

Lawyer neutrals and other people's money

by

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Last's month's column focused on trust accounts and overdrafts. One reader asked an excellent follow-up question: What about lawyers who serve as neutrals? What are they to do with other people's money that they hold? Many attorneys serve as parenting consultants, parenting time expeditors, special masters, custody evaluators, arbitrators, and mediators. Many receive retainers in advance and bill their services as a third-party neutral on an hourly basis over time. Where should the lawyer as neutral put those third-party funds, in their trust account or business account?

The rules

As always, it is helpful to start with the text of the rules. Rule 2.4(a), Minnesota Rules of Professional Conduct (MRPC), acknowledges this common role for lawyers:

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

Rule 1.15(a), MRPC, states the rule for safekeeping property: "All funds of clients or third persons held by a lawyer or law firm *in connection with a representation* shall be deposited in one or more identifiable trust accounts...." (emphasis added). When a lawyer serves as a neutral, the parties involved are not the neutral's clients. The lawyer is holding third-party funds but is not doing so "in connection with a representation." Therefore, Rule 1.15(a) does not require those funds to be placed in a trust account.

The rule continues: "No funds belonging to the lawyer or the law firm shall be deposited" in the trust account except monies to cover service charges or funds payable to both the client or third person and the lawyer or law firm. Based upon the language of Rule 1.15(a), MRPC, the OLPR has always advised lawyers that funds not held in connection with a representation, such as advance fees paid for neutral services, not

legal services, should not be in your trust account. The Minnesota Supreme Court has interpreted Rule 1.15(a), MRPC, in this manner as well. (*In re Varriano*, 755 N.W.2d 282, 289 (Minn. 2008): “Rule 1.15(a) explicitly requires that funds held in connection with a representation be deposited into a trust account. Implicitly these are the only types of funds that belong in a trust account. Lawyers' personal funds or fees to which they are entitled must not remain in the trust account.”)

What if you have this wrong?

To the extent that this surprises you, please don't panic. There is no duty to self-report a violation of the rules. This fact also surprises many people. The rules do require lawyers to report certain misconduct of others if they know of it (Rule 8.3(a), MRPC), but there is no duty to self-report. Now that you know, I recommend that you revise your business practices as soon as possible to hold advance third-party neutral fees in your business account, not your trust account. No doubt this will be welcome news for many, as it might eliminate unnecessary trust account record-keeping. If you only do this type of third-party neutral work, you may find you do not need a trust account at all.

Remember, though, if you are holding third-party funds *in connection with a representation*, those must go into trust, and it is a violation of the ethics rules to hold them in a non-trust account. Take care, as well, if you choose to act as an escrow agent for third parties. Those funds should not be in your trust account either, since they are not held in connection with a client representation. These rules may seem overly cautious, but the point of the rules is to protect money placed in trust. Holding other funds not relating to client representations in your trust account may put those funds at risk of claims by third parties or improperly shelter funds from rightful claims of third parties.

Other tips for lawyers acting as neutrals

Another question I have received on the ethics line from lawyers acting as neutrals relates to the duty to report misconduct of lawyers that they learn of while acting as neutrals. Neutrals have strong confidentiality rules, as do lawyers. For those acting as neutrals subject to Rule 114 of the Minnesota Rules of Practice, there is a specific exception to confidentiality if disclosure is required by a professional code. Rule 114.08(e) provides the “[n]otes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes.” Thus, if you

are required to report lawyer misconduct you learn of while serving as a neutral, you may do so consistent with your neutral confidentiality obligations. You can always give us a call if you have questions about whether you would be required to report particular misconduct. Whether or not a duty to report exists is one of the most frequent questions on the ethics line.

Conclusion

While I understand the impulse of lawyers to treat the handling of other people's money the same in all circumstances—put it into trust for safekeeping—the rules are more precise than that. If you are holding other people's money for purposes other than in connection with a client representation, those funds do not belong in your trust account. Please call our ethics hotline (651-296-3952) if you have questions, and thanks to a thoughtful reader for this column suggestion.