

# Conducting a trust account self-assessment

BY SUSAN HUMISTON ✉ [susan.humiston@courts.state.mn.us](mailto:susan.humiston@courts.state.mn.us)



**SUSAN HUMISTON** is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

**S**afekeeping client or third-party funds relating to a representation is one of the most important legal and ethical duties lawyers have. Safekeeping is not only an important ethical obligation with potentially serious licensure consequences; it's a fiduciary duty owed to our clients or others whose money we hold. This column has covered common trust account errors as well as examples of serious discipline imposed when the rules are not followed. This month I want to discuss ways that you can proactively conduct a self-assessment of your trust account practices. Whether you handle your own trust account or supervise others who do all the heavy lifting, ensuring that this important task is completed consistently and correctly is always worth your time. As the year ends and 2024 begins, I hope you are inspired to give yourself the gift of peace of mind relating to your trust account responsibilities.

## California's new annual self-assessment rule

My inspiration for this topic comes from California. Effective earlier this year, California created a Client Trust Account Protection Program to aid in the detection and deterrence of trust account misconduct.<sup>1</sup> There are several components to this program but one in particular stood out to me—a required annual self-assessment that attorneys must complete as part of their annual license registration. This assessment, the first of its kind in the nation, is just a series of questions that requires the lawyer to affirm in detail compliance with the reporting and recordkeeping ethics rules. It includes provisions that have long been part of the requirements in Minnesota: annual disclosure of account information and certification of compliance with the rules.

Minnesota requires lawyers to confirm annually that they keep compliant books and records for their trust account, and to disclose annually the bank and accounting information for their account(s). If you have a trust account, when you complete Step 2 on your annual registration, you are certifying that “I or my law firm maintains books and records as required by Rule 1.15, MRPC and Appendix 1 to the MRPC.”<sup>2</sup> Completing an annual self-assessment helps to ensure that this certification is accurate.

## Self-assessment content

California's self-assessment is done online.<sup>3</sup> Although it references the California rules, generally the same inquiries apply for a review of your trust account. Let's walk through some related questions you should ask yourself regarding your Minnesota trust account:

1. Is your trust account with a bank approved by this Office and have you reported its existence through your annual registration? Have you disclosed all trust accounts that you maintain?
2. Do you maintain all funds that should be in trust (client advance attorney's fees, advances for expenses, settlement funds, and third-party funds you have been provided) in a designated trust account separate from any personal or business accounts? How do you know this is true? Do you have a written policy? Have you talked with staff about this requirement?
3. Do you know what the required books and records are for your trust account? Appendix 1 to the Minnesota Rules of Professional Conduct describes the required books and records. Too many people misunderstand this question and think it just means their bank statements. Nope.
4. Do you have for each trust account: a check register; a subsidiary ledger for each client with funds in trust; a separate subsidiary ledger for nominal attorney funds held in the account (not to exceed \$200); an interest subsidiary ledger; a trial balance report of the subsidiary ledgers, updated monthly; a completed reconciliation report, prepared monthly; bank statements; cancelled checks (if provided); deposit slips; and memoranda documenting wire or electronic account transfers? All these documents are required to be kept.
5. Do you have a record of the monthly reconciliation of the check register balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance? Three-way reconciliation of the account is the hallmark of trust accounting recordkeeping and is something bookkeepers and accountants are not used to performing unless they have been instructed on the required records. Have you given your team Appendix 1 and made sure

they understand its requirements? Do you periodically review Appendix 1 to make sure you understand its requirements?

6. Do you have a process to ensure that timely notice is made to clients or others of transactions involving deposits and withdrawals related to their money? You should be accounting to clients and third parties no less than monthly any activity relating to their funds.
7. Do you have a process to ensure that attorney's fees are withdrawn timely when earned? You should not be holding earned fees in your trust account as a "cushion" or to avoid overdrafts. Doing so is commingling of attorney and client funds and is ethically prohibited.
8. Do you have more than \$200 of your funds or firm funds in your account? You can and should keep nominal sums (up to \$200) in the account to cover bank charges and service fees that may arise so that client funds are not used to cover trust account service charges.
9. Do you have a process to ensure that if a dispute arises regarding funds transferred from trust, those funds are returned to trust and not withdrawn until the dispute is resolved?
10. If you have delegated to others the maintenance of your trust account, do you have policies and procedures sufficient to ensure the account is maintained in compliance with Minnesota's ethics rules? Do you make sure that periodic training takes place so that personnel understand the policies and procedures?
11. If not performed by you, do you review on a monthly basis the monthly three-way reconciliation referenced above to ensure that it balances and any open questions are answered? A family member who is in private practice has a policy that he reviews his trust account records on a monthly basis the same day he gets them from his bookkeeper and does not do anything else except work on his trust account if the reconciliation does not match to the penny or if his review shows something out of line. In my view, this is the right approach to such an important fiduciary and ethical obligation. Do you have the same or a similar approach? It really is that important.
12. Do you have procedures in place to ensure that any payments in cash are documented by a receipt signed by both the recipient and the payor, and that copies of such receipts are maintained?
13. Is someone other than a lawyer a signatory on the trust account? If so, does a lawyer also sign every check? Checks must be signed by lawyers. Also, a lawyer must direct every electronic transfer or withdrawal from the trust account and a written record of that direction must be kept. Do you have those records?
14. Do you hold client funds on closed client matters? Have you investigated why this is the case? You have an obligation to timely return unearned and unused client funds upon termination of the representation. You must address those funds to ensure stale checks are accounted for and that former clients are located and their funds returned to them.
15. Do you have a process for periodic review of your policies and procedures and compliance with those procedures to ensure your trust account is being maintained in a manner consistent with the rules?

16. Do you ensure that your trust account and business account records are maintained for six years following the business/tax year to which they apply?
17. Having reviewed these questions, how do you feel about your trust account maintenance?

If you reviewed these questions, and they made sense to you, that is wonderful, and I hope that gives you some peace of mind. If a review of these questions raised questions in your mind, don't panic—but please do turn your attention to your trust account. Note also that this list of questions does not cover every single issue that might occur with a trust account but rather is intended to ensure you understand the main obligations relating to your account. Nothing is a substitute for sitting down with Rule 1.15 and Appendix 1.

### Resources

We have a lot of resources on our website, including sample forms that can assist you with your compliance. We are also in the process of creating a trust account school that we hope to launch in 2024 that you and your staff can attend to ensure you have the knowledge you need to comfortably manage your trust account. The state law library has an on-demand free basics training for trust accounting.<sup>4</sup> We are available every day to answer your trust account questions at 651-296-3952. Trust account recordkeeping may seem mysterious and daunting; it is not, and we are here to help. ▲

### NOTES

<sup>1</sup> Rule 9.8.5, California Rules of Court.

<sup>2</sup> Blank Minnesota Annual Registration Statement, available at <https://www.lro.mn.gov/for-lawyers/annual-lawyer-registration-fees>.

<sup>3</sup> California's Trust Account Protection Program, including a draft of the self-assessment, is available at <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Account-Protection-Program>.

<sup>4</sup> Visit the State Law Library website at <https://mn.gov/law-library/services/index/on-demand-cle-videos.jsp>.