NEBRASKA
State Bar Association

LAWYER TRUST ACCOUNT HANDBOOK

A Practical Guide for Making Trust Account Decisions

This non-authoritative document should be used in conjunction with the text of the Nebraska Court Rules of Professional Conduct and related Nebraska Ethics Advisory Opinions. All interpretations and decisions relating to trust accounts remain the ultimate responsibility of the individual lawyer.

Revised September 2014

The Nebraska Court Rules of Professional Conduct impose strict fiduciary standards on any lawyer who holds the property of others. These standards are detailed in Nebraska Court Rule of Professional Conduct §3-501.15, “Safekeeping Property.” As violations of the Rules can result in harsh discipline, including disbarment, it is crucial that lawyers thoroughly understand the rules and employ proper procedures.

This handbook focuses upon a lawyer’s responsibilities for the safekeeping of money held in a trust account. Other types of property held on behalf of clients and third parties must also be safeguarded under a lawyer’s fiduciary responsibility. Specifics related to the manner of retaining items other than money can also be found in Neb. Ct. R. of Prof. Cond. §3-501.15.

Quick Reference to Subjects Covered

GENERAL PRINCIPLES

The purpose of a trust account is to safeguard client and third party funds. The fiduciary nature of the relationship and the need for public confidence in the legal profession require attorneys to maintain trust accounts separate from the attorney's personal or business operating account and from other fiduciary accounts.

All lawyers admitted to practice with an office in the State of Nebraska must have and maintain a trust account unless such lawyer is a member of the Nebraska judiciary, or does not reasonably expect that he or she will receive into his or her hands funds of clients. A lawyer or law firm must maintain an interest-bearing insured trust account for clients' funds, unless an election not to do so is submitted in accordance with the procedure set forth in Neb. Rev. Ct. Rules §3-903(C). No earnings from such an account shall be made available to a lawyer or law firm.

The responsibility for compliance with trust accounting rules lies solely with the attorney. This duty cannot be delegated away, so all administrative work on trust accounts must be closely reviewed and supervised by the attorney.

TRUST ACCOUNT SPECIFICS

What constitutes "trust funds?"

Black's Law Dictionary (9th ed. 2009), defines trust fund as the property held in a trust by a trustee. Examples of trust funds are:

- Client advances for fees until they are actually earned by the attorney;
- Court costs collected from the client;
- Fines collected from the client;
- Real estate conveyance funds;
- Settlement proceeds or awards held for disbursement; and
- Any amounts held in dispute.

Fees that are earned should be deposited into the operating account upon receipt.

Where should I deposit trust funds?

Trust funds are required to be deposited in an account separate from the lawyer's own property. The account should be designated as a "Client Trust Account," or words of a similar nature, and maintained in the state where the lawyer's office is situated, unless the client consents to another location.

Every client trust account must be an interest-bearing IOLTA account or an interest-bearing non-IOLTA account. All client trust accounts, regardless of type, must be maintained only in financial institutions approved by the Counsel for Discipline of the Nebraska Supreme Court as set forth in §3-904. A list of approved financial institutions can be accessed at http://www.nltaf.org/docs/banks.pdf. In addition, Neb. Rev. Ct. Rules §3-904(F) mandates that as a condition of the privilege to practice law, every lawyer admitted to practice in Nebraska shall be deemed to have consented to overdraft reporting on client trust accounts. Financial institutions are required to report to the Counsel for Discipline every instance of overdraft on client trust accounts regardless of whether the account has overdraft protection (Neb. Rev. Ct. Rules §3-904(A)).

What is an IOLTA account?

IOLTA is a program acronym that stands for "Interest on Lawyer Trust Accounts." The basic concept of the IOLTA Program is that public good can be promoted by converting non-interest bearing trust accounts into interest-bearing trust accounts. The money generated from this program is used to provide free legal aid to those who cannot afford to pay for it.

The IOLTA program allows attorneys to invest small or short-term deposits to generate money through the use of NOW or Super NOW checking accounts. The interest from the NOW accounts is channeled to the Nebraska Lawyers Trust Account Foundation (NLTAF) for the support of the Legal Aid of Nebraska program.

Those lawyers or law firms who do not "opt-out" of the program by February 15 of each year will be automatically enrolled in the program. All IOLTA trust accounts must be

placed in a financial institution that is approved by the Counsel for Discipline of the Nebraska Supreme Court. The list of approved financial institutions can be found here: http://www.nltaf.org/docs/banks.pdf.

What is a non-IOLTA account?

Non-IOLTA accounts are interest-bearing trust accounts for individual clients and third parties. If a lawyer will be holding a substantial amount of funds or smaller amounts for a long time, the lawyer should deposit those funds in a separate interest-bearing account for the benefit of that client. The client's social security number or employer identification number is attached to the account so interest that accrues is payable as directed by the client. The definition of "substantial" depends upon the circumstances of each case – the larger amount of funds, the shorter the time period needed to justify the establishment of separate accounts for the funds and vice versa. The potential amount of interest that can accrue at the time is also a factor in the cost/benefit analysis.

Funds belonging to more than one client can be pooled in one non-IOLTA account, but detailed and transparent subaccounting in required to compute and pay the net earnings attributable to each client. This can become a complicated and time-consuming task and extreme caution must be taken to ensure no benefit inures to the lawyer or law firm from the deposit of trust funds.

Should I use an IOLTA or non-IOLTA account?

A lawyer must exercise sound judgment in determining whether to deposit trust funds in an IOLTA or non-IOLTA account. Neb. Ct. R. of Prof. Cond. §3-501.15 outlines the duties of a lawyer in safekeeping property.

Here are some factors that may be taken into consideration whether or not an IOLTA or Non-IOLTA Account should be used:

1. The amount of interest the funds would earn during the period they are expected to be deposited;
2. The cost of establishing and administering a non-IOLTA trust account. For example:
    a. the cost of the lawyer and staff services;
    b. bank services, and
    c. the cost of preparing any tax reports for interest accruing to a client or third party's benefit;
3. The capability of a bank or lawyer to calculate and pay interest to those with claims to the funds; and
4. Any other circumstance that affects the ability of the trust to earn income in excess of the costs incurred to secure such income.

The lawyer has an on-going responsibility to regularly review the trust account(s) and determine if any change of circumstances require different treatment of funds held in trust.

How do I open an IOLTA account?

The Nebraska Supreme Court adopted the conversion of the voluntary Interest On Lawyers Trust Accounts (IOLTA) Program to an Opt-out Program in December 1992. The Opt-out Program became effective January 1, 1993. Every attorney trust account was converted to an interest-bearing account. A lawyer or law firm choosing to opt-out must file a Notice of Declination with the Chief Justice of the Supreme Court or his/her designee for that year. See Neb. Rev. Ct. Rules §3-903(C).

Quick checklist for IOLTA accounts:

- ✓ Ensure IOLTA account(s) is/are structured as interest-bearing.
- ✓ Verify the bank is approved at http://www.nltaf.org/docs/banks.pdf.
- ✓ Any subsequent changes to trust account information is timely reported to the Foundation at 402-475-7106.

What are the reporting requirements for an IOLTA account and how often must interest be paid?

Financial institutions are responsible for transmitting interest income reports to NLTAF each month. A copy of the report must also be submitted to the participating attorney or law firm. This report includes: name of the participating lawyer/law firm, account number, any service charge or fee deducted, amount of interest remitted to the Foundation, rate of interest paid and average account balance.

Interest on the account should be paid by the tenth working day of each month. Interest not remitted monthly is required to be paid at least quarterly to NLTAF. Interest should be calculated on an average monthly balance in the account, or computed in accordance with an institution's standard accounting practices.

What accounting procedures and records are needed?

Neb. Ct. R. of Prof. Cond. §3-501.15 requires complete records of trust account funds and other property be kept by the lawyer and shall be preserved for a period of five years after termination of representation. Comment [1] to the Rule states that a lawyer should maintain on a current basis, books and records in accordance with generally accepted accounting practices and comply with any recordkeeping rules established by law or court order. The Comment refers to

ABA Model Financial Recordkeeping Rule for further guidance, but that rule has been revised and renamed the ABA Model Rules for Client Trust Account Records.

Please note Nebraska has not adopted the ABA Model Rules for Client Trust Account Records, but refers to them in the Comment to the Rule to provide guidance. The ABA Model Rules for Client Trust Account Records are more comprehensive and requires the following:

(a) Receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;
(b) Ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;
(c) Copies of retainer and compensation agreements with client [as required by Rule 1.5 of the Model Rules of Professional Conduct];
(d) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;
(e) Copies of bills for legal fees and expenses rendered to clients;
(f) Copies of records showing disbursements on behalf of clients;
(g) The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;
(h) Records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;
(i) Copies of [monthly] trial balances and [quarterly] reconciliations of the client trust accounts maintained by the lawyer; and
(j) Copies of those portions of client files that are reasonably related to client trust account transactions.

Can trust account bookkeeping functions be delegated?

The sole responsibility for ensuring compliance with trust accounting rules lies with the attorney. The attorney may have other persons make the actual entries in the trust account records and/or perform the monthly reconciliations. However, the delegation to others is permissible only if the attorney closely reviews the work of others. Failure to do so, regardless of intent, can result in harsh professional discipline, including disbarment.

Strong internal controls and routinely monitoring them for compliance is an effective means of assuring proper trust accounting procedures. The following steps are strongly recommended to fulfill an attorney's fiduciary responsibilities for oversight of account operations (from the Missouri Lawyer Trust Account Foundation):

1. Establish a clearly expressed written policy, applicable to all attorneys and staff, detailing the procedures for all trust account operations;
2. To lessen the opportunity for theft, only licensed attorneys should have signatory authority over the trust account or checks should require two signatures one of which must be the attorney;
3. The trust account checkbook should be kept under lock and key;
4. All staff involved in trust account recordkeeping should receive adequate training to appreciate the importance and requirements of the fiduciary responsibilities;
5. If there are sufficient staff to do so, split the recordkeeping responsibilities among staff to enhance accountability (i.e., reconciliations performed by personnel not involved in bookkeeping function);
6. All deposits to the trust account should be made daily;
7. All receipts should be deposited intact to the trust account (i.e., don't split deposits between the trust account and operating account; do not retain cash from a transaction);
8. Produce detailed records of the deposit to clearly identify each item deposited;
9. Withdrawals from the trust account should not be made via cash, rather only made on preprinted, numbered checks to a named payee;
10. All checks presented for the attorney's signature should be accompanied by documentation detailing the reason and amount for the transaction;

11. Prior to signing a trust account check, trust account balances should be verified to ensure sufficient funds are available;
12. The attorney should verify the check deposited into the trust account is considered “good funds” available for disbursement and that the disbursement does not exceed the amount credited to that party’s applicable client ledger (such action could constitute wrongful taking of other client trust funds);
13. Any transfer from the trust account to the operating account should be done by:
    a. A check written from the trust account and deposited to the operating account with accompanying documentation to justify the transaction; or
    b. Electronic transfer with records maintained including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;
14. Attorneys should be the first to review monthly bank statements for irregularities;
15. All voided or unused checks should be periodically reviewed;
16. Reconciliations should be promptly completed and the attorney should review and sign the reconciliation to document his or her review;
17. The attorney should also review individual client ledgers on a monthly basis to ensure there are no negative balances; and
18. Strong consideration should be given to an annual audit of the trust account by a certified public accountant.

These internal procedures create a strong system of checks and balances providing opportunities to catch mistakes, innocent or otherwise. It is a prudent business practice to consider bonding of the individuals who are signatories to the trust account or who may otherwise have access to the account.

Neb. Ct. R. of Prof. Cond. §3-501.15(d) requires prompt notification to clients and third parties upon receipt of their funds or other property. It is advisable to periodically notify each person whose funds are held in trust of the status of those funds and describing any receipts or disbursements on their behalf. As discussed in Comment [3], if there is

an objection to a disbursement, for example, the amount of earned fees, those funds must remain in the trust account until the dispute is resolved.

For more information:

The Foundation is available to answer questions and help lawyers and financial institutions with their IOLTA accounts. Feel free to contact:

Nebraska Lawyers Trust Account Foundation
635 South 14th Street, Suite 120
P.O. Box 95103
Lincoln, Nebraska 68509
Telephone: 402.475.1042
Facsimile: 402.475.7106

The office of Counsel for Discipline of the Nebraska Supreme Court is available to answer questions regarding Client Trust Accounts maintained by Nebraska attorneys. Feel free to contact:

Mark A. Weber
Counsel for Discipline
3808 Normal Blvd.
Lincoln, NE 68506
402.471.1040
877.504.0967

Lawyer's Advisory Committee Opinions

The eight members of the Lawyers' Advisory Committee are attorneys appointed by the Nebraska Supreme Court. Each Supreme Court Judicial District is represented on the Committee and the chairperson and vice chairperson are selected at large.

Pursuant to Rule of Discipline § 3-305, the Advisory Committee may render, upon the request of a Nebraska attorney, an advisory opinion or an interpretation of the 'Rules of Professional Conduct' regarding anticipatory conduct on the part of the requesting attorney.

The following advisory opinions have been summarized. Not all details are included in each. Therefore the summaries should only be used for guidance. Actual copies of the opinions are available at http://www.supremecourt.ne.gov/lawyers-ethics-opinions. It is important to consult the current version of the Rules before deciding on a course of conduct as the opinion may not reflect current practices or the proper citation to the current Rules.

Nebraska Ethics Advisory Opinion for Lawyers

No. 09-02

QUESTION: What ethical duties does an attorney have in a situation where the attorney is holding funds in a trust account for a client who cannot be located?

ANSWER: An attorney holding trust account funds for a missing client is required to act with reasonable diligence in attempting to locate the client. If the attorney is unable to locate the client, the attorney should disburse the funds in accordance with Nebraska's Uniform Disposition of Unclaimed Property Act.

Under Rule §3-501.3, it is not clear what constitutes "reasonable diligence." As suggested by the Arizona State Bar Opinion, diligence may include phoning the client, sending correspondence to the client's last known address, locating a new address for the client, or contacting the client's medical providers or known family members and friends.

The Committee encourages attorneys to anticipate the possibility of a missing client situation and address the disbursement of unexpended client funds in written fee agreements. Reasonable diligence must be used to locate the missing client. If those efforts prove unsuccessful, the attorney must disburse the funds in accordance with state law, and, specifically, the Nebraska Uniform Disposition of Unclaimed Property Act if it is determined to be applicable.

No. 06-2

QUESTION: Should all or part of a flat fee go into the lawyers trust account?

ANSWER: The code of professional responsibility adopted by the Nebraska Supreme Court does not prohibit collecting a flat fee and placing it into the attorney's regular business account as income. As long as the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible is communicated to the client, preferably in writing, the Committee does not disapprove of charging a flat fee. The Committee feels any remaining fees to be earned should be based on the attorney's hourly rate which should be communicated preferably in writing to the client.

Article 9: Trust Fund Requirements for Lawyers.

§ 3-901. Definitions.

(A) The following definitions shall apply to the Trust Accounts and Blanket Bonds Rules:

(1) "Financial Institution" includes any state or federally chartered bank, savings bank, savings and loan association, or building and loan association insured by the Federal Deposit Insurance Corporation.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(3) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument which the institution dishonors.

§ 3-902. General provisions.

All lawyers admitted to practice on active status (defined as Regular Active, Junior Active, Senior Active, or Military Active) with an office in the State of Nebraska shall have and maintain a trust account in a financial institution for the deposit of funds of

clients unless such lawyer is a member of the Nebraska judiciary, or does not reasonably expect that he or she will receive into his or her hands funds of clients. Lawyer trust accounts shall be maintained only in financial institutions approved by the Counsel for Discipline of the Nebraska Supreme Court as set forth in § 3-904.

§ 3-903. Interest-bearing trust accounts.

(A) Except as may be authorized hereinafter, interest earned on insured trust accounts (less any deduction for service charges, fees of the financial institution, and intangible taxes collected with respect to the deposited funds) shall belong to the clients whose funds have been so deposited, and the lawyer or law firm shall have no right or claim to such interest.

(B) Unless an election not to do so is submitted in accordance with the procedure set forth in § 3-903(C), a lawyer or law firm shall maintain an interest-bearing insured trust account for clients' funds which are nominal in amount or are expected to be held for a short time in compliance with the following provisions:

(1) No earnings from such an account shall be made available to a lawyer or law firm.

(2) The account shall include only clients' funds which are nominal in amount or to be held for a short period of time.

(3) Funds in each interest-bearing account shall be subject to withdrawal upon demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(4) The rate of interest payable on any interest-bearing trust account shall be the same rate of interest paid by the financial institution for all other holders of similar accounts. Interest rates higher than those offered by the financial institution on regular or savings accounts may be obtained by a lawyer or a law firm on some or all of the deposited funds so long as there is no impairment of the right to withdraw or transfer principal immediately, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(5) Lawyers or law firms electing to deposit client funds in an interest-bearing trust account shall direct the financial institution:

(a) To remit interest or dividends, as the case may be, at least quarterly to the Nebraska Lawyers Trust Account Foundation (hereinafter Foundation); and

(b) To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm, the trust account number, and the interest rate for whom the remittance is sent; and

(c) To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation.

(6) The interest or dividends received by the Foundation shall be used by the Foundation solely for the support of the Legal Aid of Nebraska program. Such income shall be applied only to activities permitted to be conducted by organizations exempt from taxation under § 501(c)(3) of the Internal Revenue Code of 1986, as from time to time amended.

(7) This rule may be subsequently amended to effectuate its purposes or to comply with any amendments to the Internal Revenue Code or new interpretations by the Internal Revenue Service or the courts.

(C). A lawyer or law firm that elects to decline to maintain accounts described in § 3-903(B)(5) shall submit a Notice of Declination in writing to the Chief Justice of the Supreme Court or his or her designee by February 15 of the year to which the Notice of Declination will apply.

(1) Notwithstanding the foregoing, any lawyer or law firm may petition the Court at any time and, for good cause shown, may be granted leave to file a Notice of Declination at a time other than those specified above. An election to decline participation may be revoked at any time by filing a request for enrollment in the program.

(2) A lawyer or law firm that does not file with the Chief Justice of the Supreme Court a Notice of Declination in accordance with the provisions of this rule shall be required to maintain an account in accordance with § 3-903(B)(5).

(3) The Board of Directors of the Nebraska Lawyers Trust Account Foundation may take all action necessary at any time to exempt a lawyer, law firm, or trust account otherwise participating in the program where in the Board's judgment such participation would be administratively or economically unreasonable, burdensome, or counterproductive to the purposes of the program.

§ 3-904. Trust account overdraft notification rules.

(A) The trust account overdraft notification rules shall become effective on July 1, 2002.

(B) A financial institution shall be approved as a depository for lawyer trust accounts if it shall file with the Counsel for Discipline of the Nebraska Supreme Court an agreement, in a form provided by the Counsel for Discipline, to report to the Counsel for Discipline, in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Counsel for Discipline shall establish rules governing approval and termination of approved status for financial institutions and shall annually publish a list of approved financial institutions.

(C) No trust account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days' notice in writing to the Counsel for Discipline.

(D) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor. The financial institution shall provide a copy or machine readable copy of the dishonored instrument, if the instrument is available to the financial institution, to the Counsel for Discipline within 5 banking days of receiving a written request for a copy of the instrument from the Counsel for Discipline; and

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(E) Such reports shall be delivered by mail, electronically, or otherwise to the Office of the Counsel for Discipline of the Nebraska Supreme Court within 5 banking days of the date on which an instrument is dishonored. If an instrument presented against insufficient funds is honored, then the report shall be delivered by mail, electronically, or otherwise to the Office of the Counsel for Discipline of the Nebraska Supreme Court within 5 banking days of the date of presentation for payment against insufficient funds.

(F) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(G) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

§ 3-905. Trust account affidavit rules.

(A) A lawyer who is associated with a law firm, which for purposes of this rule shall include firms that operate as a limited liability professional organization, a partnership, a professional service corporation, or a nonprofit legal services organization, shall be considered to have and maintain a trust account if his or her law firm maintains a trust account as specified in § 3-902.

(B) A nonresident lawyer who is admitted to practice before the courts of this State on a case-by-case basis shall be exempt from the requirements of these rules.

(C) Each lawyer admitted to practice on active status (defined as Regular Active, Junior Active, Senior Active, and Military Active) with an office in the State of Nebraska shall submit to the Court a certification reflecting the existence of the trust account required under § 3-902 or, in the alternative, that he or she does not now have and does not reasonably expect to have funds of clients come into his or her hands within the next 12

months. Such certification shall be submitted through the Court's on-line system on an annual basis at the time of annual license renewal. Members of the Nebraska judiciary need not complete the certification. Those lawyers maintaining trust accounts shall also provide on their certification the name and address of the financial institution where the account is maintained, the account number, and the name and address of all persons authorized to sign checks or make withdrawals on the account. If an existing trust account is closed or a new account opened, an updated certification shall be submitted in the manner directed by the court by any such attorney within 30 days providing the reason for closing of an account, as well as the specified information on any new account.

(D) Any lawyer who has filed an affidavit that he or she does not reasonably expect to have funds of clients come into his or her hands within the next 12 months but who does receive clients' funds shall forthwith establish a trust account for the deposit and maintenance of such funds.

(E) Until otherwise directed by the Supreme Court, the affidavits and any other information required by § 3-905 shall be collected and maintained by the Bar Association on behalf of the Nebraska Supreme Court.

§ 3-906. Trust account audit rule.

The Counsel for Discipline of the Nebraska Supreme Court, or such counsel's representative authorized in writing, shall have access to the affidavits required in § 3-905 and shall have the power to audit at any time any trust account required by these rules.

§ 3-907. Purpose of rules.

(A) These rules shall not affect the Client Assistance Fund, its rules, procedures, structure, or operation in any way; nor shall the adoption of these rules make the Nebraska State Bar Association, its officers, directors, representatives, or membership liable in any way to any person who has suffered loss by theft, misappropriation, or fraud by a lawyer. These rules are adopted solely for the purposes stated herein and not for the purpose of making the Nebraska State Bar Association, its officers, directors, representatives, or membership insurers or guarantors for clients with respect to funds of clients which come into the hands of their lawyers.

(B) These rules do not create a claim against a financial institution or its officers, directors, employees, and agents for failure to provide a trust account overdraft report or for compliance with any provision of these rules.

§ 3-501.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Misappropriation of Client Funds - Sanctions

Advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney.

In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.

Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts.

Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.

Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.

A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.

The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.

Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.

State ex rel. Counsel for Dis. v. Crawford, 285 Neb. 321, 827 N.W.2d 214 (2013)