

ETHICS SAFE HARBOR: LAWYER NEUTRALS EXEMPT FROM SAFEKEEPING PROPERTY OBLIGATION

*Stuart Widman**

Rarely do lawyers avoid the reach of ethics obligations. Yet here is one for lawyer neutrals: they need not segregate advance deposits that parties to the disputes give them for future work. The nature of the neutral's relationship with the disputants makes the difference.

The Model and state Rules of Professional Conduct generally require lawyers to hold funds of clients and third parties in separate client trust accounts. Model Rule 1.15(a) on "Safekeeping Property" states that a lawyer "shall hold property of clients or third persons that is in a lawyer's possession ... separate from the lawyer's own property." It continues: "Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated", unless the client or third person consents to a different location. (See also similar Illinois Rule 1.15(a) that specifically requires deposit into "interest- or dividend-bearing client trust accounts".) Both Rules have ancillary requirements of record keeping and reporting. (See Model Rule 1.15(a) and (d); Illinois Rule 1.15(a) and (d).) There are certain exceptions to these Rules, at least in Illinois, such as where the lawyer gets a payment that the client and lawyer treat as the lawyer's property at the time of payment. (See Illinois Rule 1.15(c).)

A complete carve-out exists under Rule 1.15 for lawyer arbitrators and mediators who get deposits for future work. The exemption is not stated expressly; rather, it is the logical inference from other express language in Rule 1.15 – that the Rule applies to property delivered "in connection with a representation." (See Rules 1.15(a), (e).) Since lawyer arbitrators and mediators are not client representatives, the Rule has no application to them.

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There is no doubt that lawyer neutrals do not act in a representative role for purposes of Rule 1.15. The Preamble to the Model Rules juxtaposes three sections that make that clear. Discussing Lawyer's Responsibilities, Preamble [1] and [2] say that a lawyer "is a representative of clients", and "[a]s a representative of clients" performs various functions as advisor, advocate, negotiator, and evaluator. In contrast, Preamble [3] discusses roles that a lawyer may have "[i]n addition to these representational functions", such as "serv[ing] as a third-party neutral, a nonrepresentational role." (See also Illinois Preamble [1], [2], and [3].)

The difference in – or the absence of – the lawyer/client relationship for a neutral is confirmed again in Rule 2.4. Specific to lawyer neutrals, Rule 2.4 unequivocally states that the lawyer neutral "assists two or more persons who are not clients of the lawyer", and even requires the lawyer neutral to inform unrepresented parties that "the lawyer is not representing them." Rule 2.4(b) and Comment [3] further note "the differences between the role of a third-party neutral and a lawyer's service as a client representative." The annotations to the Model Rules do, however, distinguish traditional non-representational mediation from representational mediation where the lawyer is a "go-between for clients" – presumably a situation where the lawyer would still be subject to the safekeeping requirements.

There are even some express statements in the Comments that lawyer neutral services are not covered by the safekeeping rule. For example, Comment [5] to Model Rule 1.15 notes that there might be other ethical obligations of a lawyer who is not providing representational legal services (eg. acting as an escrow agent), and such activities are "not governed by this Rule". (See also Comment [5] to Illinois Rule 1.15.) Similarly, the Illinois Attorney Registration & Disciplinary Commission (ARDC) of the Illinois Supreme Court states in its website on trust accounts that "Rule 1.15(a) comes into play when a lawyer comes into possession of the property of clients or third parties 'in connection with a representation'", and that no disclosure on an ARDC reporting form is necessary in a non-representational role.

The reading of Rule 1.15 has been confirmed with ARDC representatives. In separate conversations in November 2015, it was indicated that Rule 1.15 "on its face" is not applicable to lawyer neutrals, and that the ARDC concurs with the view that Rule 1.15

does not apply to advance deposits received by lawyer neutrals in Illinois.

The Rule seems clear: lawyer neutrals need not treat advance deposits from parties to a dispute as the lawyers are required if the lawyer is representing the client or receives third-party funds during such representation. What hat the lawyer is wearing makes a difference.

This article is not a survey of all states, and its message may not apply under the ethics rules of some states. Thus, lawyer neutrals must check the rules and comments in the respective state that governs the neutral activities. Also, the possible exemption from the safekeeping rule is only that; it is not an exemption from any other rule applicable to lawyer neutrals (eg. confidentiality; conflicts from prior matters). Nor does this article address how malpractice carriers view the safekeeping requirement for neutrals. But lawyer neutrals are provided a plausible – if not determinative – argument that they are excused from the safekeeping property requirements that otherwise exist in a representational role.