TRUST ACCOUNT RECORDKEEPING:
REQUIRED READING

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I didn't go to law school to be an accountant or a bookkeeper! Why do I have to maintain all these complicated books and records?" Indeed, few of us went into law school either knowing a significant amount about bookkeeping or particularly wanting to. Furthermore, the typical accounting class that may have been taken in law school focused on understanding corporate balance sheets, assuming that a client's accounting issues were the only ones facing a new lawyer.

Recently, based upon complaints our office has investigated, including trust account overdraft notices,Ftn 1 there has arisen a gnawing sense that too many lawyers have adopted the above lament. They have forgotten (or never learned) the importance of accurately keeping and maintaining the required trust account and business account books and records. Proper record keeping is not just a technical burden meant to keep lawyers from the real practice of law. It is an integral part of protecting the public, which is the goal of the lawyer discipline system. So, perhaps as a reminder, a brief trust account primer is in order.

Perhaps the most profound symbol of the trust that a client or third person places in a lawyer is that they entrust their funds or other property to her. In recognition of the significance of that gesture, the attorney must exercise the highest degree of corresponding fiduciary care in safekeeping that property. Proper maintenance of fiduciary accounts, best exemplified through maintaining the appropriate books and records for trust accounts, is therefore of critical importance. And while it's true that many lawyers at mid- to large-size law firms do not have to deal personally with the record-keeping requirements that the Rules of Professional Conduct impose on attorneys, trust account and business account record keeping is essential for the solo practitioner or small-firm lawyer who may not employ an accountant or bookkeeper. In either situation, the lawyer is the responsible party upon whom the Minnesota Rules of Professional Conduct (MRPC) impose a nondelegable obligation to ensure and certify that proper books and records are being kept.

BOOKS AND RECORDS

Rule 1.15(h), MRPC, *requires* all lawyers engaged in private practiceFtn 2 to maintain books and records sufficient to demonstrate compliance with the rule's trust account requirements, business records to show income and expenses from the lawyer's practice, and to preserve them for six years. Rule 1.15(i) requires such lawyers to certify annually that they do in fact maintain such records. That section also directs the Lawyers Board to publish annually what books and records are required in order to comply with subsection (h).Ftn 3 The Lawyers Board has established and published what those books and records are in what is known as Appendix 1 to the MRPC. This is an appendix worthy of taking out and reading, for failure to maintain the required books and records is, by itself, subject to discipline.

What are books and records? In very generalized terms, "records" refers to documents that are part of the normal operation of a bank account, such as bank statements, canceled checks, deposit tickets, and notices of transactions, *e.g.*, the notice issued when interest is remitted to the Lawyers Trust Account Board. A record of fees paid into the law office's business account also must be maintained. "Books" then are the journals and ledgers maintained to keep track of client funds, such as a check register, client subsidiary ledgers, and monthly trial balances and reconciliations.

The client subsidiary ledgers and monthly reconciliations comparing the total of those ledgers to the adjusted bank statement are the records most critical to fulfilling the trust account requirements. Maintaining these is not unlike the periodic balancing of a checkbook or savings account that almost every lawyer must have done at some time in life. Nevertheless, the number of lawyers who appear to lack such basic accounting skills is astounding.

A subsidiary ledger must be prepared for each client on whose behalf the lawyer deposits funds into a trust account.Ftn 4 Each deposit and disbursement on behalf of the particular client must be recorded, both on a general register and in the client's subsidiary ledger. The balance for each client should never be a negative amount. "Borrowing" funds from one client's funds to cover an obligation on behalf of another client constitutes misappropriation, as does failing to have on hand sufficient funds to cover the amount that should be held in trust for all clients combined, even if the overall account does not become overdrawn.Ftn 5 Such trust account shortages are subject to discipline.

A monthly reconciliation of these subsidiary ledgers compares the total amount that should be on hand for all clients to the adjusted bank statement balance. The numbers should be identical. If not, a shortage may exist.

Lawyers are allowed to maintain a minimal amount of their own funds in a pooled trust account sufficient to cover service charges or check-printing costs. A separate ledger must be created for the lawyer's funds as if he were a client. Retaining greater amounts of the lawyer's own money in a trust account, including earned fees, is considered commingling and is a serious violation.

As noted, every year as part of completing the attorney registration statement, lawyers must certify that they or their law firm maintain books and records as required by Rule 1.15 and Appendix 1. Many lawyers likely sign the certification without much real thought as to whether the statement is in fact true. Signing ought to cause lawyers to reflect on the state of their records and ascertain whether they are in compliance. Certifying falsely, certainly when the lawyer has known he kept no records at all, has been the basis for discipline.

"I did not knowingly take any client funds." This too is heard from many lawyers who are the subject of a trust account overdraft inquiry or who are the subject of a disciplinary investigation concerning their trust account. In many such instances the statement is true, but from the perspective of the client whose money is missing, does the distinction between dishonesty and ineptitude on the part of their lawyer really matter? Clients want their lawyer to be scrupulously honest, of course, but also conscientious. And even unintentional or negligent misappropriation of client funds due to poor record keeping may result in public discipline.Ftn 6

Informational Resources

All of the information necessary to fully comply with Rule 1.15 and Appendix 1 is available through multiple sources. The Director's Office and Lawyers Board's websiteFtn 7 has an extensive section devoted to trust account record keeping, including Appendix 1. Also on the website is a detailed list of frequently asked questions, covering such issues as how long to wait for checks to clear, how to deal with stale checks, and how to move or close a trust account. Two instructional booklets that explain how to manually maintain trust account records and how to maintain them using *Quicken*® are available from the Director's Office in manuscript form and are reproduced on the web as well. Both versions include clear illustrations. The MSBA provides similar information on using *QuickBooks*® on its website.Ftn 8 Some of the many ethics-related continuing education seminars presented each year devote time to the topic of trust account requirements as well. In sum, there really is no excuse for not knowing how to maintain records appropriately.

Notes

1 *See* Rules 1.15(k)-(o), MRPC, and Shaw, "Overdraft Notification," 63 *Bench & Bar of Minnesota* 4 (April 2006), 18-19.

2 Most public lawyers and lawyers employed by corporations do not directly handle client funds, and therefore are exempt from the record-keeping obligations of Rule 1.15, MRPC.

3 Somewhat paradoxically, Rule 1.15(h) also states that equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail are acceptable.

4 Most lawyers maintain a pooled IOLTA trust account, with the interest generated paid to the Lawyer

Trust Account Board for use in assisting legal services providers. Rule 1.15(e), MRPC. Separate interest-bearing accounts for individual clients are also appropriate in some instances. Rule 1.15(f).

5 *See In re Isaacs*, 451 N.W.2d 209, 211 (Minn. 1990), in which the Supreme Court defined misappropriation as "whenever funds belonging to a client are not kept in trust and are used for any purpose other than that specified by the client." Intent is not a necessary element for misappropriation to occur, but does affect the level of discipline.

6 *See* fn. 5, *supra*.

7 *http://www.courts.state.mn.us/lprb* or *http://www.mngov.org/lprb*.

8 *http://www.practicelaw.org/members/management/home.php*.