

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 44
Issued on October 27, 2011.

BACKGROUND

The Committee has received a multi-part opinion request from a Nevada personal injury attorney who requested guidance as to the proper procedure for disbursing settlement funds from a trust account. One of the questions posed to the Committee requested guidance on a specific situation. However, the Committee is constrained to issuing opinions pertaining only to hypothetical circumstances.¹ Thus, this opinion will address the issues, and not the specific fact pattern.

QUESTIONS PRESENTED

- (1) Is it ethical for an attorney to make an immediate disbursement from his trust account of settlement proceeds if the attorney has funds and is willing and able to cover if the settlement check bounces?
- (2) Is it ethical for an attorney to make immediate disbursement from his trust account of settlement proceeds to his client, but not other creditors, if the attorney is willing and able to cover the check to his client if the settlement check bounces?
- (3) If one is required to wait until a settlement check clears before disbursement, how much of a delay is reasonable to wait before disbursement?

ANSWERS

- (1) No. An attorney may not disburse the proceeds of a settlement check and/or draft until the funds have cleared the banking process and have been physically deposited into the attorney's trust account. Furthermore, it is unethical for an attorney to use his/her own funds to "cover" a bounced check on the trust account.
- (2) No. *See* Response to Question No. 1.
- (3) A client is entitled to funds once they have been physically deposited into the trust account. Therefore, an attorney must act diligently in disbursing the funds in a prompt and timely manner once the check has cleared the banking process and the funds are actually present in the trust account.

¹ *See* Nevada Supreme Court Rule ["SCR"] 225 (2010).

² *See* ABA Model Rule 1.15, at comment 1. ("[a] lawyer should hold property of other with the care required of a professional fiduciary").

AUTHORITIES

- a. ABA Model Rule of Professional Conduct 1.15 (2009)
- b. Nevada Rule of Professional Conduct 1.3 (2010)
- c. Nevada Rule of Professional Conduct 1.4 (2010)
- d. Nevada Rule of Professional Conduct 1.15 (2010)
- e. Cases and References as Cited Herein

DISCUSSION

Attorneys are fiduciaries to their clients and regularly have possession of their clients' property.² Because this property routinely consists of money, whether for an escrow the attorney is handling or proceeds from a settlement, attorneys must have a trust account to safeguard the funds belonging to clients and other third parties.³ Attorneys are required to maintain accurate records of the transactions in their trust account and these records are to be preserved for at least seven (7) years beyond the termination of representation of each client.⁴

Unless a client specifically requests an individual account, in the essence of practicality, an attorney may use one trust account for all his/her clients' funds. Nevada Rule of Professional Conduct ["NRPC"] 1.15(a) requires that property of multiple clients which is held in the same trust account shall be identified as such and appropriately safeguarded. The funds of each client must be thought of and treated as separate from all other clients' funds.⁵ It is important for the attorney to remember that, even though these funds are commingled, the funds of one client cannot be used to pay the obligations of another client.⁶

The overall purpose of the trust account is to keep the clients' funds separate from those of the attorney.⁷ The requirement of separateness means that a lawyer may not commingle his or her funds

² See ABA Model Rule 1.15, at comment 1. ("[a] lawyer should hold property of other with the care required of a professional fiduciary").

³ See NRPC 1.15(a).

⁴ *Id.*

⁵ Illinois Attorney Registration and Disciplinary Comm., CLIENT TRUST ACCOUNT HANDBOOK, July 15, 2009.

⁶ *Id.* (NEVER allow one client's funds to be used, even momentarily, to satisfy another client's obligations (emphasis in original)).

⁷ See ABA Model Rule 1.15 at comment 1. ("[a]ll property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.")

with the funds of a client or a third person."⁸ NRPC 1.15(b) provides that an attorney may not deposit his/her own funds into a client trust account, except for the sole purpose of paying bank service charges . . . but only in an amount necessary for that purpose.⁹ In fact, when a client pays a retainer fee, the funds are to be deposited into the trust account until the fee is earned.¹⁰ However, once the fee has been earned by the attorney, those funds must be promptly transferred out of the trust account and into the attorney's account as leaving them in the trust account constitutes commingling."¹¹ Therefore, an attorney who deposits his/her own funds to cover a settlement check that does not clear the banking process is in violation of NRPC 1.15.

Upon receipt of a settlement check, an attorney has the duty to promptly notify the client of its receipt.¹² The rule goes on to state that the attorney shall promptly deliver to the client or third person any funds . . . that [they are] entitled to receive.¹³

Therefore, the issue is when is a client entitled to receive the funds from a settlement check which has been deposited into his/her attorney's trust account? If the funds are in the form of a check or draft, the client's entitlement to the funds is clearly not immediate as the client is not entitled to the funds of other clients. A client's entitlement to his/her settlement funds does not begin until the check has cleared and the funds have been actually deposited into the attorney's trust account.¹⁴

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⁸ John M. Burman, *PROFESSIONAL RESPONSIBILITY IN WYOMING*, at 189 (1st Ed. 2008).

⁹ *See also* ABA Model Rule 1.15, at comment 2. (“[w]hile normally it is impermissible to commingle the lawyer’s own funds with the client funds . . . it is permissible when necessary to pay bank service charges on the account. Accurate records must be kept regarding which part of the funds are the lawyer’s”).

¹⁰ *See* NRPC 1.15(c).

¹¹ Phil Pattee, Assistant Bar Counsel, *If It's In the Trust Account, It Belongs to Someone Else*, *NEVADA LAWYER*, March 2007.

¹² *See* NRPC 1.15(d); *see also* Charles W. Wolfman, *MODERN LEGAL ETHICS, PRACTITIONER’S EDITION*, at 181 (1986).

¹³ *Id.*; *see also* NRPC 1.4(a)(3) (A lawyer shall . . . “[k]eep the client reasonably informed about the status of the matter”).

¹⁴ Illinois Attorney Registration and Disciplinary Commission, *CLIENT TRUST ACCOUNT HANDBOOK*, July 15, 2009, *available at*: http://www.iardc.org/toc_main.html. (deposit in the trust account cannot be disbursed until the deposited item has cleared the banking process and has been credited to the trust account).

Handled in any other manner, the client would be receiving the funds of other clients and/or third parties, which, without their consent, is a violation of the attorney's fiduciary duty to those other individuals and constitutes conversion.¹⁵ Any unauthorized use of trust account funds which deprives the client or third person the use of those funds, even temporarily, is conversion.¹⁶ An attorney should never allow one client's funds to be used, even momentarily, to satisfy another client's obligations. Do not be tempted to do your client a favor by writing a check to the client for settlement proceeds before the settlement check has cleared on the theory that there is other money in the trust account. By doing so, you are putting other clients' funds at risk.¹⁷

Furthermore, the attorney has no entitlement to his/her fee until such funds have been actually deposited into the trust account as, if taken before such time, the attorney has taken other clients' funds to pay his/her fee in a totally unrelated matter. This, too, can be deemed as conversion.¹⁸

Unfortunately, this Committee cannot advise as to how long it is reasonable to wait for a settlement check and/or draft to clear the banking process as that is the expertise of the banking industry. There should be no disbursement from a trust account until the funds are physically in the attorney's trust account. However, if the settlement is in the form of cash or cashier's check, provided that the deposition is made into the attorney's trust account before the bank's cutoff for business, checks from the trust account may be issued on the same day.¹⁹

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¹⁵ See *In re Reeves*, 93 SH 599 (Ill., January 12, 1995), *aff'd* 93 SH 599 (M.R. 11056, May, 1995) (lawyer suspended for, *inter alia*, conversion of client funds due to issuing checks on the trust account before settlement checks cleared and funds actually deposited in the account); see also Illinois Attorney Registration and Disciplinary Commission, CLIENT TRUST ACCOUNT HANDBOOK, *id* at 111.B, (the rule of uncollected funds is simply: if you write a check from the trust account after you have deposited a check or draft on behalf of a particular client, but before the monies have cleared the banking process and have been credited to the trust account . . . either the check will bounce or you will be drawing on funds which belong to other clients. This is considered conversion even if you have no dishonest motive and no client is ultimately harmed).

¹⁶ Illinois Attorney Registration and Disciplinary Commission, CLIENT TRUST ACCOUNT HANDBOOK, *supra* note 14, at 111.B.

¹⁷ *Id.*

¹⁸ *In re Reeves*, *supra* note 15, at 3. (respondent often issued himself checks for attorney's fees drawn on his escrow account before the client check from which such fees should have been taken had cleared and its proceeds credited to his account. Therefore, respondent received monies that actually belonged to his clients without their authority).

¹⁹ See Minnesota Office of Lawyers Professional Responsibility. *Frequently Asked Questions About Trust Accounts*, available at: <http://www.mncourts.gov/lprb/trustfaq.html>.

CONCLUSION

A deposit into an attorney's trust account cannot be disbursed until the deposited item has cleared the banking process and has been credited to the trust account. If the attorney does not wait for the funds to be physically deposited into the account before disbursing, he/she is spending funds which belong to other clients and/or third parties without their prior consent, which constitutes conversion. Furthermore, an attorney who disburses funds immediately on the premise that he/she is willing to cover the check if it is not honored by depositing his/her own funds into the trust account violates NRPC 1.15.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunals charged with regulatory responsibilities, or any member of the State Bar.