

You Should Really Already Know This . . .

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Lawyers Professional Responsibility Board Opinion 15 was adopted on Sept. 13, 1991. This opinion sets forth specific requirements for dealing with various types of advance fee payments from clients to attorneys. It is a straightforward, simple opinion. Compliance with the terms of the opinion does not create an onerous burden for attorneys and ought to be a fairly routine administrative task. For some reason, however, this still remains a problem.

Over the last 18 months close to a dozen admonitions have been issued to attorneys for Opinion 15 violations.

The general rule is this: If you have not yet earned a fee paid to you by a client, the money goes into a trust account until it is earned. The one exception to the rule is when the advance fee is intended as an availability or nonrefundable retainer. In order for an advance fee to properly be considered an availability or nonrefundable retainer, you must have a written fee agreement signed by the client. The agreement must contain a final paragraph immediately above the client signature informing the client that the funds will not be held in a trust account and that 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. All availability or nonrefundable retainers must be reasonable in amount.

Here are some excuses for noncompliance with Opinion 15 that do not work. "My client didn't give me the money. His/her friend/relative/significant other gave me the money on his/her behalf." Let's be real here. Yes, Opinion 15 discusses fees "paid by a client." It is not, however, much of a stretch to read into the opinion a requirement that fees paid on behalf of a client must also be handled in accord with Opinion 15. Note that Rule 1.15, Minnesota Rules of Professional Conduct (MRPC), the underlying basis for Opinion 15, requires all funds of clients or third persons held by a lawyer in connection with a representation to be deposited in a trust account.

"My client and I agreed that the fee was nonrefundable, but the client just never signed the agreement." Until the client signs on the dotted line, any advance fee payment must be held in trust. Remember this saying - "If the client didn't sign, the money's not mine - yet."

"My client couldn't sign an agreement, he was in jail and needed immediate representation." Presumably, at some point, you will have some opportunity for contact with the client. It is OK to accept a retainer paid on behalf of a jailed client in order to undertake an emergency representation. But, until the client signs the appropriate agreement, the retainer must be held in trust until earned.

"My client signed an agreement that clearly states the retainer is nonrefundable, but I just didn't include the required language above the signature." The language of Opinion 15 is clear. You must include the required language in a final paragraph above the client's signature.

Finally, please note that Opinion 15 requires that the client be provided with notice and an accounting upon withdrawal of earned funds from the trust account. The accounting need not be complex. You simply need to itemize how much was originally held in trust, how much was withdrawn for fees and expenses and how much remains in trust. If the client objects to any payments made from the trust account, the disputed portion of the funds must remain in trust (or be restored to the trust account, if already disbursed) until the dispute is resolved. See Rule 1.15(b), MRPC.