment to a third party may only be made with the client's consent. See Rule 1.2(a). Therefore, unless the client in the instant request has instructed the inquiring attorney not to pay the arbitrator or unless the inquiring attorney has knowledge that the client disputes the arbitrator's fee, the inquiring attorney has a duty to notify the arbitrator and to pay his/her fee out of the funds earmarked for this purpose.

The inquiring attorney may not pay the arbitrator's fee out of the funds in his/her possession if the client has directed him/her not to pay it. A demand by the client that the inquiring attorney return the entire amount advanced for the arbitrator's fee is effectively a direction not to pay it. Similarly, the inquiring attorney may not pay the arbitrator's fee if he/she knows that there exists a dispute relating to the arbitrator's fee. Under these circumstances, the Panel believes that the inquiring attorney has an obligation to notify the arbitrator that he/she is in possession of funds earmarked for the arbitrator's fee, but does not have the authority of the client to release them. Without the client's authority to pay the arbitrator, the inquiring attorney must hold the disputed funds in trust until the matter is resolved. If the matter is not resolved within a reasonable time, the inquiring attorney may pay the funds into the court registry in an interpleader proceeding. See Rhode Island Supreme Court Ethics Advisory Panel Opinion 91-37.