

Does This Belong To Me?

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It seems so simple. It is simple. Client funds paid to the lawyer go into the lawyer's trust account. Funds belonging to the lawyer do not. Yet despite the simplicity of these concepts, lawyers occasionally forget their obligation to place client funds into trust. Or, more accurately, lawyers forget how to ensure that funds coming into their possession are theirs and not the client's. A quick review of the applicable rules can help lawyers solve this problem.

The requirement that "all funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable interest bearing trust accounts" is established in Rule 1.15 of the Minnesota Rules of Professional Conduct.

As a corollary to this, the Rule provides that only client funds go into the trust account. "No funds belonging to the lawyer or law firm shall be deposited therein except as follows . . . [e.g., funds reasonably sufficient to pay service charges]." So far, so good.

Now, what if a lawyer verbally tells the prospective client that his fee for the representation is a set amount, payable at the beginning of the representation. The client understands this and pays the lawyer the amount demanded. The lawyer considers the fee "earned" and places the money in his business account. Or, what if another lawyer verbally tells the prospective client that the funds the client is giving her are to secure her services and may not be refunded? The lawyer then places the funds in her business account. Have the lawyers placed the funds in the proper place? Under the limited facts given here, the answer is no. The funds described above are client funds and must be treated as such.

Opinion 15 of the Lawyers Professional Responsibility Board Opinions provides that "all fees paid at the beginning of the representation shall be presumed to be advance fee payments unless a written fee agreement signed by the client states otherwise." The first attorney has no written fee agreement with the client. Opinion 15 reiterates the obligation established by Rule 1.15 that all advance fee payments must be deposited into an interest bearing trust. Opinion 15 also explains that the lawyer may withdraw the funds when earned provided the client is given: "(1) written notice of the time, amount and the purpose of the withdrawal; and (2) an accounting of the client's funds in the trust account."

As to the second attorney, she also lacked a written agreement regarding the funds. Although Opinion 15 provides that "funds paid to a lawyer pursuant to an availability or non-refundable retainer agreement are not required to be deposited in trust or held in trust," the opinion does not stop there.

"All availability or non-refundable agreements must be in writing and signed by the client." In other words, funds paid as part of an availability or non-refundable retainer agreement need not be placed in trust, if there is a written retainer agreement signed by the client. However, absent a written agreement the funds are still considered to be the client's.

In addition, the written retainer agreement cannot be just any sort of writing. The retainer agreement must comply with the very specific requirements of Opinion 15. Let us suppose that the lawyer has the client sign her "standard" retainer agreement that explains in numbered paragraphs:

- the lawyer's rate,
- how the lawyer is to be paid,
- the fact that the retainer is non-refundable, and
- how unpaid fees are to be handled.

The client signature line is after the last paragraph. The client signs the document, pays the money, and the lawyer places the funds into her business account.

The lawyer still has not met her ethical obligations.

Opinion 15 requires a "final paragraph immediately above the client signature line" that informs the client that: "(1) the funds will not be held in a trust account; and (2) the client may not receive a refund of the fees if the client later chooses not to hire the lawyer or chooses to terminate the lawyer's services." Written retainer agreements that fail to have this language (or have the required language but bury it in the body of the document) are not in compliance with Opinion 15. Attorneys have received admonitions for failing to comply with these requirements.

Opinion 15 provides a procedure for clearly establishing that funds the lawyer receives are the lawyer's and not the client's. If an issue subsequently arises about the lawyer's handling of funds, the lawyer's compliance with Opinion 15 will provide the Director's Office with an easy method of verifying whether the lawyer properly handled the funds.

It's that simple.