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Ethics: Flat Fees and Trust Accounts – Updated Missouri Rule of Professional Conduct 4-1.15 Effective January 1, 2019: What You Need to Know

by Melinda J. Bentley[1]

The Supreme Court of Missouri entered an order on July 23, 2018, effective January 1, 2019, that affects how Missouri lawyers handle flat fees pursuant to Missouri Rule of Professional Conduct 4-1.15.[2]

In addition to amending the blackletter Rule to address the handling of certain advance flat fees, the order added a new Comment providing guidance regarding the change. Two existing Comments were also amended to give additional guidance to lawyers regarding disbursements from trust accounts. As always, when reviewing these changes, lawyers should remember that the text of a Rule of Professional Conduct defines the lawyer's professional role, but the Comments do not add obligations to a Rule.[3] Instead, Comments provide guidance to lawyers for practicing in compliance with a Rule and are intended to illustrate the meaning and purpose of a Rule. [4]

Handling Flat Fees Effective January 1, 2019

Rule 4-1.15(c) governs what funds go into a client trust account. The new subdivision (c), effective January 1, 2019, provides an optional choice for lawyers regarding advanced flat fee payments that do not exceed \$2,000 to be

deposited into another account instead of the trust account. The new subdivision (c) states:

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that an advanced flat fee which does not exceed \$2,000 is exempted from this requirement and may be deposited into another account.[5] (New language underlined)

Except for this option regarding advanced flat fees not exceeding \$2,000, all legal fees that are paid in advance, whether flat or fixed, and all expenses paid in advance, are required to be deposited into a client trust account and may only be withdrawn as fees or expenses are incurred. Of course, if the fees are earned when the lawyer receives them, those funds should not be deposited into the trust account, but into the operating or other account of the lawyer.

A new Comment [20], also effective January 1, 2019, provides further guidance regarding the new exception as to advanced flat fees not exceeding \$2,000 that may be deposited into another account. New Comment [20] provides:

[20] Even though an advanced flat fee that will be promptly paid and which does not exceed \$2,000 may be placed directly into the office operating account, if the attorney-client relationship is terminated prior to the advanced flat fee being earned then any unearned portion of the advanced fee shall be refunded. (New language underlined)

All legal fees that are paid in advance, whether flat or fixed, remain subject to the reasonableness standard of Rule 4-1.5 governing fees and would, therefore, be subject to refund if the fees are not earned. New Comment [20] simply clarifies that unearned fees that have met the permissive exception of new Rule 4-1.15(c) are still subject to refund.

Disbursements and “Good Funds” – Updated Comment [5] Effective January 1, 2019

Rule 4-1.15(a)(6) remains unchanged and sets forth the requirements for lawyers when making disbursements from the client trust account. It states:

No disbursement shall be made based upon a deposit:

- (A) if the lawyer has reasonable cause to believe the funds have not actually been collected by the financial institution in which the trust account is held; and
- (B) until a reasonable period of time has passed for the funds to be actually collected by the financial institution in which the trust account is held.

Comment [5] to Rule 4-1.15 continues to provide the same guidance on subsection (a)(6), noting “that a lawyer must wait a reasonable period of time for deposited funds to be collected by the financial institution in which the trust account is located before disbursing the funds on that deposit.” This Comment refers to this concept of the funds being collected by the financial institution as being “good funds” and notes that “[i]t is not sufficient to wait only until the deposit is ‘cleared’ or ‘available,’” as the transaction could still be reversed by the financial institution.

There is additional language in Comment [5] that is effective January 1, 2019 regarding a presumptively reasonable period to wait for a disbursement absent actual notice of a reason to wait longer. It states:

Waiting 10 days after the date the bank records the deposit is presumed to be a reasonable period, unless a lawyer has actual notice of a reason to wait longer on a specific deposit. A shorter period may be reasonable, in some circumstances. (New language underlined)

Despite this presumptively reasonable period of 10 days, lawyers should be mindful of the additional guidance that remains unchanged in the last sentence of Comment [5]:

A lawyer must also delay disbursement and take extra measures to ensure collection before disbursement if the lawyer is aware of information that causes doubt about the collection or collectability of the deposit.

Disbursements and Timing of Withdrawal of the Lawyer's Funds – Updated Comment [6] Effective January 1, 2019

Rule 4-1.15(b) remains unchanged, and it continues to provide that the only funds of the lawyer that are permitted to be in the client trust account are those funds for the sole purpose of paying financial institution service charges, and only in an amount necessary for those service charges. Comment [6] continues to provide guidance that accurate records must be kept as to which part of the funds belong to the lawyer, and that otherwise it is normally "impermissible to commingle the lawyer's own funds with client funds," except as permitted by Rule 4-1.15(b). Comment [6] adds guidance, effective January 1, 2019, as to when the lawyer should disburse the lawyer's funds from the trust account, providing:

Except as provided in 4-1.15(b), funds belonging to the lawyer must be disbursed to the lawyer reasonably promptly after the fee is earned or the expense paid and the client: has been billed, has had an opportunity to dispute the disbursement, or otherwise has agreed to the disbursement. Disbursement within a period of one month shall be presumed to be reasonably promptly. A longer period may be considered reasonably prompt, in some circumstances. (New language underlined)

Lawyers should be mindful of this presumption of a one-month period being reasonably prompt to transfer the lawyer's funds and consider all of the circumstances to determine if a longer or shorter time is appropriate. Additionally, lawyers should be ensuring that the lawyer's funds are "good funds" in accordance with Rule 4-1.15(a)(6) and Comment [5] prior to taking possession of the funds.

If you 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 (<http://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 Order dated July 23, 2018, effective January 1, 2019, In re: Repeal of subdivision (c) of subdivision 4-1.15, entitled "Trust Accounts and Property of Others;" and paragraphs [5] and [6] of the Comment to subdivision 4-1.15; all of the foregoing as a part of Rule 4, entitled "Rules of Professional Conduct," and in lieu thereof adoption of a new subdivision (c) of subdivision 4-1.15, entitled "Trust Accounts and Property of Others;" and new paragraphs [5],



[6], and [20] of the Comment to subdivision 4-1.15 entitled “Trust Accounts and Property of Others,” at

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3 Rule 4, Scope [14].

4 Rule 4, Scope [14] and [21].

5 Rule 4-1.15(c), effective January 1, 2019.

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