

**OPINION NO. 9**  
**MAINTENANCE OF BOOKS AND RECORDS**

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The Lawyers Professional Responsibility Board several years ago issued Formal Opinion No. 9, concerning appropriate books and records to be maintained by lawyers engaged in the private practice of law. The purpose of Opinion No. 9 was to give specific guidance to lawyers about how to comply with those provisions of Canon 9, Code of Professional Responsibility, which mandate that certain books and records be kept by attorneys engaged in the private practice of law.

Recently, Canon 9 was amended to implement the interest on lawyer trust account (IOLTA) program. The other substantive rules concerning the maintenance of books and records in the handling of client trust properties were unchanged. In order, however, to bring Formal Opinion No. 9 into compliance with the new IOLTA provisions, the Board, at its June 23, 1983 meeting, amended Opinion No. 9.

The amended opinion is published elsewhere in this issue of *Bench & Bar*. I believe Opinion No. 9 is a very clear and detailed opinion and does not require reiteration here. I hope that all attorneys engaged in the private practice of law will take this opportunity, however, to carefully review Opinion No. 9 and ensure that their own office books and records are in compliance with it.

One perhaps unanticipated result of the adoption of IOLTA is the heightened concern displayed by attorneys about the proper handling of client funds. Many questions have been asked recently by attorneys about the types of monies which constitute trust funds. Surprisingly, there appeared to be some widespread confusion about the proper uses of a trust account and about the kinds of monies which were to be deposited therein. As is the case with the debate about the proposed Model Rules of Professional Conduct, new proposals have the merit of at least reminding attorneys of their long-standing obligations. I am confident that many questions about trust accounts have been answered and that compliance with applicable regulations will be higher than ever. It is in this spirit that I now urge all attorneys to review carefully Opinion No. 9.

I will herein answer one question which has arisen repeatedly during the past several months. There appears to be much confusion about where client retainers are to be deposited. This is a question of both substance and timing.

In some cases, an attorney may charge what is known as an availability retainer. In business settings, an attorney may charge a monthly rate to a business and then be available to perform routine legal services throughout the month at no additional cost. In other cases, the attorney may charge a retainer simply for undertaking to handle a matter. These kinds of retainers are common in dissolutions and criminal matters.

In our opinion, availability retainers are generally earned when they are received and the case is accepted. Generally, then, such retainers are the property of the attorney and may be deposited in the business account. Since fees are to be reasonable (*i.e.*, bear some relationship to the value of the services rendered), extreme caution must be utilized in charging nonrefundable availability retainers. Nevertheless, within reasonable limits, they are permissible; and, under such circumstances, are earned when received.

These days a more common kind of retainer is actually a deposit against future services and out-of-pocket expenses. In such cases where the services have yet to be performed or the expenses have yet to be incurred, the money is, in effect, client money which belongs in the trust account. In such cases, the funds may be withdrawn from the trust account as services are performed or as expenses are incurred. Until services have been performed or expenses incurred justifying the withdrawal of these trust monies, the advance deposit should be treated like other trust monies and be retained in the appropriate fiduciary account.

We have often urged that there be periodic billings during the course of handling an extended legal matter. Similarly, we would suggest that notice be given to the client monthly or at other reasonably frequent intervals concerning the status of the advance deposit, showing amounts withdrawn attributable to services and expenses and the remaining balances, if any. Where the client disputes the lawyer's right to the amount withdrawn, the lawyer should ordinarily redeposit that amount in the trust account until the fee dispute is somehow resolved. *See* DR 9-102(A)(2).

One other cautionary note deserves mention. Where the lawyer has received a deposit retainer and the lawyer has earned the fees, the funds should be withdrawn reasonably promptly. This is important because, just as the lawyer is not entitled to use trust funds for his or her own purposes, the trust account is also not to be the depository of lawyer funds. Thus, in order to avoid allegations of commingling, earned fees should not be permitted to languish in the trust account for extended time periods.

Some of the foregoing provisions many seem complex. They do, however, also underscore the importance of the monthly reconciliations mandated by Opinion No. 9. Where such reconciliations have occurred, the problems which I have discussed above are unlikely to be present.

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### **AMENDED OPINION NO. 9** **Maintenance of Books and Records**

To establish compliance with the applicable provisions of the Code of Professional Responsibility relating to funds and property held in a fiduciary capacity, every attorney engaged in the private practice of law, or partnerships or professional corporations of which the attorney is a member, associate or employee, should maintain the books and records described below. Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail would be acceptable. Books and records may be prepared manually, by machine or by computer.

The following books and records should be maintained for funds and property received and disbursed other than in a fiduciary capacity:

1. A cash receipts journal reflecting monies received on his own account such as fees received and other non-fiduciary receipts. The receipts journal should identify the source of the receipt and show the date of the receipt. Receipts should be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item.

2. A cash disbursements journal reflecting all monies disbursed on his own account.
3. A record in the form of a fees book or file of copies of billing invoices reflecting all fees charged and other billing to clients.
4. Bank statements, cancelled checks, and duplicate deposit slips.
5. A periodic reconciliation of the cash balance derived from the cash receipts and disbursements journal totals, the checkbook balance and the bank statement balance.

The following books and records should be maintained for funds and property received and disbursed in a fiduciary capacity for clients or others.

1. An identification of all trust accounts maintained, including the name of the bank or other depository, account number, account name, dates account is open, agreement with bank establishing account and its interest bearing nature. A record should also be maintained showing clearly the type of each such account as pooled, without allocation of interest (DR 9-103(B)), or pooled with allocation of interest (DR 9-103(C)(2)) or individual, including the client name. (DR 9-103(C)(1)).
2. A cash receipts journal (separate from the non-fiduciary funds journal) listing the sources of the receipt and the date of the receipt. Receipts should be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item.
3. A disbursements journal listing the date of the disbursement and payee. All disbursements should be made by check.
4. A subsidiary ledger containing a separate page for each person or company for whom monies have been received in trust showing the date of receipt and the amount, monthly accruals of interest, if any, the date and amount of each disbursement, including disbursements from accrued interest for costs of establishing and administering the account and any unexpended balance. For accounts established pursuant to DR 9-103(B), interest accruals and transaction costs need not be entered in ledgers or in monthly trial balances if such accruals and cost are completed by the depository and net interest paid by the depository to the Lawyers Trust Account Board.
5. A monthly trial balance of the subsidiary ledger showing the name of the client; and the balance of the client's account at the end of each month.
  - (a) The total of the monthly trial balance should reconcile with the control figure computed by taking the beginning balance, adding (1) the total monies received in trust for the month and (2) the interest accrued for the month and deducting (1) the total of monies disbursed for the month and (2) the costs paid for establishing and administering the account.
  - (b) Monies disbursed for a client which exceed monies received should be supported by an adequate written explanation.
6. A monthly reconciliation of the cash balance derived from the cash receipts and cash disbursements journal totals, the checkbook balance, the bank statement balance, and the subsidiary ledger trial balance total.

7. Bank statements, cancelled checks, duplicate deposit slips, and bank reports showing trust account interest accrued, transaction costs and net amounts paid to the Lawyers Trust Account Board.

8. A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others, provided that routine files, documents and items such as real estate abstracts which are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and redelivery.

Adopted: June 23, 1983.

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Robert F. Henson  
Chairman, Lawyers Professional  
Responsibility Board

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