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CLIENTS' FUNDS - NO CASUAL MATTER

by
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It may have been years since some of us balanced our personal checkbooks. As long as clients are not affected and there is no fraud or other illegality, how you choose to conduct your personal financial business is none of mine. However, if you choose to handle your IOLTA or other client accounts without balancing them on a regular basis, it is my business.

Mass. R. Prof. C. 1.15 makes the issue of how to keep clients' funds my business. There are minimum requirements for attorneys who hold clients' funds. As will be detailed later in this article, these include establishing separate operating and IOLTA or other trust accounts, maintaining a detailed check register for each trust account (including showing the client matter to which each deposit or disbursement is attributed), maintaining individual ledgers for each client matter for accounts with pooled client funds, regularly balancing all trust accounts to the adjusted bank statements, and in addition regularly reconciling the total of all individual client ledgers to the check register balance for any account holding pooled client funds. This is not all that is required by Rule 1.15 but without complying with these requirements, it is virtually impossible for an attorney to fulfill her obligations to properly keep clients' property safe.

This information is not new to most of you. However, there are still a significant number of attorneys who do not hold and maintain clients' funds as required. This fact is demonstrated by the continuing and consistent number of reports of dishonored checks sent by banks to Bar Counsel. Since the dishonored check rule requiring this reporting became effective on October 1, 1995, Bar Counsel has received an average of 300 notices of dishonored checks annually, with a steady number of these resulting in discipline for inadequate record keeping. This year is no different, despite the ready availability of easy-to-use software for financial record keeping.

It makes me wonder why Bar Counsel continues to receive so many notices annually. My conclusion is that too many attorneys handle client funds with the same informality they apply to their own funds. Too many attorneys do not understand the difference.

Unfortunately, we seem to be educating the members of the bar who need to be reminded one attorney at a time. At the rate of 300 each year, it is a project which will never end unless the bar takes the initiative to educate itself. This article is another attempt at education.

Attorneys must balance IOLTA, and other client accounts. Bar counsel expects that the balancing and reconciliation of accounts to occur monthly. When accounts are not balanced regularly, checks are dishonored because of errors made months ago which would have been detected and corrected with a monthly balancing of the account. In addition, attempting to balance an account with even a moderate level of activity less frequently than monthly creates a situation where errors are less likely to be found. When the cause for an account being out of balance is difficult to detect or cannot be determined, the account will stay out

of balance permanently. There may be some accounts with little or no activity which need not be balanced monthly, but these are a rare exception.

Attorneys must keep a separate ledger for each client matter for which funds are held in an account where client funds are pooled, such as an IOLTA account. This means, for example, an individual ledger showing receipts and disbursements for each personal injury case, real estate escrow, or retainer for fees. A separate ledger should also be kept for any nominal personal funds that the attorney has deposited to the account to cover routine bank charges for the maintenance of the account, printing of checks, or the like. Without a regularly balanced separate ledger for each client matter, it is very easy to overpay one client to the disadvantage of another without realizing it for months. Without a ledger for each client matter, it is also virtually impossible to make a prompt and accurate response to any client concerning the use and amount of funds the attorney is holding for that client.

For pooled client accounts (IOLTA accounts or the few conveyancing accounts that meet the narrow requirements of Rule 1.15(e)), the balancing and reconciliation process does not stop there. It is then necessary that the total of the balances of all of the individual ledgers, including any amount held for bank charges, be equal to the check register balance. In turn, the check register balance for both pooled and individual trust accounts must equal the adjusted bank statement balance. Again this permits the early detection of any error and prompt and accurate response to any client inquiry concerning funds held by an attorney on behalf of a client.

Every attorney who holds funds for clients must maintain some system to perform these tasks. Although attorneys may use manual or "one-write" systems, the availability, efficiency, and low cost of software to track bank accounts makes this a simple and economical solution for almost every attorney to use to perform these activities. For anyone who does use an electronic system, the attorney must arrange for safe-keeping of the data through regular back-up and retention of tapes or disks just as paper records would need to be safely maintained. Note that Rule 1.15 requires records to be preserved for a period of six years after termination of the representation.

Until the casual approach to holding clients' funds among some members of the bar diminishes, this will remain a recurring subject of concern for bar counsel and for discipline for the attorneys who persist in their casual approach.

Please direct all questions to webmaster@massbbo.org.

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