

Handling Retainer Fees

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The improper handling of retainers has often resulted in discipline of the offending attorney. (See "Summary of Admonitions," in the March 2001 issue of *Bench and Bar*.)

Opinion 15 of the Lawyers Professional Responsibility Board (LPRB) sets out the framework for dealing with retainer fees. The opinion generally provides that funds belonging to the client should be placed in a trust account and only withdrawn when earned. Funds belonging to the attorney should not be placed in the trust account. As simple as this sounds, every year attorneys are admonished for failing to handle funds properly.

The decision whether to place funds into the trust account or the business account hinges on whether the money belongs to the client or the attorney, as set forth above. Client funds belong in the trust account. In order to avoid commingling, earned attorney funds should not be deposited into the trust account. When an attorney bills a client for services performed and subsequently receives payment, the fees have already been earned. Such fees belong to the attorney and should be deposited in the business account.

When the attorney receives funds from the client at the beginning of representation and there is no retainer agreement, the money will be presumed to be an advance against future fees, and should be deposited into the trust account. Opinion 15 advises:

All advance fee payments must be deposited into an interest bearing trust account in accordance with Rules 1.15(a)(2) and (f), Minnesota Rules of Professional Conduct. A lawyer may withdraw fees from the trust account 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. See *In re Lochow*, 469 N.W.2d 91 (Minn. 1991).

When an attorney enters into a written retainer agreement with the client at the start of the representation, the retainer will control how the money is handled. If the retainer agreement describes the fee as an advance against future billings, the money belongs to the client until the billing occurs – the same as if there were no retainer agreement. Client money must be deposited into the trust account. Once the fee is earned, it may be taken out of the trust account, upon proper notice to the client.

If the retainer agreement describes the fees as earned upon receipt or as a nonrefundable retainer, the money belongs to the attorney, and should not be placed in the trust account. Opinion 15 states:

Funds paid to a lawyer pursuant to an availability or non-refundable retainer agreement are not required to be deposited into a trust account or held in trust. All availability or non-refundable retainer agreements must be in writing and signed by the client. *Lochow*, 469 N.W.2d at 98.

Note that the opinion also states that in order to qualify as a nonrefundable retainer, the retainer agreement

should include a final paragraph, immediately above the client signature line, which 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.

There are, of course, slight variations on the language employed in retainer agreements, but to stay within the parameters of Opinion 15, it should give the client the prescribed information and the information should be placed in a prominent position immediately above the client's signature – not buried in pages of text.

In one instance, an attorney whose retainer agreement language complied with Opinion 15, nevertheless was disciplined for violating Rule 1.15, MRPC. The attorney deposited "earned upon receipt" retainers into his business account, as required. The attorney represented criminal defendants and always obtained the retainer before putting in an appearance at court. Often, however, the client did not sign the retainer agreement until they met at the courthouse for the first appearance, or even later in the representation. As a result, when the attorney received the funds earlier, he did not have in place a retainer agreement that allowed him to claim the funds as his own. The attorney modified his practice by depositing all retainers into his trust account and removing the funds only after a signed retainer agreement was in place.

As always, if an attorney is in doubt as to whether to deposit funds into the trust account or business account, or needs any other ethics advice, the attorney advisory opinion service is available to help. Call the Office of Lawyers Professional Responsibility at (651) 296-3952 or (800) 657-3601, Monday through Friday during normal business hours.