Informal 91-02

December 27, 1991

INFORMAL OPINION 91-2 (Revised)

Client Trust Accounts in Excess of FDIC Insurance

In our original Opinion, we were responding to an attorney's questions about ethical responsibilities when an attorney's clients' funds account exceeds the $100,000 limit on depositor's insurance provided by the Federal Deposit Insurance Corporation (FDIC). Both the attorney requesting the Opinion and the committee incorrectly assumed that the FDIC insurance covered the amount held by the attorney or firm as trustee. In the same edition of *The Connecticut Lawyer* in which our Opinion was published, was an article by Paul B. Edelberg and Stephen M. Carruthers entitled "The FDIC Insurance Rules: How They Affect Your Practice." That article instructs us that the FDIC insurance does not apply to the aggregate amount in a trust fund, but to the amount of funds belonging to the individual clients in the banking institution (*See* 12 CFR Part 330 *et seq*.)

In light of this greater understanding of the law, we now feel that the conclusions in our original Opinion were misleading. Thus, with apologies to the bar, the Opinion is withdrawn and the following substituted in its place:

There is one reference in the Rules of Professional Conduct to a lawyer's obligations towards clients' funds. *See* Rule 1.15 generally. Rule 1.15(d)(3) requires that "pooled" trust accounts which generate interest for the IOLTA program be in banks which are members of FDIC. Further instructions on handling client's funds is found in Practice Book Section 27A.l. Among other requirements in that section is that clients' funds can only be deposited in banks approved by the Statewide Grievance Committee.

None of these rules directly answer your concerns about an attorney's obligations with regard to insurance. The germ of the answer, however, does lie in the clear injunction in the Comment to Rule 1.15 that, "A lawyer should hold property of others with the care required of a professional fiduciary."

Strictly speaking, the scope of the responsibility of a professional fiduciary is a legal question and this committee has historically avoided offering legal opinions. Since the rules require you to act as a fiduciary, however, it is difficult to separate the legal from the ethical and thus seems appropriate that we should try to provide some guidance. You must be cautioned, however, that whether or not someone has met his or her legal obligations as a fiduciary will be fact specific. Our advice can only be general and advisory and cannot be a substitute for a thorough legal analysis of a given set of facts.

Connecticut, like most jurisdictions, requires that fiduciaries act as a prudent person would in handling trust properties and funds. *U.S. Trust Co. v. Bohart*, 197 Conn. 34, 495 A.2d 1034 (1985). The Commentary to Rule 1.15 describes the duty of an attorney holding clients' funds as that of a *professional* fiduciary. That implies some special skill or more facilities greater than the prudent person, which must be employed in managing the clients' funds. C.F. *Scott on Trusts* (1987 edition) Sec. 174.1.

Clearly a professional fiduciary, in an age of bank failures, must exercise due care in selecting banks in which to deposit their funds. In *U.S. v. Howard*, 302 U.S. 445, the court held that it was a question for the jury whether a bankruptcy trustee had breached his duty of care by depositing a number of trustee accounts

in excess of the surety bond posted by the bank (pursuant to the bankruptcy laws extant at the time) when the trustee knew of several "runs" on the bank and the bank subsequently failed. *See also Scott on Trusts* Sec. 180.

In light of the foregoing, including our newfound knowledge of the relevant FDIC rules, it would seem that those rules do not, in and of themselves, pose any ethical obligations or limitations on a lawyer's handling of client funds. We assume that the prudent person would take advantage of FDIC insurance whenever it is practical to do so. The more difficult question arises when the amount of the client's funds the lawyer is handling exceeds the insurable amount or when the client has other funds in the bank which in the aggregate will exceed $100,000.

As is often required in the practice of law, the lawyer's role in such instances is to assess the risks for the client. In some instances, where the lawyer otherwise has the authority, the lawyer can decide where and how to deposit the funds. In others, it will be appropriate and necessary for the lawyer to consult with the client before deciding where and how to deposit funds. In any event, such fact specific and essentially legal questions are beyond the scope of this committee's authority.

The original request for an Opinion asked two questions to which we respond in turn:

1. Is it unethical or improper for a lawyer to permit his trustee account to ever exceed the sum of $100,000?

FDIC rules seem to be clear that it is not the aggregate of the funds in the trustee account which are insured, but that the insurance is for the benefit of individual clients who "own" the funds. Thus, there would be no ethical problem if the total sum in a trustee account exceeded $100,000. The professional fiduciary's duty of care would come into play, however, if a single client's funds exceeded the $100,000 insurance limit.

2. Must a lawyer maintain multiple bank accounts in multiple banks even if it means splitting the deposits?

No, multiple accounts are not necessary solely as a means of keeping the total balance in the account below the $100,000 limit.
