VERMONT BAR ASSOCIATION
Advisory Ethics Opinion No. 2002-4

SYNOPSIS

This Opinion addresses a series of inquiries about handling client trust funds. It concludes, in summary, that:

1. As written, the Vermont Rules of Professional Conduct (VRPC) prohibit deposit of any lawyer funds into a client trust account, including funds to cover bank service charges. The Committee recommends amendment of VRPC 1.15A to allow lawyers to maintain a sum certain balance of attorney funds in the trust account to cover trust account transaction costs.

2. Trust account checks can only be drawn on client funds after the deposit on which the check is drawn clears.

3. When trust account checks remain uncashed for long periods of time, the lawyer should treat those funds as unclaimed funds under applicable provisions of the Vermont statutes.

4. In very general terms, the Gramm-Leach-Bliley Act requires a lawyer to provide privacy notices to clients for whom the lawyer performs financial services, including investment or financial advice and tax preparation and planning, for personal, family, or household purposes.

5. A lawyer is permitted to withdraw funds from the client trust account to cover monthly invoices if the client consents to this arrangement, as long as the invoice is promptly forwarded to the client, the client receives prompt notice of the transaction in the trust account, and the funds are redeposited into the account if the client questions or challenges any aspect of the transaction.

6. Settlement funds paid by insurance companies cannot be disbursed from the client trust account until the check from the insurance carrier clears and the funds covered by the check are available.

7. Title insurance premiums should be held by the lawyer in the client trust account until the title insurance company binds its commitment to issue coverage to the homeowner.

8. Maintaining the firm's IOLTA account and general checking account in the same bank is not prohibited.

9. When a lawyer has been holding funds in escrow for an extended period of time pending resolution of a dispute about ownership of those funds, the lawyer can either file an interpleader action asking the court to resolve the dispute or treat the funds as unclaimed property under applicable provisions of the Vermont statutes.

1. How much of the firm's money can be held in a client trust account to cover bank service charges if properly accounted for in the ledgers as a separate "client"?

VRPC 1.15 – 1.15C as currently drafted do not permit attorney funds to be commingled with client funds in a client trust account. VRPC 1.15(a) strictly mandates that: "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" (emphasis added). VRPC. 1.15B(a) continues that: "A lawyer or law firm which receives client funds shall create and maintain a pooled interest-bearing trust account for deposit of client funds that are not reasonably expected to earn a substantial amount of interest for the client, individually or in combination with other client funds held by the lawyer or law firm." The comment to VRPC 1.15 similarly notes that: "All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts."

The plain language of the Rules and the Comments does not support an interpretation or application that would allow a lawyer's money to be held in a client trust account, even to cover bank service charges. This conclusion is reinforced by the provisions of the Rules which contemplate that transaction costs will be paid out of the interest accruing on the account. See VRPC 1.15B(a) ("The interest accruing on this account, net of any transaction costs, shall be paid over to the Vermont Bar Foundation."). In our experience, however, this inflexible rule is impossible of application as written, because the transaction costs for maintaining a client trust account often exceed the interest generated by the funds held in the account. Thus, not maintaining a minimum balance of attorney funds in a client trust account causes one of two prohibited results: (1) the principal of client funds being automatically debited by the bank to cover transaction costs, or (2) overdrafts. The Committee therefore encourages amendment of VRPC 1.15-1.15C to allow attorney funds to be held in the client trust account to cover bank service charges as long as those funds are separately accounted for and designated for this purpose.

2. What procedures are required in issuing checks from client trust accounts for real estate closings drawn on funds deposited via broker's or lawyer's trust account checks that have not yet cleared pursuant to applicable banking rules?

The Committee understands that this inquiry arises from the standard condition in real estate purchase and sale contracts that the buyer must provide cash or a certified check to the seller at closing. However, buyers often arrive at the closing with checks that cannot clear on the day of the closing, including checks drawn on another attorney's IOLTA account or a real estate broker's IORTA account, and lawyers are then asked to deposit those checks into their own IOLTA accounts and to issue a check for the closing funds on the same day the deposit is made.

As written, relevant provisions of the Vermont Rules of Professional Conduct support the inference that client funds cannot be disbursed from the client trust account until the deposit upon which the withdrawal or check will be drawn has cleared and the client funds are available for disbursement under applicable banking rules. See, e.g., VRPC 1.15(b) ("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.") (emphasis added). If a check is drawn or a withdrawal is made from the client trust account before the corresponding deposit has cleared, then the funds that are being withdrawn from the account actually are the property of another client. If such withdrawals were allowed, the second client could impermissibly be denied access to her funds deposited in a lawyer's client trust account until the first client's check cleared.

Under these circumstances, the only available response is for the attorney expressly to warn a client who will be involved in a closing that, unless liquid funds are available on the date of the closing the closing will not be able to proceed. Checks from other lawyer's and broker's trust accounts are not liquid funds unless presented in a form that is immediately available, whether by way of wire transfer, transfer from another account within the same bank, or cash.

3. How should trust account checks that remain uncashed for lengthy periods of time be handled?

In Advisory Ethics Opinions 1998-09, this Committee recommended that when a lawyer seeks to close an IOLTA account than has been dormant for an extended period of time and the lawyer cannot determine to whom the funds in the account belong, the lawyer should comply with Vermont law governing Unclaimed Property, 27 V.S.A. §§ 1208-1238. Opinion 1998-09 was decided under the Code of Professional Responsibility. The result is the same under the Vermont Rules of Professional Conduct. Thus, to the extent that a trust account check remains uncashed for an extended period of time, the Committee recommends that the lawyer comply with Vermont Unclaimed Property laws.

4. What are protocols regarding the issuance of privacy statements?

A comprehensive analysis of a law firm's obligations under the Gramm-Leach-Bliley Act, Public Law 106-102, is beyond the scope of this opinion. In very general terms, the Act requires annual notices to be sent to each client who maintains a customer relationship with the law firm in which the law firm provides one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes. Financial services are defined as investment or financial advice, including tax preparation and tax planning. See 16 C.F.R. § 313.

5. How should a law firm handle payments to the firm for fees and expense invoices from client retainers? Is the firm required to get approval from the client to pay the invoice or is it sufficient to send a copy of the invoice showing that payment was deducted from the retainer?

In Advisory Ethics Opinion 1998-05, the Committee advised that the attorney is permitted to withdraw funds from the client trust account to cover monthly invoices for fees and expenses. This practice continues to be acceptable under the Vermont Rules of Professional Conduct, as long as the invoice is promptly forwarded to the client, notice is promptly provided to the client of the transaction in the trust account by which the funds to cover the bill were withdrawn, and, if the client questions or challenges any aspect of the transaction, including any fee or expense included on the invoice or the withdrawal of the funds from the client trust account, the funds must immediately be redeposited in the client trust account until the dispute is resolved. The client should consent to this procedure, preferably in writing, including, for example, by counter-signature on an engagement letter that clearly delineates this arrangement.

6. What are the time requirements regarding insurance settlements? Can we write and deposit in the firm's general account a payment check for fees and expenses

from the IOLTA account the same day as the settlement funds are deposited in the IOLTA account?

The time requirements relating to disbursements of settlement funds received from insurance companies does not differ in any way from the time requirements applicable to any other transaction in the client trust account, as discussed more fully in the answer to inquiry no. 2, above. Unless and until the check from the carrier clears and the funds covered by the check are available, payment should not be made from the IOLTA account from those funds. Following any other procedure would result in a prohibited application of one client's funds held in the trust account for the benefit of another client, and could result in funds being unavailable to their rightful owner.

7. Is the firm required to hold the title insurance premiums collected from clients in an IOLTA account until the issuance of the policy?

The answer to this questions falls at the intersection of contract, insurance, and professional responsibility law. VRPC 1.15-1.15C establish that the client trust account is intended to hold client funds. Contract and insurance law, on the other hand, are the guides for when a premium payment ceases being client property and becomes the property of the title insurance company: to wit, when the title insurance company binds its commitment to issue coverage to the homeowner. At this time, the title insurance premium is no longer client property and it need not be held in the client trust account. If held in the trust account, the funds should be accounted for separately, and recognized as property of the title insurance company.

8. Do the firm's general checking account and any IOLTA account need to be maintained in separate banks?

No. There is nothing in any of the Vermont Rules of Professional Conduct to suggest that having the firm's IOLTA account and general checking account in the same bank is prohibited.

9. What procedures are required for disbursing escrow funds that have been held in a firm's trust account for an extended period of time when the parties have never settled or litigated the matter?

The answer to this questions depends upon the circumstances under which the funds were deposited into the trust account. We assume that the inquiry relates to a sum of money in which more than one person claims an interest, and that no resolution of the dispute or agreement about right to the escrowed funds has been achieved. Under these circumstances, the lawyer can file an interpleader action asking the court to adjudicate the dispute over title to the funds. Initiation of an interpleader action can be accompanied by a request that the disputed funds be paid into court. As discussed in the answer to inquiry no. 3, if the funds remain unclaimed in excess of the period established in 27 V.S.A. § 1215, the Committee recommends that the lawyer comply with Vermont's statutes governing unclaimed property.

10. Define the procedures by which law firms are to issue 1099-MISC for all vendors who are not corporations or are paid more than $600.00 in a calendar year?

This does not constitute a professional responsibility question, and the committee expresses no opinion about it.

11. Provide specific checklists of what documentation is to be on file and what procedures need to be followed in order to pass a trust account audit.

VRPC 1.15 through 1.15C speak for themselves.

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