ALASKA BAR ASSOCIATION
ETHICS OPINION No. 2025-2

A Lawyer's Duty to Safeguard Client Trust Funds from Third Party Fraudulent and Criminal Activity

Issue Presented

Fraudulent and criminal schemes directed at law firm trust accounts are widespread in Alaska and nationwide. When successful, these schemes can result in client trust funds being misappropriated, causing financial harm to clients. This Opinion examines what a lawyer should do under the Alaska Rules of Professional Conduct ("ARPC") to be aware of and mitigate the potential for harm from such schemes, in the context of a hypothetical situation.

Short Answer

ARPC 1.1 (competence) and 1.3 (diligence) provide that a lawyer shall provide competent and diligent representation, backed with the legal knowledge, skill, thoroughness and preparation reasonably necessary. ARPC 1.15 (safekeeping property) applies these rules with particular force in trust account transactions, where a lawyer is responsible for client and third party funds.[1] While a lawyer is required to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive," ARPC 1.15(d), the lawyer should not disburse trust account funds without taking all reasonable steps to assure that the funds are actually in the trust account and are correctly disbursed.

Analysis

Our hypothetical situation is regrettably typical. Lawyer Robin receives an email inquiry from a prospective client in another jurisdiction who claims to need assistance in a commercial dispute. The prospective client claims to be owed substantial funds. On behalf of the prospective client, Robin writes a demand letter to the alleged debtor. The alleged debtor responds immediately by acknowledging the debt and offering to pay the balance. Robin draws up settlement paperwork, and the alleged debtor promptly sends a check for the full amount, which Robin deposits in her trust account.

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[1] "Misappropriation of client funds usually is an obvious violation of the rule and is dealt with by disbarment or other severe disciplinary sanction." Annotated Model Rules of Professional Conduct, 10th Edition, p. 297 (Bennett, Gunnarsson, and Kisicki, eds.); "[S]uspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." In the Disciplinary Matter Involving Triem, 929 P.2d 634, 647 (Alaska 1996).

The client aggressively pressures Robin to release the settlement funds, claiming the funds are urgently needed. Robin transfers the settlement amount to the client, less her fees. One week later Robin checks her trust account and discovers that the alleged debtor's settlement check bounced. In a panic, Robin tries to reach her client, without success, and searches the public record for information about her client and the alleged debtor, but finds nothing. Neither the client nor the alleged debtor can be located. The result is that trust account funds belonging to other clients have been disbursed to an unknown, untraceable third party.

Robin ignored a series of "red flags": (1) a new or unfamiliar client from a foreign jurisdiction, who communicated primarily by email or text; (2) performance of a relatively simple task (in this case a demand letter[2]) that generated a speedy "payment"; and (3) immediate pressure from the client for the lawyer to make prompt payment from the lawyer's trust account, before the "payment" clears. Robin's failure to verify the prospective client's identity and bona fide existence and her haste in transferring funds out of the trust account violated her professional obligations under ARPC 1.1 (competence), 1.3 (diligence), and ARPC 1.15 (safekeeping property).[3]

Criminal and fraudulent activities directed at lawyers, law firms, and legal transactions have become commonplace, as acknowledged by the FBI,[4] professional trade associations[5], insurers[6], court systems[7] and bar associations

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[2] While the hypothetical addresses a putative client purporting to have a legal claim against another person, these scams can also involve requests that an attorney provide assistance in a real estate or business transaction that may result in the client receiving funds as a "deposit" or holding funds as a trustee. Other variations will no doubt surface in the future. The common thread is that the lawyer's work generates a prompt deposit into the trust account, followed by a prompt demand for payment from the putative client.

[3] *See* ARPC 1.15 Comment ("A lawyer should hold property of others with the care of a professional fiduciary."). The Comment further clarifies that the rule includes an obligation to "maintain on a current basis books and records in accordance with generally accepted accounting practice…").

[4] https://www.fbi.gov/file-repository/fy-2022-fbi-congressional-report-business-email-compromise-and-real-estate-wire-fraud-111422.pdf/view

[5] https://www.nar.realtor/law-and-ethics/protecting-your-business-and-your-clients-from-cyberfraud

[6] https://www.hanover.com/resources/tips-individuals-and-businesses/prepare-now-learn-how/email-wire-fraud-scam-affecting

[7] https://www.wicourts.gov/courts/offices/docs/olrscams.pdf

around the country, both in informal guidance,[8] ethics opinions,[9] and discipline.[10] As the North Carolina State Bar opined in 2020 Formal Ethics Opinion 5, "given the constant threat to client funds and the significant harm that can result from such fraudulent activity, a lawyer's duty in representing clients …. necessarily requires the lawyer to be vigilant in reasonably educating him or herself on the current state of such fraudulent attempts and in communicating with clients and staff about such risks."

The risks of financial fraud in today's world are of such magnitude – and the speed of electronic transactions are so fast – that affirmative, competent, and diligent efforts of a lawyer are required to (1) understand the nature of the risks in such an undertaking, and (2) take reasonable steps to prevent such risks. This is particularly true when a lawyer encounters common and repeated patterns that are or should be well known to competent practitioners; are suspicious on their face; and are avoidable through the exercise of basic care, not requiring extraordinary efforts.[11] This is not to say that lawyers are the guarantors of all aspects of a transaction, nor that every fraudulent scheme can be prevented. Nonetheless, lawyers are required by the ARPCs to take all reasonable precautions to protect their clients' interests in the face of the rapid proliferation of fraudulent schemes.[12] To meet the ARPC duties of competence, diligence and safekeeping of others' property requires lawyers to be aware of the risks of fraud and to take all reasonable steps to protect against it.

Approved by the Alaska Bar Association Ethics Committee on February 6, 2025.

Adopted by the Board of Governors on April 23, 2025.

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[8] https://blog.texasbar.com/2024/07/articles/law-firms-and-legal-departments/scams-continue-to-target-texas-attorneys/

[9] North Carolina State Bar 2020 Formal Ethics Opinion 5; New York City Bar Formal Opinion 2015-3.

[10] Private Reprimand 2024-OLR-08, Wisconsin Office of Lawyer Regulation.

[11] Private Reprimand 2024-OLR-08, Wisconsin Office of Lawyer Regulation ("After years of educational efforts, disciplinary agencies are now expecting lawyers and law firms to be cognizant of and alert for red flags signaling such scams and appropriately train their staff. Failure to do so may be prosecuted . . . as a failure to take reasonable steps to safeguard client property.").

[12] While many of the Rules of Professional Conduct are directed at intentional misconduct, no intent element is included in ARPC 1.15. "Some few offenses , such as those requiring a maintenance of office books and records… are so absolute in form, thus warranting a finding of a violation… no matter what the lawyer's state of mind." Restatement (Third) of Law Governing Lawyers Sec. 5 cmt. d (2000).