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The Limited Duties of Lawyers to Protect the Funds and Property of Nonclients

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ARTICLE

Vincent R. Johnson

The Limited Duties of Lawyers to Protect the Funds and Property of Nonclients

Abstract. Issues arise daily in law practice about the duties owed by lawyers to nonclients with respect to funds or property entrusted to them. In resolving those issues, care must be exercised when interpreting state versions of Model Rule 1.15, the American Bar Association's pattern ethics rule on safekeeping of funds and property. Otherwise, a lawyer's duties to third persons may too readily encroach on the performance of obligations owed to clients, as well as on the legitimate interests of lawyers themselves.

As numerous authorities have recognized, lawyers are obliged to protect the property interests of third persons only if they possess a "matured legal or equitable interest" in the specific funds or property held by the lawyer. To be entitled to protection (by way of safekeeping, notice, delivery, or sequestration in escrow), a third person must be known by the lawyer to hold an interest in the relevant funds or property by way of assignment, lien, court order, judgment, statute, or letter of protection. Anything less normally will not suffice. In particular, the assertion of an unmatured claim by an unsecured creditor does not require a lawyer to act in a manner inconsistent with the instructions of the lawyer's client.

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I. UNEXPECTEDLY NARROW OR BROAD ETHICS RULES

Certain rules of legal ethics, upon close examination, have a narrower or broader reach than one might expect. Consider, for example, the rules that impose on lawyers duties to report misconduct by other lawyers¹ or judges² to disciplinary authorities.³ Although these rules are typically worded in mandatory terms (using the phrase “shall inform”⁴) and cover a wide range of professional misconduct (including any conduct that raises a substantial question as to a “lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,”⁵ or a “judge’s fitness for office”⁶), the compulsory reporting obligations do not apply in a broad range of cases, even if those situations involve egregious conduct.⁷ This is true because the reporting

1. See MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 2017) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).

2. See *id.* r. 8.3(b) (“A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.”).

3. Similar reporting obligations are imposed on judges by rules of judicial ethics. See *In re J.B.K.*, 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996, no writ) (“A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Rules of Professional Conduct should take appropriate action. If the information received by that judge raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, the judge shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.” (citing TEX. CODE JUD. CONDUCT, Canon 3(B)(5), reprinted in TEX. GOV. CODE ANN., tit. 2, subtit. G, app. B (West Supp. 1996))).

4. MODEL RULES OF PROF'L CONDUCT r. 8.3(a)–(b) (AM. BAR ASS'N 2017); see also Attorney Grievance Comm'n of Md. v. Ruddy, 981 A.2d 637, 658 (Md. 2009) (“MPRC 8.3 applies to all lawyers, whether or not they are members of the Attorney Grievance Commission.”); *Baxt v. Liloia*, 714 A.2d 271, 281–82 (N.J. 1998) (“RPC 8.3(a) requires that ‘[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.’ Grove’s attorney should have reported the violations alleged herein to the Office of Attorney Ethics . . . or the local District Ethics Committee at the time they occurred.”); *In re Garringer*, 626 N.E.2d 809, 812 (Ind. 1994) (finding the duty to report applies only to “misconduct such as to remove them from the realm of mere speculation and conjecture”).

5. MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 2017).

6. *Id.* r. 8.3(b).

7. *Cf.* Ill. State Bar Ass'n, Informal Op. 01-04 (2002) (“Although keeping the money after its ownership has clearly been established may raise a strong suspicion of the intent to permanently deprive, these facts [are] insufficient to establish knowledge of lawyer theft. The lawyers who act as bar association officers are under no duty to report the attorney’s conduct to the ARDC.”); *In re Ethics Advisory Panel*, Op. No. 92-1, 627 A.2d 317, 323 (R.I. 1993) (“Rule 8.3 expressly exempts from the reporting requirement confidential information under Rule 1.6 . . . This is not to say that we are not

rules do “not require disclosure of information otherwise protected by Rule 1.6[.]”⁸ the rule requiring that lawyers maintain the confidentiality of information learned while representing clients.⁹ The confidentiality obligations of lawyers are extensive,¹⁰ among the most demanding in the law of attorney professional responsibility.¹¹ In many situations, the duty of client confidentiality trumps the so-called “mandatory” duty to assist disciplinary authorities in policing the profession by reporting misconduct.¹² Thus, the duty to report professional misconduct is surprisingly narrow.¹³

concerned with the ramifications of this decision. In this case a lawyer has engaged in criminal conduct as well as violated the Rules of Professional Conduct.”)

8. MODEL RULES OF PROF'L CONDUCT r. 8.3(c) (AM. BAR ASS'N 2017). Rule 8.3 also does not require disclosure of information “gained by a lawyer or judge while participating in an approved lawyers assistance program.” *Id.*

9. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 (AM. LAW INST. 2000) (discussing the duties of lawyers to safeguard confidential client information); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2017) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”).

10. *See* Leah M. Christensen, *A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law*, 34 T. JEFFERSON L. REV. 171, 171 (2011) (“A lawyer’s duty of confidentiality is an ethical rule that requires a lawyer to hold in strict confidence all information concerning the business and affairs of the client acquired during the course of the professional relationship. Further, the lawyer shall not divulge such information unless expressly or impliedly authorized by the client, required by law, or otherwise permitted or required by the relevant rules of professional conduct.” (footnotes omitted) (citing MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2017))).

11. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.2, at 9-5 (3d ed. 2001) (stating confidentiality is a “core rule” of lawyering); 2 RONALD E. MALLEEN, LEGAL MALPRACTICE § 17:11 (2017) (“The duty of confidentiality is foundational to the attorney-client relationship”); JEFFREY M. SMITH & RONALD E. MALLEEN, PREVENTING LEGAL MALPRACTICE 178 (2d ed. 1996) (discussing the “duty to prevent the unauthorized disclosure of confidential, secret and privileged information”); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 17-477, at 3–10 (2017) (discussing the confidentiality obligations of lawyers related to the transmission of client information); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2009-6, at 4 (2009) (“Client confidentiality is a hallmark of the attorney[-]client relationship.”).

12. *See In re* Disciplinary Proceeding Against Schafer, 66 P.3d 1036, 1043 (Wash. 2003) (“RPC 8.3 creates a permissive, not mandatory, disclosure when confidences and secrets under RPC 1.6 are concerned.” (citing MODEL RULES OF PROF'L CONDUCT r. 8.3(c) (AM. BAR ASS'N 2017))).

13. *See* Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY'S J. ON LEGAL MAL. & ETHICS 40, 50–53 (2011) (discussing the narrow duty to report and arguing that “[d]oubts about the importance of the mandatory reporting rule are . . . raised by broad exceptions to the duty . . . and by the uncertain contours of the reporting obligation”). *But see In re*

At the other end of the spectrum, consider the rule that bars a lawyer from communicating about the subject matter of representation with a person already represented by counsel.¹⁴ The no-communication rule is broader than what many persons might anticipate. As this author noted on an earlier occasion:

Two facets of the ABA Model Rule on communication with a represented person are striking. First, within its scope, the Rule states an absolute prohibition, rather than a restriction on time, place, or manner. Second, the demands of the Rule cannot be waived by the represented person whose interests are at stake. It makes no difference whether the opposing lawyer treated the represented party unfairly or even whether the represented person, rather than the adverse lawyer, initiated the exchange. Any communication about the subject matter of the representation is wholly banned, except as allowed by law or by consent of the represented person's counsel.¹⁵

Under the no-communication rule, a version of which exists in “every American jurisdiction[,]”¹⁶ a represented person has no power to waive the benefits of the rule by agreeing to speak about the subject matter of the representation with any lawyer other than the one the client has engaged to provide legal services.¹⁷ Consequently, the rule does more than protect the

Riehlmann, 891 So. 2d 1239, 1239 (La. 2005) (reprimanding a lawyer publicly for failure to promptly report a former prosecutor's professional misconduct).

14. See MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2017) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”); see also 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 (AM. LAW INST. 2000) (“A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer . . . unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.”).

15. Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 502–03 (1998) [hereinafter *Ethics of Communicating*] (footnotes omitted) (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995); *United States v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991), *vacated and remanded on other grounds*, 4 F.3d 1455, 1462 (9th Cir. 1993); *In re News Am. Publ'g, Inc.*, 974 S.W.2d 97, 100 (Tex. App.—San Antonio 1998, pet. granted) (en banc), *reh'g overruled sub nom*, *In re Users Sys. Servs.*, 22 S.W.3d 331 (Tex. 1999); *In re McCaffrey*, 549 P.2d 666, 668 (Or. 1976); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995)).

16. *Id.* at 500 (citing *Lopez*, 765 F. Supp. at 1448–49).

17. See *News Am. Publ'g*, 974 S.W.2d at 97 (“[O]pposing counsel violated [the] anticontact rule by meeting with party after receiving party's unilateral statement that he had terminated his own

client from over-reaching by an attorney representing another party in the same matter.¹⁸ At least in part, the no-communication rule also protects *the represented person's lawyer* from harm that the lawyer might suffer as a result of interference with the ongoing representation.¹⁹ Indeed, as between the interests of the client and the lawyer, the interests of the lawyer seem to come first.²⁰ Only the represented person's lawyer—not the represented

attorney-client relationship and wished to engage in discussions without his 'former' lawyer present"); see also Giel Stein, *Weathering the Worst Storm: How Attorneys Might Successfully Defend Their Reputation Against Attack from the Bench*, 6 ST. MARY'S J. ON LEGAL MAL. & ETHICS 284, 297 (2016) (discussing a situation where "a third-party witness appeared without his lawyer at a deposition and proceeded to volunteer that his lawyer and a state prosecutor threatened him"); John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. ON LEGAL MAL. & ETHICS 204, 229 (2013) (discussing a San Diego County Bar Association's ethics opinion which took the position that it is impermissible for a lawyer representing an allegedly wrongfully discharged employee to send a "friend request" to two high-ranking employees of a company that was known to be represented by counsel).

18. See generally Ross Fischer & Jack Gullahorn, *The Advent of State and Local Lobby Regulations and the Legal and Ethical Considerations for Attorneys*, 3 ST. MARY'S J. ON LEGAL MAL. & ETHICS 32, 76 (2013) (noting the rule against communication with one represented by counsel "is 'meant' 'to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the integrity of the lawyer-client relationship.'") (quoting *Graham v. United States*, 96 F.3d 446, 449 (9th Cir. 1996)).

19. See *Ethics of Communicating*, *supra* note 15, at 520 ("One occasionally encounters arguments which tend to suggest that a purpose of the anti-contact rule is to protect interests of the attorney, rather than the interests of the client, the system, or the relationship. The personal interests of the attorney might be reputational, such as where an attorney fears that he or she may be embarrassed because uncounselled statements made by a client may compromise the lawyer's tactics. Or the interests might be economic, where an uncounselled client, as the result of communications with opposing counsel, may discharge the attorney or settle for an inadequate amount, either of which may impair the attorney's ability to earn a fee." (footnote omitted) (citing 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 4.2:102, at 731 (2d ed. Supp. 1998))).

20. But see Vincent R. Johnson, *Legal Malpractice in a Changing Profession: The Role of Contract Principles*, 61 CLEV. ST. L. REV. 489, 510–11 (2013) [hereinafter *Legal Malpractice in a Changing Profession*] ("Although some of the rules of American legal ethics, such as the restrictions on lawyer advertising and solicitation, may have originated in a desire . . . to protect established lawyers from competition, the present regime contains few traces of that past. The relevant provisions of modern legal ethics have been debated so vigorously, so often, and in so many fora during the past forty years that virtually every rule that has survived scrutiny and is currently in force can be justified on multiple legitimate grounds." (footnotes omitted) (first citing JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 42–48 (1976); then citing Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 353–63 (2008); then citing Robert E. Lutz, *An Essay Concerning the Changing International Legal Profession*, 18 SW. J. INT'L L. 215, 219 (2011); and then citing Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 63 (2005) [hereinafter *Justice Tom C. Clark's Legacy*])).

person—can consent to communications that would otherwise violate the no-communication rule.²¹

Against this backdrop which demonstrates that ethics rules sometimes have an unexpectedly broad or narrow reach, it is appropriate to consider the ethical obligations that are imposed on lawyers with respect to protecting the funds or property of third persons. As articulated in the Model Rules of Professional Conduct,²² and the law of most states,²³ the relevant

21. See Pamela A. Bresnahan & Lucian T. Pera, *The Impact of Technological Developments on the Rules of Attorney Ethics Regarding Attorney-Client Privilege, Confidentiality, and Social Media*, 7 ST. MARY'S J. ON LEGAL MAL. & ETHICS 2, 21–22 (2016) (“Ethics opinions analyzing the prior consent provision of state analogs of Rule 4.2 have interpreted that provision strictly. For example, the New York City Bar and North Carolina State Bar have each concluded that Rule 4.2 prohibits a lawyer from sending a ‘reply all’ e-mail in response to an e-mail sent by opposing counsel, where opposing counsel copied his or her client on the original e-mail, unless opposing counsel has provided express or implied consent to do so.” (citing N.C. State Bar, Formal Op. 7 (2013); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2009-01 (2009))); see also Marguerite Zoghby, *The Prohibition of Communication with Adverse Parties in Civil Negotiations: Protecting Clients or Preventing Solutions?*, 14 GEO. J. LEGAL ETHICS 1165, 1167 (2001) (“Courts and disciplinary authorities, such as state ethics boards, have interpreted Model Rule 4.2 literally, even prohibiting clients themselves from waiving the ban.” (citing *Ethics of Communicating*, *supra* note 15, at 502; Earnest F. Lidge, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 IND. L.J. 549, 553 n.15 (1992))).

22. See MODEL RULES OF PROF’L CONDUCT r. 1.15 (AM. BAR ASS’N 2017) (regarding the safekeeping of property).

23. See, e.g., TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 1.14, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (dealing with safekeeping of property and funds). The Texas rule provides:

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Such funds shall be kept in a separate account, designated as a “trust” or “escrow” account, maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in

provisions seem to impose extensive obligations. Those duties relate not only to safekeeping the assets in which the third person has an interest,²⁴ but to notification and delivery of the assets to the interested third person,²⁵ or sequestration of the assets in trust pending resolution of a *dispute* over who is entitled to receive the assets.²⁶ However, as the following sections make clear, the obligations imposed by the relevant ethics rules are less extensive than they first appear.

The rule on safekeeping of funds or property imposes only limited duties to protect the interests of third persons. The limits on an attorney's obligations to third parties reflect the fact that rules of legal ethics are animated by a complex matrix of goals and objectives. Respect for the legitimate interests of third persons is important,²⁷ but the law governing

dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

Id.

24. See MODEL RULES OF PROF'L CONDUCT r. 1.15(a) (AM. BAR ASS'N 2017) ("A lawyer shall hold property of . . . third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the . . . third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved . . .").

25. See *id.* r. 1.15(d) ("Upon receiving funds or other property in which a . . . third person has an interest, a lawyer shall promptly notify the . . . third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the . . . third person any funds or other property that the . . . third person is entitled to receive and, upon request by the . . . third person, shall promptly render a full accounting regarding such property.").

26. See *id.* r. 1.15(e) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved."); *id.* r. 1.15 cmt. 3 ("The disputed portion of the funds must be kept in a trust account . . .").

27. See Robert P. Schuwerk, *The Proposed New Safekeeping of Property Rule: Was It Worth All the Fuss?*, *ADVOCATE*, Summer 2011, at 58, 58 (discussing a failed ethics reform). Professor Schuwerk explained that the Texas Disciplinary Rules of Professional Conduct Committee:

[W]as concerned . . . with numerous instances of lawyers apparently not realizing that the rule as written imposed ethical limits on how they treated third parties. . . . [T]he Committee was given first-hand accounts of lawyers who had apparently believed it proper to do one or more of the following under the existing rule: (a) fail to notify third parties to whom the lawyer or client had made a binding promise of payment out of the client's recovery or on whom the law conferred a right to payment out of that recovery, of the receipt of funds triggering that promise or the third party's legal right; (b) make material misrepresentations to third parties as to the actual or proposed terms of a settlement of the client's matter in order to get that third party to accept a lesser amount than that to which it was entitled; (c) withhold funds from the client's recovery

lawyers also is “intended to (1) protect clients from unnecessary harm, (2) encourage legal resolution of disputes, (3) ensure client control of legal representation, (4) promote honesty and fairness in public and private affairs, and (5) assure the proper functioning of the justice system.”²⁸

II. THE MODEL RULE ON SAFEKEEPING OF PROPERTY

Any discussion of the duties of lawyers to protect the funds or property of third persons must undoubtedly begin with the text of Rule 1.15 of the American Bar Association’s Model Rules of Professional Conduct. That provision has not only shaped state variations of the rule in many jurisdictions,²⁹ but is widely taught in Professional Responsibility courses offered at American law schools,³⁰ and tested on the Multistate Professional Responsibility Examination,³¹ the passage of which is required for admission to the bar in at least forty-six jurisdictions.³² With respect to duties to third persons, the relevant portions of Model Rule 1.15 provide:

sufficient to pay third-party claims in full and then either (i) not pay them at all or (ii) resolve them for a lesser amount, with the lawyer pocketing the difference.

Id. at 59.

28. *Legal Malpractice in a Changing Profession*, *supra* note 20, at 512 (discussing the goals of legal ethics).

29. *See* AM. BAR ASS’N CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (Dec. 12, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_15.authcheckdam.pdf [perma.cc/Z52E-YVSQ] (noting variations from the terms of Model Rule 1.15). Most of the variations are related to state implementation of IOLTA (Interest of Lawyer Trust Account) programs. *See, e.g.*, CONN. RULES OF PROF’L CONDUCT r. 1.15 (2016) (containing numerous references to the handling of IOLTA accounts and non-IOLTA accounts).

30. *See Justive Tom C. Clark’s Legacy*, *supra* note 20, at 56 (“At most law schools in the United States, students are now required to take a course devoted exclusively to the subject of attorney professional responsibility.” (citing Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 407 n.49 (1998))). “These courses normally require law students to spend twenty or more classroom hours studying the types of ethical issues that attorneys confront in the practice of law. Law school Professional Responsibility courses typically must be completed and passed in order for a student to graduate.” *Id.* (footnote omitted) (citing Levin, *supra*, at 395).

31. *See id.* at 58 (“The MPRE helps to ensure that what is taught in law school Professional Responsibility courses is focused and academically demanding.”).

32. *Multistate Professional Responsibility Exam*, NAT’L CONF. B. EXAMINERS, <http://ncbex.org/exams/mpre/> [perma.cc/NNH5-EYJW] (“The Multistate Professional Responsibility Examination (MPRE) is a two-hour, 60-question multiple-choice examination developed by [the] NCBE that is administered three times per year. It is required for admission to the bars of all but three U.S. jurisdictions (Maryland, Wisconsin, and Puerto Rico).”); “In addition, Connecticut and New Jersey accept successful completion of a law school course on professional responsibility in lieu of a passing score on the MPRE.” *Id.*

Safekeeping Property

(a) A lawyer shall hold *property of clients or third persons* that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the *consent of the client or third person*. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

...
(d) Upon receiving funds or other *property in which a client or third person has an interest*, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of *property in which two or more persons (one of whom may be the lawyer) claim interests*, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.³³

Only one part of the Comment to Model Rule 1.15 refers to "third persons." The relevant commentary states:

Paragraph (e) . . . 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.³⁴

33. MODEL RULES OF PROF'L CONDUCT r. 1.15 (AM. BAR ASS'N 2017) (emphasis added).

34. *Id.* r. 1.15 cmt. 4.

A careful reading of Model Rule 1.15 quickly identifies the linguistic fault lines that run throughout the rule. Subsection (a) refers to “property of . . . third persons.”³⁵ In contrast, subsection (d) refers to “property in which a . . . third person has an interest[.]”³⁶ Does the difference in language imply a difference in meaning? Is there a distinction between owning property and merely having an interest in property? Or are the two provisions talking about the same thing?

More troublingly, subsection (e) talks about “property in which two or more persons . . . [merely] *claim interests*[.]”³⁷ Surely, there is an important difference between owning property (subsection (a)), having an interest in property (subsection (d)), and simply claiming to have an interest in property (subsection (e)). The language quoted above from the Comment to Model Rule 1.15 seems to limit the duties imposed on a lawyer with respect to claimed interests in property by requiring that the relevant funds or property must be “specific,” and that the claim must be “lawful” and “not frivolous.”³⁸

It is important to ask how far the duties of lawyers extend with respect to the protection of the funds or property claimed by third persons, for these types of issues arise in law offices every day and create serious dilemmas for attorneys.³⁹ A review of relevant authorities strongly suggests that the protections afforded by state versions of Model Rule 1.15 may not extend as far as might first appear. Such rules do not protect every person who asserts a claim to funds or property held by a lawyer in connection with the representation of a client. As the following section demonstrates, current authorities draw an important distinction between matured legal or equitable interests and unmatured claims.

35. *Id.* r. 1.15(a).

36. *Id.* r. 1.15(d).

37. *Id.* r. 1.15(e) (emphasis added).

38. *Id.* r. 1.15 cmt. 4.

39. *Cf.* Scott Morrill, *Disbursing Disputed Funds: Understanding RPC 1.15-1(d)(e)*, OR. ST. B. BULL., Jan. 2011, at 9, 9 (“Difficulty with disputes between clients and third parties often arises when the lawyer tries to determine who is ‘entitled to receive’ the funds and whether the client and third party have legitimate claims to the funds.”); Ethics Advisory Serv. Comm., *The Pitfalls of Rule 1.15(b)*, LA. B.J., Feb. 2001, at 392, 392 (“The vagaries of Rule of Professional Conduct 1.15(b), combined with the myriad of medical lien laws and growing consumer dissatisfaction with both lawyers and doctors, can lead to much discomfort and confusion about a lawyer’s obligation regarding client funds which may also be claimed by third parties, such as medical care providers.”).

III. MATURED LEGAL OR EQUITABLE INTERESTS VERSUS UNMATURED CLAIMS

A. *Relevant Authority*

A well-reasoned ethics opinion of the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline sheds substantial light on the rule dealing with safekeeping of property.⁴⁰ Interpreting the Ohio version of Model Rule 1.15, the Board wrote:

A determinative issue for a lawyer is what constitutes an "interest" that triggers a lawyer's safekeeping duties to a third person.

The rule does not define "interest," but Comment [4] to Rule 1.15 provides insight into the meaning of "interest" and the application of the rule. "[T]hird 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 a 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."

ABA Comment [4] to ABA Rule 1.15 is identical to Ohio's Comment [4] to Rule 1.15. Professors Hazard and Hodes state that use of the phrases "lawful claims" and "duty under applicable law" "suggest that the third party must have a *matured* legal or equitable claim, such as a lien on specific funds, in order to trigger the lawyer's duty to hold the funds apart from *either* claimant, pending resolution of the dispute."

....

Not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15. . . .

What constitutes a lawful claim is a matter of substantive law.⁴¹

It makes sense to distinguish between matured legal or equitable interests recognized by substantive law and mere claims that have never achieved

40. Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-7 (2007).

41. *Id.* at 3-4 (quoting 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 19.6 (3d ed. Supp. 2005)).

such legal status. A lawyer has a duty to respect the property rights of others.⁴² However, a lawyer generally has no duty to advance the interests of a nonclient in acquiring property rights that the nonclient does not possess.⁴³ As a Nevada ethics opinion cogently observed, the rule on safekeeping of property “does *not* create third party interests in funds; it just requires the attorney possessing the funds to honor the interests that the law recognizes.”⁴⁴

Numerous authorities have considered what constitutes a matured legal or equitable interest sufficient to oblige a lawyer to protect the interests of a third party in particular funds or property. Those authorities suggest that the rights of a third person to funds or property in a lawyer’s possession is not easily established and generally requires something in the nature of:

42. Cf. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2017) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”); *id.* r. 3.4 (dealing with fairness to opposing parties and counsel); *id.* r. 4.4(b) (“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”).

43. A possible exception is the narrowly articulated, intended-third-party-beneficiary doctrine. For example:

[A] lawyer owes a duty to use care . . .

. . . .

(3) to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer’s performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely

1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000); *see also* SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 221–28 (2d ed. 2015) (discussing cases).

44. Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 31, at 3 (2005) (citing *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. Ct. 1996), *appeal dismissed*, 699 A.2d 151 (Conn. 1997) (per curiam)).

- a valid statutory lien,⁴⁵ judgment lien,⁴⁶ or similar court order;⁴⁷
- a court judgment concerning disposition of property⁴⁸ or funds in the lawyer's possession;⁴⁹
- statutory subrogation rights;⁵⁰
- a secured claim by a creditor that is specific to the funds in the lawyer's possession;⁵¹

45. See D.C. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Informal Op. 293 (2000) ("In general, a 'just claim' that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client[.] . . . [Such as] a statutory lien that applies to the proceeds of the suit being handled by the lawyer[.]" (citations omitted)); see also *Aetna Cas. Co. v. Gilreath*, 625 S.W.2d 269, 274 (Tenn. 1981) (holding the lawyer was under a duty to recognize the statutory lien of the client's employer on workers' compensation recovery proceeds); Colo. Bar Ass'n Ethics Comm'n, Formal Op. 94, at 4-257 (1993) ("Where the third party holds an undisputed interest as a result of a statutory lien . . . the property should be distributed in accordance with the terms of the lien . . ."); D.C. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Informal Op. 251 (1994) (discussing how a lawyer must disregard a client's direction to disburse settlement proceeds to the client in face of the statutory Medicaid lien); Ill. State Bar Ass'n, Informal Op. 01-04 (2002) ("Assuming that a valid lien exists, an attorney becomes liable for tortious conversion when: (1) the lienholder has a right to the property; (2) he has the right to immediate and absolute possession; (3) he has made a demand; and (4) the attorney wrongfully took possession or control of the property." (citing *Cirrincone v. Johnson*, 561 N.E.2d 662, 666 (Ill. 1990))).

46. See Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-7, at 6 (2007) (explaining the exception "to the principle that a lawyer has a constitutional obligation to deliver property of the client to the client, on demand, despite third-party claims . . . [if] the lawyer knows of a valid statutory or judgment lien against the property").

47. See *McIntyre v. Comm'n for Lawyer Discipline*, 247 S.W.3d 434, 437 (Tex. App.—Dallas 2008, no pet.) (involving a judicial order to an attorney to deliver a check to the IRS); D.C. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Informal Op. 293 (2000) ("[A]n attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer . . ."); Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 31, at 4 (2005) (discussing "attachment or garnishment upon the specific funds").

48. See Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-7, at 4 (2007) ("A lawful claim includes a valid judgment lien . . .").

49. D.C. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Informal Op. 293 (2000) ("[A] court order relating to the specific funds in the lawyer's possession . . ." (citations omitted) (citing Colo. Bar Ass'n Ethics Comm'n Formal Op. 94 (Nov. 20, 1993))); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-7, at 4 (2007) ("A lawful claim includes . . . [an] order of a court regarding the specific funds in the lawyer's possession.").

50. See Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-7, at 4 (2007) ("A lawful claim includes a valid statutory subrogation right as to the specific funds in the lawyer's possession.").

51. See *id.* at 5 ("A lawful claim includes a secured claim by a creditor that is specific to the funds in a lawyer's possession. It is not a lawyer's responsibility to pay general unsecured creditors of a client, including judgment creditors who have not attached or garnisheed the funds."); Or. State Bar Bd. of Governors, Formal Op. 2005-52 (2005) ("As a matter of law, Secured Creditor's valid and perfected security interest entitles Secured Creditor to receive funds to the extent necessary to satisfy the security

- a valid assignment;⁵²
 - “a contractual agreement made by the client and joined in or ratified by the lawyer to pay certain funds in the possession of the lawyer (e.g., client expenses in consideration of the supplier’s agreement to forebear collection action during the pendency of the lawsuit) to a third party[.]”⁵³
- or

interest. . . . The same would be true if Secured Creditor’s lien were statutory rather than contractual in origin.”).

52. See *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102, 1105 (Idaho Ct. App. 1983) (finding that the state’s ethics rule did “not shield the law firm from responsibility for failing to transmit the assigned funds to the creditor-assignee” because “[t]he client had dealt with those funds by a valid and enforceable assignment” and “was not ‘entitled to receive’ the funds assigned”); *Berkowitz v. Haigood*, 606 A.2d 1157, 1160 (N.J. Super. Ct. Law Div. 1992) (“Since the client has the power to validly assign the proceeds, the attorney has the obligation to honor such an assignment, if properly notified.”); *Romero v. Earl*, 810 P.2d 808, 810 (N.M. 1991) (“[O]nce an attorney has accepted from his client an assignment of settlement proceeds to the client’s creditor, the client, as assignor, cannot cancel or modify the assignment by unilateral action without the assent of the assignee, nor may he defeat the rights of the assignee. Under such circumstances, a lawyer is not ethically bound to give the client more than the sum to which the client is entitled, nor is the client entitled to receive the funds promised to the creditor.” (citing *Martinez v. Martinez*, 650 P.2d 819, 822 (N.M. 1982); *Bonanza Motors*, 657 P.2d at 1104)); *Hsu v. Parker*, 688 N.E.2d 1099, 1102 (Ohio Ct. App. 1996) (“After notice of the assignment has been given to the obligor, or knowledge thereof received by him in any manner, the assignor has no remaining power of release. The obligor must pay the assignee.” (quoting 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 890 (1951))); *Butler v. Comm’n for Lawyer Discipline*, 928 S.W.2d 659, 663 (Tex. App.—Corpus Christi 1996, no pet.) (involving an apparently valid assignment that was declared void as a matter of law); *Winship v. Gem City Bone & Joint, P.C.*, 185 P.3d 1252, 1257 (Wyo. 2008) (“[P]ayment of the settlement proceeds to a client’s valid assignee does not violate an attorney’s ethical obligations.”); see also *Silver v. Statewide Grievance Comm.*, 699 A.2d 151, 196 (Conn. 1997) (per curiam) (“If there was, for example, a valid assignment by the client of an interest in the settlement proceeds, then that, of course, would be binding on the lawyer and it would be unethical for the lawyer to ignore it once it has been brought to his attention.” (citing *Bonanza Motors*, 657 P.2d 1102; *Berkowitz*, 606 A.2d 1157; *Leon v. Martinez*, 638 N.E.2d 511 (1994))); Cal. Standing Comm’n on Prof’l Responsibility & Conduct, Formal Op. 1988-101 (“[S]hould the attorney pay the funds to the client, it may be found that the attorney did so in degradation of an enforceable third party lien exposing the attorney to potential civil liability to the health care provider.”); Nev. Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 31, at 3 (2005) (citing *Achrem v. Expressway Plaza Ltd.*, 917 P.2d 447 (1996) (per curiam)) (“The most clear-cut example of when the law will recognize an interest in funds is when the third party receives a common law assignment of such funds.”).

53. D.C. Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Informal Op. 293 (2000); see Fla. Bar v. Neely, 587 So. 2d 465, 466, 468 (Fla. 1991) (per curiam) (disbarring an attorney based in part on his failure to perform a promise to pay a doctor out of the lawsuit recovery for continuing to treat the attorney’s client); Nev. Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 31, at 4 (2005) (discussing the term “letter of protection”); Tex. Prof’l Ethics Comm., Op. 625 (2013) (“It is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer who replaces a client’s prior lawyer in a litigation matter to distribute funds resulting from settlement of the litigation matter without regard to a promise of payment, of which the second lawyer is aware, given to the client’s healthcare

- ownership of the disputed funds.⁵⁴

To summarize, the term “matured legal or equitable interest” denotes the narrow range of cases in which authorities have found that claims trigger the protections of the ethics rules dealing with safekeeping of property. Those cases traditionally have involved the assertion of rights acquired by assignment, lien, court order, judgment, statute, or letter of protection—and no others.

In contrast, one reported decision noted, “Examples of unmatured legal or equitable claims are: medical bills from the client without a provider demand; unsigned, unrecorded medical liens; medical bills or a demand letter from a provider to an attorney; or knowledge that the provider treated the client for accident related injuries.”⁵⁵ Apparently coined by professors Geoffrey C. Hazard and W. William Hodes, the authors of a leading treatise on the law of attorney professional responsibility,⁵⁶ the term “matured legal

provider in a letter signed by the client’s prior lawyer.”); *see also* *Am. State Bank v. Enabnit*, 471 N.W.2d 829, 833 (Iowa 1991) (“Although the clients were bound under their contract to pay the funds to the bank, [lawyer] Enabnit was not. When, for reasons of their own, the clients demanded the funds, Enabnit did not become liable to the bank for complying with the demand.”). Additionally, the court, deciding *Heffelfinger v. Gibson*, wrote:

Appellant argues that he was not liable to appellee under the agreement because he had turned Mrs. Strassburger’s case over to another attorney, Davis, and none of the funds paid to her in the settlement of her lawsuit ever passed through his hands. That circumstance is not enough to relieve him of his obligation. In clear language, he had specifically agreed, “to withhold such sums from *any* settlement, judgment or verdict as may be necessary to adequately protect the said doctor above-named.” For appellant to have avoided liability under this agreement would, in our view, have required a novation

Heffelfinger v. Gibson, 290 A.2d 390, 393 (D.C. 1972) (citing 1 RESTATEMENT OF CONTRACTS § 165 (AM. LAW INST. 1932)).

54. *See* *Clements v. Comm’n for Lawyer Discipline*, No. 01-99-00258-CV, 1999 WL 1063451, at *2 (Tex. App.—Houston [1st Dist.] Nov. 24, 1999, no pet.) (“When Clements disbursed the [proceeds of Bell’s \$10,000 check] to his clients, no settlement agreement had been signed by Bell. Thus, the funds still belonged to Bell. Consequently, Clements was, as a matter of law, obligated under Rule 1.14(a) to keep the funds in his trust account until Bell signed the settlement agreement.”).

55. *Haro v. Sebelius*, 789 F. Supp. 2d 1179, 1194 (D. Ariz. 2011) (citing *Ariz. Comm’n on Rules of Prof’l Conduct, Informal Op. 98-06* (1998)) (“The Rules of Professional Conduct provide that the lawyer has an ethical duty to protect third-party claims and to refuse to surrender property to a client when the third-party claim has become a matured legal or equitable claim.” (citing *ARIZ. RULES OF PROF’L CONDUCT* r. 1.15 (2014))), *rev’d on other grounds* 747 F.3d 1099 (9th Cir. 2014).

56. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* (3d ed. 2001); *see, e.g.*, 1 GEOFFREY C. HAZARD, JR., ET AL., *THE LAW OF LAWYERING* § 20.06, at 20-16 (4th ed. Supp. 2016) (“Comment [4] to Rule 1.15 uses the phrases ‘lawful claims’ and ‘duty under applicable law’ to suggest that the third party must have a *matured* legal or equitable claim . . . in order

or equitable claim” has been widely used in cases,⁵⁷ articles,⁵⁸ ethics opinions,⁵⁹ appellate briefs,⁶⁰ and trial court documents.⁶¹

B. *State Variations*

Some jurisdictions have drafted their own versions of the ethics rule dealing with safekeeping of property in ways that specifically address the difference between matured legal or equitable interests, on the one hand, versus unmatured claims, on the other hand. For example, Rule 1.15 of the Ohio Rules of Professional Conduct now provides:

(d) Upon receiving funds or other property in which a client or third person has a *lawful interest*, a lawyer shall promptly notify the client or third person.

to trigger the lawyer’s duty to hold the funds apart from *either* claimant, pending the resolution of the dispute.”).

57. See *Crane v. Native Am. Air Ambulance, Inc.*, No. CV 06-092 TUC FRZ (HCE), 2007 WL 625917, at *11 (D. Ariz. Feb. 23, 2007) (quoting ARIZ. RULES OF PROF’L CONDUCT r. 1.15 cmt. 4 (2007)) (“[W]hen the third-party claim has become a matured legal or equitable claim, the lawyer must refuse to surrender the property to the client”); *Silver*, 699 A.2d at 155 (“An interest as used in the rules means more than an unsecured claim with respect to a third party. An interest in the fund or property requires that the third party have a matured legal or equitable lien.” (citing 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.15:302, at 460 (2d ed. 1996))).

58. See Geoff Trachtenberg & Patricia Sallen, *New Tool Addresses Third-Party Claims to Legal Funds*, ARIZ. ATT’Y., Jan. 2014, at 30, 30 (“To comply with your client’s direction [to hand over the money] . . . you would have to conclude that the putative creditor doesn’t have a ‘matured legal or equitable claim.’”); *Proposed Advisory Opinion 02-05*, 29 FLA. B. NEWS, no. 2, 2002, at 11 (discussing the term in examining out-of-state precedent).

59. See Ariz. Comm. on Rules of Prof’l Conduct, Informal Op. 98-06 (1998) (“The Committee concludes that an attorney must have actual knowledge of a ‘matured legal or equitable claim’ to all or part of the funds or other property held by the attorney in order for the special duties of ER 1.15(b) to be invoked.”); Utah Ethics Advisory Op. Comm., Formal Op. No. 00-04 (2000) (“When a lawyer receives funds or property and knows a third person claims an interest in the funds or property, the lawyer must first determine whether the third person has a sufficient interest to trigger the duties stated in Rule 1.15(b). Only a matured legal or equitable claim—such as a valid assignment, a judgment lien, or a statutory lien—constitutes an interest within the meaning of Rule 1.15 If no such interest exists, the lawyer may disburse the funds or property to the client.”).

60. See, e.g., Brief of Respondent at 24, *United Fin. Cas. Co. v. Coleman*, 295 P.3d 763 (Wash. Ct. App. 2012) (No. 42276-o-11), 2011 WL 8183089 (“Once such a statutory lien has been recorded with the County Recorder, the attorney would be deemed to have notice of the lien, and the lien would represent a ‘matured legal or equitable claim’ under [ethics rule] 1.15.”).

61. See, e.g., Defendants Jay H. Solowsky and Pertnoy, Solowsky & Allen, P.A.’s Reply Memorandum in Support of Their Motion to Dismiss Plaintiff’s Verified Complaint and Jury Demand at 3 n.2, *Bocciolone v. Solowsky*, No. 08-20200-CIV-COOKE/BANDSTRA, 2009 WL 10666926 (S.D. Fla. 2009) (No. 08-202000-CIV-COOKE/DUBÉ), 2008 WL 2934840 (referencing the Hazard and Hodes treatise, which it describes as a “leading authority”).

For purposes of this rule, *the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property.* Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.⁶²

In *Cincinnati Bar Association v. Alsfelder*,⁶³ the Supreme Court of Ohio held that, under Ohio's version of Model Rule 1.15, the rights of a third person to an accounting did not extend to that jurisdiction's lawyer disciplinary authority, but was instead limited to a third person who has a lawful interest in funds or other property in the lawyer's possession. As the court explained:

The *third* person discussed throughout Prof. Cond. R. 1.15(d) is not *any* third person, but the third person who has a lawful interest in funds or other property in the lawyer's possession. To interpret the rule otherwise would permit any third person to request—and be entitled to receive—an account of funds or property held by a lawyer. Here, the facts that . . . [the state lawyer disciplinary authority] subpoenaed [attorney] Alsfelder's account records and that Alsfelder failed to comply are simply not relevant in the context of an alleged violation of [Rule] 1.15(d).⁶⁴

Alabama has adopted a version of the safekeeping rule that limits a lawyer's duties to third persons. Those obligations exist only where the “third person has an interest *from a source other than the client or the third person.*”⁶⁵

In Arizona, the duties of a lawyer to hold disputed property in trust pending resolution of a dispute may be limited by the actions of the persons involved. If the lawyer provides notice to the third person of intent to

62. OHIO RULES OF PROF'L CONDUCT r. 1.15 (2015) (first and second emphasis added).

63. *Cincinnati Bar Ass'n v. Alsfelder*, 6 N.E.3d 1162 (Ohio 2014).

64. *Id.* at 1166 (first emphasis added).

65. ALA. RULES OF PROF'L CONDUCT r. 1.15(b) (2016) (emphasis added). “Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person.” *Id.*

distribute the property to the lawyer's client, and the third person fails to initiate legal action within ninety days to assert a claim to said property, and provide notice thereof, the lawyer may make the distribution after consultation with the client, unless prohibited from doing so by law or court order.⁶⁶ Thus, Arizona's version of the safekeeping of property rule makes clear that, at least in some situations, the third person must do far more than merely notify the lawyer of a claim, but in fact must initiate legal proceedings aimed at protecting the third person's legal interests.

The Connecticut rule⁶⁷ on safekeeping of property makes certain that not all claims by third persons are sufficient to impede the distribution of property by a lawyer to the client, and creates a mechanism to assist lawyers in resolving uncertainty about the legitimacy of interests claimed by third persons. Connecticut Rule 1.15 provides:

66. ARIZ. RULES OF PROF'L CONDUCT r. 1.15(f) (2015). The Arizona rule provides:

Where the competing claims are between a client and a third party, the lawyer may provide written notice to the third party of the lawyer's intent to distribute the property to the client, as follows:

(1) The notice shall be served on the third party in the manner provided under Rules 4.1 or 4.2 of the Arizona Rules of Civil Procedure, and must inform the third party that the lawyer may distribute the property to the client unless the third party initiates legal action and provides the lawyer with written notice of such action within 90 calendar days of the date of service of the lawyer's notice.

(2) If the lawyer does not receive such written notice from the third party within the 90-day period, and provided that the disbursement is not prohibited by law or court order, the lawyer may distribute the funds to the client after consulting with the client regarding the advantages and disadvantages of disbursement of the disputed funds and obtaining the client's informed consent to the distribution, confirmed in writing.

(3) If the lawyer is notified in writing of an action filed within the 90-day period, the lawyer shall continue to hold the property separate unless and until the parties reach an agreement on distribution of the property, or a court resolves the matter.

(4) Nothing in this rule is intended to alter a third party's substantive rights.

Id.

67. CONN. RULES OF PROF'L CONDUCT r. 1.15(g) (2016).

(g) The word “interest(s)” as used in this subsection and subsections (e)⁶⁸ and (f)⁶⁹ means more than the mere assertion of a claim by a third party. In the event a lawyer is notified by a third party or a third party’s agent of a claim to funds held by the lawyer on behalf of a client, but it is unclear to the lawyer whether the third party has a valid interest within the meaning of this Rule, the lawyer may make a written request that the third party or third party’s agent provide the lawyer such reasonable information and/or documentation as needed to assist the lawyer in determining whether substantial grounds exist for the third party’s claim to the funds. If the third party or third party’s agent fails to comply with such a request within sixty days, the lawyer may distribute the funds in question to the client.⁷⁰

The Louisiana version of Model Rule 1.15 tightly defines the types of property interests that trigger the obligations of the safekeeping of property rule. Louisiana Rule 1.15(d) states:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. *For purposes of this rule, the third person’s interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.*⁷¹

68. Subsection (e) of the Connecticut rule provides:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Id. r. 1.15(e).

69. Subsection (f) of the Connecticut rule provides:

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) have interests, the property shall be kept separate by the lawyer until any competing interests are resolved. The lawyer shall promptly distribute all portions of the property as to which the lawyer is able to identify the parties that have interests and as to which there are no competing interests. Where there are competing interests in the property or a portion of the property, the lawyer shall segregate and safeguard the property subject to the competing interests.

Id. r. 1.15(f).

70. *Id.* r. 1.15(g) (emphasis added).

71. LA. RULES OF PROF’L CONDUCT r. 1.15(d) (2016) (emphasis added).

The Wisconsin rule on safekeeping of property likewise makes clear that a lawyer is required to act to protect third persons from harm only in regards to a tightly defined range of property interests. Wisconsin Supreme Court Rule 20:1.15(e) states:

(1) Upon receiving funds or other property in which a client has an interest, or in which a lawyer has received notice that a 3rd party has *an interest identified by a lien, court order, judgment, or contract*, the lawyer shall promptly notify the client or 3rd party in writing.

. . . .

(3) When a lawyer and another person or a client and another person claim *an ownership interest in trust property identified by a lien, court order, judgment, or contract*, the lawyer shall hold that property in trust until there is an accounting and severance of the interests.⁷²

C. *Unsecured Creditors Are Not Protected*

Numerous authorities have emphasized that unsecured creditors are not protected by legal ethics rules dealing with the safekeeping of property.⁷³ For example, the Nevada ethics committee wrote, “the mere assertion of a ‘claim’ by a general, unsecured creditor is not an ‘interest’ in the funds themselves in the hands of the lawyer.”⁷⁴ The District of Columbia ethics committee explained that, “a lawyer is not required to pay the general unsecured creditors of her client, including judgment creditors who have not attached or garnished the funds in the lawyer’s possession[.]”⁷⁵ Consequently, “the mere assertion of a claim by a third party is not enough

72. WIS. SUP. CT. r. 20:1.15 (2016) (emphasis added).

73. See *Klancke v. Smith*, 829 P.2d 464, 466 (Colo. App. 1991) (“Although we agree that the children are entitled to a portion of the [wrongful death] award, we conclude that defendant [lawyer] Smith satisfied his statutory duty by paying the settlement proceeds to his client, the surviving party entitled to sue and recover damages.” (citing *Campbell v. Shankle*, 680 P.2d 1352 (Colo. App. 1984))); *Blue Cross of Mass. v. Travaline*, 499 N.E.2d 1195, 1199–1200 (Mass. 1986) (concluding personal injury lawyer owed no duty to pay settlement proceeds to insurers, whose master medical certificate contained a subrogation clause); HAZARD, JR. & HODES, *supra* note 11, at §19.6 (explaining that a third party’s claim that is not reduced to a judgment against a lawyer’s client does not warrant a lawyer’s refusal to deliver funds to his client); see also *Schuwert*, *supra* note 27, at 58 (“[W]hat have always been considered to be *excluded* . . . are general creditors of the client with no claim to the *particular* funds in the lawyer’s possession.”).

74. Nev. Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 31, at 3 (2005).

75. D.C. Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 293 (2000).

by itself to freeze property in the lawyer's possession until the dispute is resolved."⁷⁶

In their nationally used textbook, Professors Lisa G. Lerman and Philip G. Schrag, who teach at Catholic University and Georgetown respectively, explain:

A lawyer is not a collection agency for all his clients' creditors. [A] department store has no right to ask the lawyer to give it money that the client owes, even if the debt is legitimate and overdue. If, on the other hand, the department store sues the client for the money, obtains a judgment, and then obtains an order against the lawyer to surrender the funds, that is another matter.⁷⁷

Section 45 of the *Restatement (Third) of the Law Governing Lawyers*, which was enacted long after Texas and other states had revised their ethics rules to impose on lawyers a limited range of obligations relating to the safekeeping of the funds and property of third persons, makes clear that unsecured creditors are not protected.⁷⁸ According to the *Restatement*:

76. *Id.* ("Indeed, the imposition of such a requirement [to freeze assets based on mere assertion of a claim] . . . could raise significant due process issues as constituting, in effect, a prejudgment attachment." (citing Conn. Office of State Ethics, Informal Op. 95-20 (1995); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975))).

77. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 550 (2d ed. 2008).

78. For example, when the 1971 Texas Code of Professional Responsibility was replaced by the current Texas Disciplinary Rules of Professional Conduct, effective January 1, 1990, the rule dealing with the safekeeping of funds and property of clients was expanded to impose on lawyers certain limited obligations to third persons. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV., no. 5, 1990, at 15, 16. During the same period of time, similar changes were made to the ethics rules of other states dealing with the safekeeping of property. See Jeanne M. Whalen, Comment, *Safekeeping Client Property: Why the ABA Is Hands-Off and the States Are Hand-Holding*, 38 U. TOL. L. REV. 1279, 1294 n.80 (2007) ("[Promulgated in 1983], Rule 1.15 [of the ABA Model Rules of Professional Conduct] extended fiduciary protection to third parties as well as those who had established an attorney-client relationship with the lawyer in question." (citing MODEL RULES OF PROF'L CONDUCT r. 1.15(a) (AM. BAR ASS'N 2017))). The developments in other jurisdictions dealing with the interests of third parties sometimes used language identical to the language found in the Texas Rules. The president of the State Bar of Texas explained to the Texas lawyers who voted in the referendum that, "In drafting the . . . [Texas] Disciplinary Rules, the [Texas] committee relied not only on the American Bar Association Model Rules of Professional Conduct [(1983)] but, to an equal degree, relied on the codes and rules of the bar associations of our sister states . . ." James B. Sales, *The Texas Disciplinary Rules of Professional Conduct: A Model to Replace the Outdated Texas Code of Professional Responsibility*, 52 TEX. B.J. 388, 390 (1989); see also W. Frank Newton, *The Proposed Texas Disciplinary Rules of Professional Conduct Should Be Adopted*, 52 TEX. B.J. 557, 557 (1989) (relating "work product of state and national legal leaders").

If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs.⁷⁹

Thus, a mere contractual promise that has not been adjudicated by a court, or the simple possibility that a third party might assert rights under common law or statutory principles that are not self-executing, is not sufficient to trigger the protections of ethics rules dealing with the safekeeping of funds and/or property.

Distinguishing between claims of a matured legal or equitable interest and unsecured claims draws a sensible line in regard to respect for property rights. Lawyers and clients must respect the property rights of others. The difficulty arises when there is uncertainty as to the existence or validity of a claim. When a person claims to have a matured property interest acquired by way of assignment, lien, court order, judgment, statute, or letter of protection, it is typically easy to resolve the matter by reference to documentary evidence. Consequently, in such situations, sequestration of the disputed funds or property is likely to be minimally disruptive to the interests of the lawyer's client. In contrast, unsecured claims come in all varieties, are often not easily resolved, and are hence disruptive and subject to abuse. The distinction between claims of matured legal or equitable interests and unsecured claims articulates a workable rule for balancing clients' interests and the property rights of others.

D. *Unknown Claims*

The ethical duties imposed on a lawyer to protect the property interests of third persons only extends to lawful, matured claims of interest which are known to the lawyer. A lawyer does not have a duty to search out information about claims which are unknown. Such an obligation might be regarded as both burdensome and vague.⁸⁰ In addition, a Texas ethics opinion explained:

79. 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 45 cmt. d (AM. LAW INST. 2000).

80. See Jim M. Perdue, Jr., *Duties to People You Don't Know, Will Never Meet, and Who Hate Your Client: The Objections to Proposed Amendments to Texas Disciplinary Rule of Professional Conduct 1.15*, ADVOCATE, Summer 2011, at 62, 64 (discussing a proposed change to ethics rules under which "the threat of failing to provide notice to [nonclients] about property to which the attorney's client is entitled appeared to be elevated to a grievable offense").

[A lawyer's] obligations with respect to clients' confidential information do not permit a lawyer to make inquiries as to the existence of unasserted claims to funds otherwise belonging to the client. No requirement for such inquiries is imposed by the Texas Disciplinary Rules. Moreover, the Committee is aware of no provision of state or federal law that would require inquiries in these circumstances.⁸¹

Various authorities have also reached the conclusion that a lawyer has no duty to notify a third party that funds are being received if that party has no existing, matured and legally enforceable interest in that property.⁸² For example, in *Silver v. Statewide Grievance Committee*,⁸³ a grievance committee reprimanded a lawyer for failing to notify automobile insurers of the receipt of settlement funds and failing to sequester those funds until the pending claims of the client and insurers were resolved.⁸⁴ The Appellate Court of Connecticut subsequently affirmed a judgment holding that the lawyer was not required to notify insurers of receipt of settlement proceeds or to pay any portion of settlement proceeds to them because, under a state law, the insurers did not acquire a statutory lien on the claimant's recovery until such time as the proceeds of such recovery *were* in the possession and control of the claimant.⁸⁵ In other words, the statutory right to a lien had not yet matured at the time the funds were still in the control of the lawyer. As the court explained:

Rule 1.15 does not create third party interests, but, rather, requires an attorney to safeguard only those interests that otherwise exist at law. . . . [T]he legislature insulated attorneys from the liability of reimbursing basic reparations benefits by providing that an insurer's lien does not attach to a

81. Tex. Prof'l Ethics Comm., Op. 606 (2011).

82. See, e.g., 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS: ATTORNEY TORT STANDARDS, ATTORNEY ETHICS STANDARDS, JUDICIAL ETHICS STANDARDS, RECUSAL AND DISQUALIFICATION OF JUDGES § 6:14, at 1237 (2017) ("[A]bsent an obligation imposed by law or contract, a lawyer has no obligation to seek out and notify creditors of the lawyer's client of the receipt of funds belonging in whole or in part to the client."); see also D.C. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 293 (2000) ("[T]he rule does not apply to claims of which the lawyer lacks knowledge." (citing *Shapiro v. McNeill*, 699 N.E.2d 407, 409 (1998))); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-7, at 1 (2007) ("Not every claim of a third person triggers a lawyer's safekeeping duty, only a lawful claim that a lawyer knows of is an interest subject to protection under Rule 1.15.").

83. *Silver v. Statewide Grievance Comm.*, 679 A.2d 392 (Conn. App. Ct. 1996), *appeal dismissed*, 699 A.2d 151 (Conn. 1997) (per curiam).

84. *Id.* at 396.

85. *Id.* at 396-97.

claimant's recovery until the claimant has possession and is in control of the recovery. While settlement proceeds were in the plaintiff's [lawyer's] control, therefore, Safeco and USAA did not have an interest in the proceeds. Their interests in the *Jones* and *La Banca* cases arose only after the plaintiff had distributed the proceeds to his clients. We conclude that the plaintiff did not have an ethical duty to notify the insurance companies of his receipt of the settlement proceeds or to deliver a portion of the proceeds to the insurance companies.⁸⁶

A Nevada ethics committee likewise stated that “the lawyer who receives funds has no ethical duty to affirmatively seek to discover third parties with an interest in the funds before paying them out.”⁸⁷ Citing a Utah ethics opinion, the Nevada committee wrote, “the lawyer’s knowledge that his client owes bills—even if the lawyer knows that a creditor (without a promise by the client or lawyer) expects payment [out] of the personal injury recovery—does *not* give rise to an ‘interest’ in the funds by the creditor.”⁸⁸

E. *Liability to Persons Not in Privity*

It is a basic principle of the law governing lawyers that broad-ranging duties are owed to clients, while only limited duties are owed to nonclients.⁸⁹ The concept of privity remains an important benchmark in the law of legal malpractice for two reasons: “First, absent a requirement of privity, parties to a contract for legal services could easily lose control over their agreement. Second, imposing a duty to the general public upon lawyers would expose lawyers to a virtually unlimited potential for liability.”⁹⁰

Courts have been very reluctant to impose duties on lawyers that may conflict with the duties they owe to their clients.⁹¹ Interpreting the

86. *Id.* at 397 (emphasis added).

87. Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 31, at 5 (2005).

88. *Id.* (citing Utah Ethics Advisory Op. Comm., Formal Op. No. 00-04 (2000)).

89. *See generally* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 169–256 (2d ed. 2016) (discussing limited duties owed to nonclients, but identifying seventeen theories under which courts have imposed liability).

90. *Calvert v. Sharf*, 619 S.E.2d 197, 203 (W. Va. 2005) (quoting *Schreiner v. Scoville*, 410 N.W.2d 679, 681 (Iowa 1987)); *see also Blair v. N.C. Ing.*, 21 P.3d 452, 458 (Haw. 2001) (“Over a century ago, the United States Supreme Court held that a third party not in privity of contract with an attorney may not maintain a legal malpractice action against an attorney for negligence absent fraud or collusion.”).

91. *See Barcelo v. Elliott*, 923 S.W.2d 575, 578–79 (Tex. 1996) (“[T]he greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney

safekeeping of property rule to impose a broad obligation on lawyers to sequester funds or property acquired during the representation of a client that is claimed by unsecured creditors would be inconsistent with the strict privity rule followed in states such as Texas,⁹² and with the policy of avoiding the imposition of conflicting duties that interfere with the representation of an existing client. The principles of limited liability to nonclients that, through countless decisions,⁹³ have become part of the law of virtually every jurisdiction, must ultimately be squared with any expansive interpretation of the duties owed to third persons under state ethics rules related to safekeeping of property.

Issues related to lack of privity sometimes arise in cases where a client, but not the client's lawyer, has promised some third person payments from the proceeds of a case.⁹⁴ In *Yorgan v. Durkin*,⁹⁵ a chiropractor brought an action against his patient's lawyer seeking to enforce an assignment executed unilaterally by the patient, without the lawyer's knowledge or consent, purportedly giving the chiropractor a lien against proceeds that would be recovered from the patient's personal injury claim.⁹⁶ In holding that the

did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.”).

92. See, e.g., *In re Sunpoint Sec., Inc.*, 377 B.R. 513, 556–57 (Bankr. E.D. Tex. 2007) (“Texas has adopted that strict privity approach in holding that only clients may recover from attorneys on a negligence theory.” (citing *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 782–83 (Tex. 2006))).

93. For example, in *Flaherty-Wiebel v. Morris, Downing & Sherred*, a woman (Flaherty) sued the lawyer and law firm who represented her former husband (Wiebel) in drafting a pre-nuptial agreement. *Flaherty-Wiebel v. Morris, Downing, & Sherred*, 384 F. App'x 173, 176 (3d Cir. 2010). In rejecting the woman's claim for legal malpractice, the Third Circuit wrote:

In this case, Flaherty has not alleged facts that support the existence of an attorney-client relationship with the defendants. As Flaherty admits, Wiebel notified Flaherty that the defendants represented Wiebel and drafted the documents as Wiebel's attorneys, and that Flaherty should not contact the defendants about the pre-nuptial agreement. Moreover, Flaherty was represented by her own counsel during the negotiation of the pre-nuptial agreement. Although the defendants had previously drafted estate planning documents for Flaherty[,] Flaherty's allegations do not establish an attorney-client relationship with respect to the pre-nuptial agreement. Since Flaherty was not represented by the defendants during the negotiation of the pre-nuptial agreement, she cannot sustain a claim for legal malpractice based on their performance in drafting this agreement.

Id. (citations omitted).

94. See Morrill, *supra* note 39, at 10 (“[W]hile a simple contractual obligation between the client and third party might be a claim against the client, it would not be a legitimate claim against the funds in trust.”).

95. *Yorgan v. Durkin*, 715 N.W.2d 160 (Wis. 2006).

96. *Id.* at 161.

lien was not enforceable against the attorney, the Supreme Court of Wisconsin wrote:

In our view, it is significant whether the attorney has signed the agreement or otherwise accepted its terms. Here, applying basic contract principles, we determine that Attorney Durkin was not a party to the agreement and not bound by it. Dr. Yorgan had no reasonable expectation that Durkin would be bound by the agreement if he did not sign it. Likewise, Yorgan had no reasonable reliance interest in Durkin's acceptance or rejection of the agreement.⁹⁷

The *Yorgan* court went on to note that, according to the "great weight" of authority, a lawyer is not bound by a letter of protection given to a medical provider which the lawyer did not sign or send.⁹⁸ Further, the court cautioned against the risk of turning lawyers into involuntary bill collectors, writing:

We see no readily discernable stopping point on attorney liability if liability is imposed for the reasons [Dr.] Yorgan advances. A variety of client creditors would need only send the client's attorney a copy of their agreements with the client in order to enlist the attorney as a de facto collection agent Putting attorneys in this position may compromise their duties to their clients.⁹⁹

F. *Attorney Immunity from Civil Liability*

In some jurisdictions, civil claims by third persons alleging that a lawyer has violated ethical duties related to the safekeeping of property may be barred by an immunity. For example, Texas recognizes a very broad attorney immunity doctrine. In *Cantey Hanger, L.L.P. v. Byrd*,¹⁰⁰ the Texas Supreme Court wrote:

Texas common law is well settled that an attorney does not owe a professional duty of care to third parties who are damaged by the attorney's negligent representation of a client. However, Texas courts have developed a more comprehensive affirmative defense protecting attorneys from liability to [nonclients], stemming from the broad declaration over a century ago that "attorneys are authorized to practice their profession, to advise their clients

97. *Id.* at 164.

98. *Id.* at 166.

99. *Id.* at 168.

100. *Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477 (Tex. 2015).

and interpose any defense or supposed defense, without making themselves liable for damages.” This attorney-immunity defense is intended to ensure “loyal, faithful, and aggressive representation by attorneys employed as advocates.”

In accordance with this purpose, there is consensus among the courts of appeals that, as a general rule, attorneys are immune from civil liability to [nonclients] “for actions taken in connection with representing a client in litigation.” Even conduct that is “wrongful in the context of the underlying suit” is not actionable if it is “part of the discharge of the lawyer’s duties in representing his or her client.”

....

Fraud is not an exception to attorney immunity; rather, the defense does not extend to fraudulent conduct that is outside the scope of an attorney’s legal representation of his client, just as it does not extend to other wrongful conduct outside the scope of representation. An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that his alleged wrongful conduct, regardless of whether it is labeled fraudulent, is part of the discharge of his duties to his client.¹⁰¹

This broad rule of attorney immunity articulated by the Texas Supreme Court may bar actions for damages alleging that an attorney improperly dispensed funds or property in which a third person claimed an interest. The rule may also bar claims by third persons for forfeiture of disputed funds paid to the lawyer, with the consent of the lawyer’s client, as attorney’s fees. This is true because forfeiture (also called disgorgement¹⁰²) is a civil

101. *Id.* at 481, 484 (first citing *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996); then citing *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999); then citing *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. App.—Dallas 1910, no writ); then citing *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, no pet.); then citing *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, no pet.); then citing *Toles v. Toles*, 113 S.W.3d 899, 910 (Tex. App.—Dallas 2003, no pet.); then citing *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 287–88 (Tex. App.—Fort Worth 1997, no pet.); then citing *Toles*, S.W.3d at 406; then citing *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01–06–00696–CV, 2008 WL 746548, at *7 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, no pet.) (mem. op.); then citing *id.* at *9; and then citing *Alpert*, 178 S.W.3d at 408).

102. As the *Swinnea v. ERI Consulting Engineers, Inc.* court explained:

Disgorgement is an equitable forfeiture of benefits wrongfully obtained . . . [I]t is applicable where a person who renders service to another in a relationship of trust breaches that trust. Disgorgement is compensatory, but it is not damages. The central purpose of forfeiture is to protect relationships of trust by discouraging agents’ disloyalty. Where a fiduciary takes advantage of his position of trust to induce a principal to enter into a contract, the fiduciary is not entitled to compensation. Thus, when a fiduciary fraudulently induced a contract, this breach of fiduciary

remedy¹⁰³ measured not by what the plaintiff lost (damages), but by what the defendant gained wrongfully (e.g., restitution).¹⁰⁴ Restitution is awarded to prevent unjust enrichment¹⁰⁵ in cases involving a lawyer's clear and serious breach of duty.¹⁰⁶ In *Cantey Hanger*, the Texas Supreme Court

duty may give rise to equitable forfeiture of contractual consideration. Forfeiture may be appropriate even if the party who was fraudulently induced into the contract fails to suffer harm or when he can be fully compensated by damages.

Equitable forfeiture is distinguishable from an award of actual damages incurred as a result of a breach of fiduciary duty. Further, a claimant need not prove actual damages to succeed on a claim for forfeiture because they address different wrongs. In addition to serving as a deterrence, forfeiture can serve as restitution to a principal who did not receive the benefit of the bargain due to his agent's breach of fiduciary duties.

Swinnea v. ERI Consulting Eng'rs, Inc., 481 S.W.3d 747, 752–53 (Tex. App.—Tyler 2016, no pet.) (first citing *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015); then citing *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999); then citing *ERI Consulting Eng'rs, Inc.* 318 S.W.3d 867, 873–74 (Tex. 2010); then citing *id.* at 882; then citing *id.* at 874; then citing *Burrow*, 997 S.W.2d at 240; and then citing *id.* at 237–38).

103. See *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 729 (Tex. 2016) (“While equitable disgorgement is a viable *remedy* for breach of trust by a fiduciary we have not expressly limited the *remedy* to fiduciary relationships nor foreclosed equitable relief for breach of trust in other types of confidential relationships.” (emphasis added) (first citing *ERI Consulting*, 318 S.W.3d at 873; and then citing 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 (AM. LAW INST. 2011)); see also 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 (AM. LAW INST. 2011) (discussing “the nature and extent of the remedy in restitution”).

104. See *Cooper v. Campbell*, No. 05-15-00340-CV, 2016 WL 4487924, at *10–11 (Tex. App.—Dallas Aug. 24, 2016, no pet.) (“Disgorgement is an equitable forfeiture of benefits wrongfully obtained. A party must plead forfeiture to be entitled to that equitable *remedy*. . . . The central purpose of forfeiture as an equitable *remedy* is not to compensate the injured principal, but to protect relationships of trust by discouraging disloyalty.” (emphasis added) (first citing *Longview*, 464 S.W.3d at 361; then citing *Swinnea*, 481 S.W.3d at 752; then citing *Alavi v. MCI Worldcom Network Servs., Inc.*, No. 09-05-364 CV, 2007 WL 274565, at *3 (Tex. App.—Beaumont Feb. 1, 2007, no pet.) (mem. op.); and then citing *Lee v. Lee*, 47 S.W.3d 767, 780 (Tex. App.—Houston [14th Dist.] 2001, no pet.)); see also *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1639 (2017) (“A 5-year statute of limitations applies to any ‘action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.’ This case presents the question whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. Disgorgement in the securities-enforcement context is a ‘penalty’ within the meaning of 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.” (emphasis added) (citation omitted)).

105. See *Kokesh*, 137 S. Ct. at 1640 (“Generally, disgorgement is a form of ‘[r]estitution measured by the defendant’s wrongful gain.’ Disgorgement requires that the defendant give up ‘those gains . . . properly attributable to the defendant’s interference with the claimant’s legally protected rights.’” (citation omitted) (citing 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51, cmt. a (AM. LAW INST. 2011))).

106. See 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. b (AM. LAW INST. 2000) (“The remedy of fee forfeiture presupposes . . . a lawyer’s clear and serious violation of a duty . . .”).

noted that, although “attorneys are immune from civil liability to [nonclients]”¹⁰⁷ for conduct that was “part of the discharge of his [or her] duties to his client[.]”¹⁰⁸ there are “other mechanisms . . . in place to discourage and remedy such conduct, such as sanctions, contempt, and attorney disciplinary proceedings.”¹⁰⁹

IV. CONCLUSION

It is easy to find in legal literature expansive language about the duties owed by a lawyer to third persons with respect to funds or property held by the lawyer. However, care must be exercised when interpreting state versions of Model Rule 1.15, the rule on safekeeping of property. Otherwise, the duties that a lawyer owes to third persons will too readily encroach on the performance of obligations owed to clients, as well as on the legitimate interests of lawyers themselves, especially with regard to the payment of fees for services they have performed.¹¹⁰

As numerous authorities have recognized, lawyers should be obliged to protect the property interests of third persons only where those persons hold a matured legal or equitable interest in the specific funds or property held by the lawyer. This generally means that in order to be entitled to protection (by way of safekeeping, notice, delivery, or sequestration in escrow), a third person must be known by the lawyer to hold a lawful interest in the relevant funds or property by way of assignment, lien, court order, judgment, statute, or letter of protection. The assertion of an unmatured claim by an unsecured creditor should not be sufficient to impose on a lawyer obligations to a third person that are inconsistent with the instructions of the lawyer’s client.

Interpreting the safekeeping rule to create duties to unsecured creditors would create chaos in the legal profession. This is true because unhappy

107. *Cantey Hanger, L.L.P. v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

108. *Id.* at 484 (citing *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01–06–00696–CV, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, no pet.) (mem. op.); *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 408 (Tex. App.—Houston [1st Dist.] 2005, no pet.)).

109. *Id.* at 482 (footnote omitted) (first citing *Reagan Nat’l Advert. of Austin, Inc. v. Hazen*, No. 03–05–00699–CV, 2008 WL 2938823, at *3 (Tex. App.—Austin July 29, 2008, no pet.) (mem. op.); and then citing *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 287 (Tex. App.—Fort Worth 1997, no pet.)).

110. *Cf. Perdue*, *supra* note 80, at 64–65 (“How the attorney earns their fee and is able to pay expenses such that they can do the work for the client (as should be their paramount duty) is unanswered by the proponents of the rule.”).

individuals, aggressive creditors, over-reaching entities, and other nonclients would be given enormous power “to tie up the funds for an indeterminate amount of time,” and would enjoy “heavy leverage” to extract the maximum amount from clients who need assets immediately.¹¹¹

111. *Id.* at 65.

