

June 2023 Multnomah Lawyer Ethics Focus

Depositing Funds into Trust to Correct Bank Errors or Thefts

Mark J. Fucile
Fucile & Reising LLP

RPC 1.15-1 imposes a strict duty on lawyers for “safekeeping” client property. A key facet of that duty requires client funds to be held in a trust account separate from a lawyer’s general business account. RPC 1.15-2, in turn, addresses the many technical aspects of trust accounting—including mandatory notices that are sent by banks to the Oregon State Bar in the event a law firm trust account is overdrawn. Given the sensitivity of the responsibility for lawyers and the corresponding regulatory interest by the OSB in ensuring timely notification following an overdraft, Oregon has long had an ethics opinion—OSB Formal Opinion 2005-145 (rev 2016)—that prohibits lawyers from depositing their own funds into trust accounts (beyond account fees) because doing so may create a “cushion” that defeats overdraft notification.

The broad restriction on depositing lawyer funds, however, raised a conundrum when an error or a theft at the bank holding the trust account caused a loss of client funds. On one hand, a lawyer might wish to reimburse the client pending or in lieu of correction of the error or theft by the bank. On the other, the prohibition on depositing law firm funds into a trust account (again, beyond account fees) is both sweeping and exacting.

Last year, the Oregon State Bar adopted an ethics opinion that balances the regulatory imperative of protecting client funds with the practical desire many lawyers have in this circumstance to make their clients whole. Formal Opinion 2022-199 (2022) allows a lawyer to reimburse the clients affected—within specified constraints and with solutions narrowly tailored to avoid the restrictions imposed by Formal Opinion 2005-145. In this column, we’ll survey both the constraints and the solutions.

Constraints

Formal Opinion 2022-199 is predicated on two important qualifiers.

First, the opinion only applies to errors or similar circumstances that are “outside of the lawyer’s control”—which the opinion defines:

“Outside of the lawyer’s control” refers to situations involving third-parties that the lawyer has no relationship with or control over and does not refer to employees, staff persons, or contractors, including bookkeepers employed by the lawyer, or any person that the lawyer may direct or otherwise exercise control over. (*Id.* at 1 n.1.)

The opinion, therefore, applies to errors or thefts occurring at a bank holding the trust account (or similar third parties). It does not, by contrast, apply to accounting errors or staff thefts within a law firm or by a bookkeeper retained by a law firm to assist with trust accounting. In doing so, the opinion specifically calls out a lawyer’s duty under RPC 5.3 to adequately supervise nonlawyers for

whom the lawyer is responsible—whether law firm employees or independent contractors.

Second, in keeping with the lawyer’s duty of communication under RPC 1.4, the opinion requires that the clients affected by the error or theft be informed of the loss and the attendant circumstances. The opinion further counsels that—depending on the particular facts involved—some situations may also trigger the need to obtain a conflict waiver under RPC 1.7(a)(2) to continue the representation. Formal Opinion 2022-199 suggests that if the loss is substantial, it may create the risk of a material limitation on the lawyer’s professional judgment moving forward that would require a conflict waiver. A 25-cent transpositional error by the bank is not likely to create a conflict. A \$25,000 loss due to a security breach at the bank, by contrast, may create a conflict depending on the circumstances (including the bank’s response).

Solutions

Formal Opinion 2022-199 offers two principal solutions.

First, the opinion reasons that the lawyer (once the clients have been informed) may simply write a check to each of the clients. This approach would not involve depositing any of the law firm’s funds into trust and, therefore, does not invoke the restrictions in Formal Opinion 2005-145 at all. Formal Opinion

2022-199, however, does not address the separate potential issue of how a direct reimbursement might impact the client’s contractual obligation under a fee agreement to maintain a particular trust balance. Similarly, Formal Opinion 2022-199 does not discuss obtaining a release from the clients concerned. Releases from current clients raise their own difficult issues that are addressed by RPC 1.8(h)(2) and OSB Formal Opinion 2005-61 (rev 2016).

Second, the opinion allows a lawyer to repay the clients and—with the clients’ permission following disclosure of the loss—deposit those funds into the trust account. In this scenario, the opinion reasons that the lawyer has essentially transferred ownership of the funds to the clients involved and then followed their direction to deposit those client funds into trust. Because the lawyer in this setting is depositing client funds into trust, Formal Opinion 2022-199 finds that the restrictions on depositing lawyers’ funds in Formal Opinion 2005-145 do not apply.

Summing Up

Formal Opinion 2022-199 concludes with what amounts to a reservation that echoes its opening qualifier of “outside of the lawyer’s control.” The reservation underscores the limited scope of the opinion and non-delegable responsibilities lawyers generally have for managing their trust accounts.

Despite its limited scope, Formal Opinion 2022-199 offers a practical avenue for lawyers to reimburse their clients for trust account losses that are truly “outside of the lawyer’s control.”

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of 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 *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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.