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Trust Accounts: What Goes In and What Comes Out

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Trust accounts are an essential—but very technical—part of private practice. We have a general duty under RPC 1.15-1 to maintain a trust account to hold client and third-party funds separate from our own. RPC 1.15-2, in turn, addresses "IOLTA" accounts in particular and in considerable detail. The Oregon State Bar *Ethical Oregon Lawyer* contains an entire chapter on trust account administration and the OSB Professional Liability Fund has a variety of practical resources on that same topic available on its web site.

In this column, we'll take a narrower focus on two fundamental questions of trust account management: what goes in and what comes out? Although simple in concept, both can be much more nuanced in practice. With both, we'll focus on the very useful guidance provided by a series of ethics opinions that are available on the OSB web site.

What Goes In?

RPC 1.15-1(a) outlines the basic rule for what goes into a trust account—*other people's money*:

> "A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate 'Lawyer Trust Account' maintained in the jurisdiction where the lawyer's office is situated."

Common examples of funds that must be deposited into a trust account are advance fee deposits and settlement funds payable to clients. With the former, RPC 1.15-1(c) explains that an advance fee deposit remains the client's money until earned by the lawyer. With the latter, RPC 1.15-1(d) notes that funds belonging to clients must be disbursed "promptly" once the check involved has cleared. A less common, but still recurring, example is an overpayment by a client on a bill—with the overpayment being refunded to the client and the lawyer's earned fees being transferred to the firm's business account.

RPC 1.15-1(b) allows a lawyer to deposit the lawyer's own funds into a trust account "for the sole purposes of paying bank service charges or meeting minimum balance requirements on that account[.]" The same rule cautions, however, that any such deposits must be limited to the "amounts necessary for those purposes." OSB Formal Opinion 2005-145 (rev 2016) prohibits additional "cushions" beyond service charges (or minimum balance requirements) because that risks defeating the overdraft notification protection required of all trust accounts.

What Comes Out?

In some respects, the question of "what comes out?" is simply the converse of "what goes in?" In other respects, however, this second question is more difficult. We'll look at three recurring examples illustrating the latter.

First, with advance fee deposits, RPC 1.15-1(c) requires that fees be transferred to the lawyer's business account once they are earned. OSB Formal Opinion 2005-149 (rev 2016) permits this to occur when the client is billed. The opinion elaborates that "[a]lthough not required to do so, Lawyer may wait a reasonable period of time—such as 30 days—after Client has been invoiced before withdrawing earned funds." This practice effectively allows a reasonable period for the client to object or otherwise question a particular bill before earned funds are withdrawn. The opinion does not, however, require a lawyer to return funds to trust if a dispute over a bill arises later—provided the lawyer was not aware of the dispute at the time the funds involved were withdrawn.

Second, RPC 1.15-1(e) addresses disbursement issues when more than one party claims the funds involved:

> "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."

OSB Formal Opinion 2005-68 (rev 2016) discusses this rule in detail in the context of settlement proceeds from litigation. Mirroring the text of the rule, the opinion counsels that undisputed portions should be distributed pending resolution of the claims to the disputed portions. The opinion also emphasizes that the lawyer holding the disputed funds is not cast in the role of adjudicator of the competing claims. Rather, the opinion advises that the lawyer must either continue to hold the funds in trust while the claimants attempt to resolve their differences or interplead the disputed funds into a court.

Third, when disbursing money from trust, we need to make sure that the corresponding inbound check involved has cleared. If not and the inbound check is later declared uncollectible, then the law firm may have unintentionally but effectively given other clients' trust funds to the person paid with the outbound disbursement. In other instances, the same scenario may result in the trust account being overdrawn—triggering an accompanying notice by the bank to the Bar. Although governed generally by Federal Reserve regulations rather than the RPCs, banks vary on when a check is considered "cleared" and this is not the same as a "provisional" (and reversible) credit a bank may accord a business

customer like a law firm. In short, a firm needs to be certain an inbound check has cleared before disbursing the corresponding outbound funds.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.