

There may not be any there, there
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Financial responsibility is important and care must be taken to pay close attention to how monetary transactions are handled. This is particularly true when holding money on behalf of others. Attorneys have a heightened duty when holding funds for others. The Minnesota Rules of Professional Conduct require that when an attorney holds funds on behalf of others that the funds be held in a trust account, separate from the attorney's or firm's money and that a ledger be kept for each client who has money in the trust account.

In order to ensure good fiscal policies, distributions should not be made until the deposit instrument has cleared the bank that holds the account on which the instrument is written. In other words, no distributions should be made until the payor bank has agreed to pay the instrument. While this seems simple, depositors often confuse funds availability for the instrument clearing the payor bank.

The confusion is caused because the attorney's bank frequently makes a portion of or all of the funds available to the attorney within a few days of the deposit even though the instrument has not been cleared by the payor bank. Pursuant to Regulation CC, banks are required to make certain portions of deposited funds available to the depositor in accordance with the amount of the deposit. For example, the first \$100 of a non-cash deposit must be made available to the depositor within one business day of the deposit.

Ethical problems are created when the payor bank refuses to pay the instrument or in other words, the payor bank bounces the instrument and the attorney has made distributions based on the instrument. If the attorney has made distributions based on the bounced check and the amount of the distributions exceeds the balance of funds in the attorney's trust account, the trust account becomes overdrawn. Pursuant to the Overdraft Notification Program enacted by the Minnesota Supreme Court, the bank must notify the Director's Office of the overdraft and the Director's Office will initiate an inquiry. Even if the amount of the distribution does not exceed the balance in the attorney's trust account, the Director's Office has received calls from attorneys regarding problems caused by bounced instruments.

Frequently attorneys will tell the Director's Office that the bank told them the funds were available before they made any distributions. The problem is that the funds are

only “sort of” there. Although banks make funds available, that is not the same as the payor bank saying that the instrument is valid. Even with electronic transfer, it may take several business days for the instrument to get to the payor bank and for the payor bank to send back notification that the instrument has been dishonored. So, although all or part of a deposit has been made available that does not mean the instrument has been accepted by the payor bank and if it is not accepted by the payor bank, then the presenting bank will recoup the money from the depositor.

When making distributions based on funds availability versus a cleared instrument, an attorney runs the risk of having shortages in their trust account if the instrument bounces. That is, the attorney runs the risk of using money belonging to Client A to cover distributions made on behalf of Client B. If an attorney finds themselves in this situation, they need to make Client A whole.

In order to avoid the above problem, remember that availability does not mean the deposit instrument has cleared, i.e., been paid by the payor bank. It is important that an attorney wait until the check has been paid by the bank it is written on before making any distributions. This is especially important in light of formerly low risk instruments, such as certified checks, are becoming more suspect as scammers are using forged and fraudulent certified checks to perfect their scams.