

So, who gets the refund?

by

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There are occasions, occurring particularly but not limited to criminal defense matters, when all or part of the lawyer's fee for representation of the client will be paid not by the client, but by a third-party payor. Sometimes, representation ends before the entire fee has been earned. Either the client, the payor, or both, may ask the lawyer to refund the unearned funds to her. The question then arises, who gets the refund?

The simplest solution is for the lawyer to clarify with the payor and the client how any refund will be allocated before accepting funds paid by the third-party payor. An agreement, preferably in writing and signed by the client, the third-party payor, and the lawyer, can expressly define how the lawyer will distribute any refund. This will help the lawyer avoid potential disputes, problems and needless consumption of unproductive time later.

Unfortunately, not all lawyers have reached those kinds of agreements, or even contemplated those agreements, when receiving funds from a third-party payor. The lawyer may then be faced with conflicting requests (or demands) for a refund.

The Rule of Professional Conduct which directly addresses third-party payment of fees, Rule 1.8(f), Minnesota Rules of Professional Conduct (MRPC), does not address this issue. Rule 1.8(f), MRPC, provides:

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
1. the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;
 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.

Few authorities exist addressing this precise issue. Although other jurisdictions may discuss the general issue of refund of fees when paid by a third-party payor, they do not address the precise issue of a refund absent any prior agreement about to whom the refund will be made.

The California State Bar Association did address this issue and opined that any excess must be refunded to the payor absent agreement with the client and the payor otherwise. *California State Bar Standing Comm. on Professional Responsibility and Conduct*, Formal Op. 2013-187. Intuitively, this approach may make some sense. The lawyer simply refunds the money to the person who paid the money. The problem with this approach, however, is that the funds may have been intended as a gift to the client, or the client may have provided these funds to the third-party to simply act as a courier, to deliver the funds to the lawyer. The third-party payor may never have had any claim of right or entitlement to the funds, but did not tell the lawyer this. In delivering any unearned fees to the third-party, the lawyer would have provided the funds to someone who has no entitlement to the funds.

Guidance may be found in Rule 1.15, MRPC. In pertinent part, this rule requires that funds belonging to a third-party be promptly delivered to the third-party, and if there is a dispute as to entitlement to the funds, the lawyer should hold the funds in trust until that dispute is resolved.

By way of advice, the director believes that a reasonable course for the lawyer faced with such a situation would be to contact both the client and the third-party payor to determine whether they agree to the distribution of any refund. If so, the lawyer may return the fees as directed by the client and the payor. Absent any such agreement, however, the lawyer should retain the funds in a trust account until the dispute is resolved, whether by agreement of the parties or court order.

Unfortunately, this may well result in the lawyer spending additional time, effort and energy to deal with the issue. The lawyer has the ability to avoid all of this, however, simply by ensuring at the outset of representation that everyone agrees who gets the refund.