

Revisions to the Comments to the New York Rules of Professional Conduct
(February 2011)

Rule 1.8, Comment [8]:

[8] This Rule does not prohibit a lawyer ~~from seeking to have the lawyer~~ or a partner or associate of the lawyer from being named as executor of the client's estate or named to another fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Rule 1.15, Comment [3]:

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold undisputed the client's share of the funds to coerce at the client into accepting the lawyer's claim for fees. ~~contention~~ While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. Notice to the client of the right to arbitrate fee disputes is required in some circumstances. The undisputed portion of the funds is to be distributed promptly.

Rule 1.15, Comment [4]:

[4] When in the course of representation a lawyer is in possession of funds in which two or more persons (other than the lawyer) claim interests, the funds should be kept separate by the lawyer until the dispute is resolved by agreement of the parties or court order or commencement by the lawyer of an interpleader action and deposit of the property into court. The lawyer should distribute promptly all portions of the funds as to which the interests are not in dispute.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Rule 8.4, Comment [2]:

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for illegal conduct that indicates lack of those characteristics relevant to law practice. Violations Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice are is illustrative of conduct that reflects adversely on fitness to practice law. Other types of illegal conduct may or may not fall into that category, depending upon the particular circumstances. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Rule 8.4, Comment [4]:

[4] A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid. As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling.