

October 2007 *Multnomah Lawyer Ethics Focus*

Billing Ethics, Part 2: Client Trust Accounts

**By Mark J. Fucile
Fucile & Reising LLP**

Last month, we began our look at billing ethics by reviewing the rules governing time-keeping and fee agreements. This month, we turn to client trust accounts. In this column, we'll look at what funds go in client trust accounts, general management and what happens if there is a dispute involving funds held in trust. RPCs 1.15-1 and 1.15-2 govern trust accounts. They are both long and detailed, and, as a result, warrant careful reading. As with last month's topic, however, further practical guidance is available in all of these areas from the Oregon State Bar's formal ethics opinions available on the OSB web site at www.osbar.org.

What Goes In?

RPC 1.15-1(a) specifies that funds belonging to the client, including advance deposits for fees and costs, must be deposited into a client trust account. Funds belonging to the lawyer, by contrast, such as the lawyer's earned fees (including hourly fees and fixed fees plainly denominated in writing as "earned upon receipt"), must be deposited into the lawyer's business account.

With small amounts or even large amounts not likely to remain in trust long, RPC 1.15-2(a) requires client funds to be deposited into an "IOLTA" ("interest on lawyer trust account") trust account for the benefit of the Oregon

Law Foundation. By contrast, if the amount is both large enough and will remain in trust long enough to generate net interest (*i.e.*, above bank service charges) to the client, then RPC 1.15-2(b)-(c) require that the funds be deposited into a separate client trust account for the client's benefit unless the client waives the interest (allowing the funds to be deposited into an IOLTA account). RPC 1.15-2(d) outlines the criteria for determining whether a separate trust account is warranted. OSB Formal Ethics Opinion 2005-117 also discusses this issue in detail. Most major Oregon banks offer both kinds of accounts.

Management

Records. RPC 1.15-1(a) requires that thorough records of trust account transactions be prepared and maintained for a period of five years after the completion of the representation involved. Trust accounts are also subject to random audit by the Oregon State Bar.

Bank Service Charges. Under RPC 1.15-1(b), a lawyer may deposit the lawyer's own funds into a client trust account as necessary to pay bank service charges on that account. But under OSB Formal Ethics Opinion 2005-145, the lawyer may not deposit an additional "cushion" to avoid overdrafts. RPC 1.15-2(n) defines "service charges" and generally limits that term to items such as monthly maintenance fees, per-check charges and the like.

Credit Card Payments. Lawyers are permitted to accept credit card payments. In a perfect world, lawyers would maintain separate linked accounts

for credit card payments, with advance fee deposits automatically going into trust and earned fees automatically going to the lawyer's business account. Some banks, however, only permit one account to be linked with credit card payments. As a result, OSB Formal Ethics Opinion 2005-172 permits credit card payments representing earned fees to be deposited temporarily into trust and then promptly transferred to the lawyer's business account. 2005-172 notes that the converse is not true. Therefore, if a lawyer's bank only permits one account to be linked to credit card payments, it must be the client trust account unless the lawyer does not accept advance fee deposits (as opposed to earned fees) by credit card.

Withdrawing Funds When Earned. Once earned, the funds then belonging to the lawyer must be withdrawn from the trust account. If the lawyer is not aware of any dispute over the lawyer's right to payment, OSB Formal Ethics Opinion 2005-149 concludes that a lawyer may withdraw earned fees as soon as they are billed. It does recognize, however, that a lawyer may wait a reasonable time (using 30 days as an example) after a client has been invoiced to ensure that there is no dispute before withdrawing the funds.

Withdrawal. RPC 1.16(d) requires that any unearned balance remaining in a trust account at the point that a lawyer withdraws be promptly refunded to the client. OSB Formal Ethics Opinion 2005-151 notes that all fees are subject to the "reasonableness" requirements under RPC 1.5 that we discussed last month. Therefore, it finds that even a fixed fee denominated "nonrefundable" must be at

least partially refunded if all contemplated work under the fixed fee has not been completed. Two recent Oregon Supreme Court decisions, *In re Fadeley*, 342 Or 403, 153 P3d 682 (2007), and *In re Balocca*, 342 Or 279, 151 P3d 154 (2007), concur.

Unclaimed Funds. Occasionally and for a variety of reasons, client funds remain in trust when the client moves without providing the lawyer with a new address. In that circumstance, OSB Formal Ethics Opinion 2005-48 counsels that the lawyer must first take reasonable steps to locate the client. If despite those efforts the client cannot be located, then the lawyer must turn the funds over to the State in accordance with the Uniform Disposition of Unclaimed Property Act, ORS 98.302-.486.

Disputes

If there is a dispute between the lawyer and the client over the lawyer's entitlement to funds being held in trust, RPC 1.15-1(e) requires that the disputed funds remain in the client trust account until the dispute is resolved. By contrast, OSB Formal Ethics Opinion 2005-149 finds that there is no requirement to return disputed funds into trust if they were withdrawn in good faith before a dispute with the client arose.

If there is a dispute between two (or more) clients to their share of funds held in trust (for example, a settlement payment), OSB Formal Ethics Opinion 2005-68 counsels that the lawyer must either retain the funds involved in trust

until the dispute is resolved or interplead the funds so that the clients can resolve the dispute between them on their own.

Summing Up

Client trust accounts are a particularly sensitive area of billing ethics for lawyers in two senses. First, we are held to a very high fiduciary standard when handling our clients' money. Second, and related to the first, both the Oregon State Bar and the Oregon Supreme Court rigorously apply the client trust rules for the protection of clients. As a result, client trust accounts are an area of the business side of our practices that require special attention and care.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular

contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.