Reference Note by Legal Ethics Counsel: Effective January 1, 2019, Rule 4-1.15(c) was repealed and a new 4-1.15(c) was adopted. Effective January 1, 2019, Comments [5] and [6] to 4-1.15 were repealed and new Comments [5], [6], and [20] were adopted. The sixth FAQ below, "How do I ethically handle flat fees?" should be read in accordance with new Rule 4-1.15(c) and Informal Opinion 2018-15.

The Ethics of Client Trust Accounts: Frequently Asked Questions

by Melinda J. Bentley[1]

Some of the most frequently asked questions of the Legal Ethics Counsel office focus on how to comply with ethical obligations related to handling client trust accounts. Lawyers are often wary of making a misstep with their client trust accounts, but by instituting sound accounting practices within their offices in accordance with Rules 4-1.145 – 4-1.155, lawyers should be able to readily comply with their safekeeping obligations. To assist lawyers with meeting these obligations, this article will provide answers to some of the most frequently asked ethics questions.

Q: How do I find out if my financial institution is approved to hold client trust accounts?

A: There are two steps by which financial institutions may be approved to hold client trust accounts. First, the financial institution must be deemed "eligible" by the Missouri Lawyer Trust Account Foundation in accordance with the requirements of Rule 4-1.145.[2] Second, the financial institution must be "approved" by the Advisory Committee pursuant to the regulation it has adopted, which includes overdraft reporting to the Office of Chief Disciplinary Counsel.[3] To find out if a financial institution is approved to hold client trust accounts, you may view the list published at www.Mo-Legal-Ethics.org.

Q: What do I do when I receive a payment through an instrument that contains both earned fees and advance payment of fees and expenses?

A: Rule 4-1.15(a)(4) requires that receipts be deposited intact, so you cannot make a split deposit.[4] The proper way to handle this situation is to deposit the full amount into the trust account. Once the funds have become "good funds," meaning the funds have actually been collected by the financial institution in which the trust account is located,[5] you should then transfer the earned fees into your operating account within a reasonably prompt period of time.

Q: May I keep my own funds in the client trust account?

A: No, you may not keep your own funds in the client trust account except an amount necessary for the sole purpose of paying bank service charges.[6] If you do have bank service charges that you pay regularly, you should transfer a reasonable amount of your own funds into the trust account on a regular basis to cover those service charges.

Q: What do I do when I know there is a valid lien, but the client wants me to disburse all of the settlement funds directly to the client?

A: When you receive funds or other property in which a client or third person has an interest, you have an obligation to promptly notify that person, and promptly deliver those funds to that person.[7] If there is a dispute as to who owns those funds, in this scenario a lienholder and the client, you are obligated to hold those funds separately until the dispute is resolved, but should disburse any portions that are not disputed.[8] Comment [8] to Rule 4-1.15 states that "[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." That comment further notes that a lawyer should not unilaterally try to arbitrate a dispute between a client and a third party, in this scenario a lienholder, but where 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."[9]

Q: How do I properly accept payments by credit card?

A: Missouri Informal Advisory Opinion 2014-05 addresses the ethical ways to handle accepting credit cards to pay fees and expenses. The first and best option is to find a credit card company that will permit you to choose for each deposit whether the funds will be deposited into your trust account or your operating account. That way, advance payment of fees and expenses go into your trust account, and earned fees go into your operating account. Debits must come only from your operating account. The second option is to place both the advance payment of fees and expenses, as well as the earned fees, into the trust account. Then you should transfer the earned fees into the operating account within a reasonably prompt period of time after they become "good funds."[10] As with the first option, debits must only come from your operating account.

Q: How do I ethically handle flat fees?

A: Flat fees are ethically permissible, but they are always subject to the reasonableness standard under Rule 4-1.5(a). Flat fees, as with all other fee arrangements, are always subject to refund. Missouri Supreme Court Advisory Committee Formal Opinion 128 provides that "nonrefundable" or "minimum" fees

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are ***not*** ethically permissible.[11] If the flat fees are being collected in advance of the services being performed, then they are advance payment of legal fees and expenses, and you must deposit them in the trust account in accordance with Rule 4-1.15 until such time as they are earned fees or expenses incurred.[12]

Q: How do I determine if I should be using an IOLTA or non-IOLTA trust account?

A: You are required to make a determination as to whether the client or third person funds should be deposited into an IOLTA or non-IOLTA account.[13] Rule 4-1.155(a)(3) provides factors for you to consider in making that determination, which include how much interest the funds would earn during the period you will be holding the funds, the costs of establishing and administering the non-IOLTA account, how you or the financial institution will be able to calculate and pay the interest to the client or third person, and other circumstances that affect the ability of the client or third person to earn income in excess of the costs incurred to secure that income. Rule 4-1.155(a)(4) provides that the determination as to whether the funds can earn income in excess of the costs "shall rest in the sound judgment of the lawyer or law firm, and no lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment."

Q: Can I have a nonlawyer assistant act as a signatory on my trust account?

A: Only a Missouri lawyer or a person under the direct supervision of a Missouri lawyer can be an authorized signatory or person authorized to make transfers from client trust accounts.[14] Comment [2] to Rule 4-1.15 notes that nonlawyer access to trust accounts should be limited and must be closely monitored by the lawyer. "The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds."[15] When you have a nonlawyer assistant helping you with your trust account, be sure that you properly train and supervise that nonlawyer assistant and make reasonable efforts to ensure that the nonlawyer assistant's conduct is compatible with your professional obligations.[16]

Q: What records must I keep regarding my trust account?

A: You must maintain complete client trust account records for at least six years after the termination of the representation or the date of the last funds disbursement, whichever is later.[17] (This timeframe was increased from five years to six years effective July 1, 2016.)[18] Complete trust account records are set forth by Rule 4-1.15(f) and include at a minimum:

(1) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(2) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(3) fee agreements, engagement letters, retainer agreements and compensation agreements with clients;

(4) accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(5) bills for legal fees and expenses rendered to clients;

(6) records showing disbursements on behalf of clients;

(7) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(8) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn, and the date and the time the transfer was completed;

(9) reconciliations of the client trust accounts maintained by the lawyer;

(10) those portions of client files that are reasonably related to client trust account transactions; and

(11) records of credit card transactions with clients to the extent permitted by law and the payment card industry data security standard.[19]

Q: How often must I reconcile my trust account?

A: Missouri Rule of Professional Conduct 4-1.15(a)(7) provides that "[a] reconciliation of the account shall be performed reasonably promptly each time an official statement from the financial institution is provided or available." Those reconciliations then become part of the required trust account records to be preserved.[20] In order to ensure proper accounting of all funds being held in the trust account, it is important to perform a reconciliation between the bank statements, receipt and disbursement journal, ledger, and any additional necessary documentation each time you receive an account statement or one is made available to you electronically by your financial institution. Typically, these statements are supplied by financial

institutions monthly, so a reconciliation should be performed reasonably promptly thereafter.

Q: What do I do if I cannot locate my client and I am holding client funds in my trust account?

A: First, you must make all reasonable efforts to locate your client as part of your duty of diligence under Rule 4-1.3. If, after reasonable efforts, you are unable to locate the client, you must continue to hold those funds in your trust account until such time that the client can be located. Missouri Supreme Court Advisory Committee Formal Opinion 118 provides that the funds may be disposed of in accordance with the unclaimed property laws of Missouri.[21]

Q: What do I do with excess funds in my trust account that were paid by a third party for the representation of a client?

A: Missouri Informal Advisory Opinion 20050041 suggests that "it is useful to have an agreement about what happens to the funds if: (a) the representation is prematurely terminated, or (b) the representation terminates normally, but there are funds left, or (c) the third party demands his or her money back while the representation is ongoing." The Rules of Professional Conduct do not address who owns excess funds in a third-party payee relationship; however, it is important to remember that Rule 4-1.8(f) prohibits a lawyer from accepting compensation for representing a client from someone other than the client unless the client gives informed consent, there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship, and confidential information is protected in accordance with Rule 4-1.6. If two or more persons claim an interest in those excess funds, follow Rule 4-1.15(e) and Comment [8].[22]

Q: When I am jointly representing a client with another attorney not in my law firm, and we have a division of fees agreement pursuant to Rule 4-1.5(e), may I hold the fees that are for that other attorney in my trust account?

A: Yes, that is the proper way to hold the fees that belong to another attorney not in your law firm when you have a division of fee agreement under Rule 4-1.5(e). For purposes of Rule 4-1.15, those are funds of a third person that should be properly secured separately from your own funds. You have an obligation to promptly notify the lawyer not in the law firm that you have received the funds and should promptly deliver those funds to the lawyer upon the funds becoming good funds, so long as the funds are not in dispute.[23]

Q: I have earned fees sitting in my client trust account. May I just pay my bills directly from that account?

A: No! It is imperative that you take ownership of any earned fees sitting in your client trust account. The trust account has the special purpose of protecting funds

being held for clients or third persons in connection with a representation, not holding earned fees of lawyers. Before utilizing any earned fees, you must take ownership of those funds by transferring them to an operating account. Otherwise the lawyer has defeated the special purpose of the trust account. "Paying personal expenses from a client trust account clearly is prohibited by Rule 4-1.15."[24]

If you still have questions about the Rules of Professional Conduct regarding trust accounts or any other ethics issue, you are always welcome to contact the Legal Ethics Counsel office (www.Mo-Legal-Ethics.org) to seek an informal advisory opinion about your prospective conduct under the Rules of Professional Conduct.

Endnotes

1 Melinda J. Bentley is Legal Ethics Counsel for the Advisory Committee of the Supreme Court of Missouri.

2 For information on the Missouri Lawyer Trust Account Foundation, please visit www.moiolta.org.

3 Mo. Sup. Ct. R. 4-1.145(a)(2); Rule 4-1.15(a)(2); Advisory Committee Regulation on Overdraft Reporting to Mo. Sup. Ct. R. 4-1.15.

4 *See also* Mo. Sup. Ct. R. 4-1.15, Comment [4].

5 Mo. Sup. Ct. R. 4-1.15(a)(6) and Comment [5].

6 Mo. Sup. Ct. R. 4-1.15(b).

7 *See* Mo. Sup. Ct. R. 4-1.15(d) (including possible exceptions to obligation to distribution requirement).

8 Mo. Sup. Ct. R. 4-1.15(e).

9 Mo. Sup. Ct. R. 4-1.15(e) and Comment [8]. *See also,* Mo. Informal Advisory Opinion 20000023 (regarding attorney's fees and expenses related to an interpleader action). Informal Advisory Opinions are published on The Missouri Bar's website at: http://www mobar.org/ethics/informalopinions htm.

10 *See supra* note 5.

11 Mo. Sup. Ct. Advisory Committee Formal Op. 128, Nonrefundable Fees (May 18, 2010). Formal Opinions are published on the Court's website at: http://www.courts mo.gov/page.jsp?id=11696.

12 Mo. Sup. Ct. R. 4-1.15(c).

13 Mo. Sup. Ct. R. 4-1.155(a)(3).

14 Mo. Sup. Ct. R. 4-1.15(a)(3) and Comment [2]; Mo. Sup. Ct. R. 4-5.3.

15 Mo. Sup. Ct. R. 4-1.15, Comment [2]; *See also In re: Farris,* 472 S.W. 3d 549, 559-561(Mo. banc 2015) (lawyer cannot avoid responsibility for the duty to safeguard and properly distribute trust
account funds by authorizing someone else to make improper transfers and expenditures instead of doing it himself, nor can lawyer avoid responsibility for trust account keeping records).

16 *See* Mo. Sup. Ct. R. 4-5.3(b).

17 Mo. Sup. Ct. R. 4-1.15(f).

18 Order dated March 7, 2016, re: Rules 4-1.15, Safekeeping Property, and 4-1.22, File Retention, effective July 1, 2016, at http://www.courts mo.gov/sup/index nsf/d45a7635d4bfdb8f8625662000632638/5fda2 OpenDocument.

19 Mo. Sup. Ct. R. 4-1.15(f)(1-11).

20 *See* Mo. Sup. Ct. R. 4-1.15(f)(9).

21 Mo. Sup. Ct. Advisory Committee Formal Op. 118 (Oct. 21, 1988). Formal Opinions are published on the Court's website at: http://www.courts mo.gov/page.jsp?id=11696.

22 *See supra* Question 4.

23 *See* Mo. Sup. Ct. Rule 4-1.15(a) and (d); *See also supra* note 5.

24 *In re Ehler,* 319 S.W.3d. 442, 450 (Mo. banc 2010).