

**VERMONT BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY SECTION
ADVISORY ETHICS OPINION 2017-1**

SYNOPSIS

An attorney inquires about ACH transfers into IOLTA accounts, citing experience with transfers being reversed thereby leaving insufficient funds in the account, and asks whether accepting ACH transfers into IOLTA accounts complies with the Vermont Rules of Professional Conduct. An attorney can take steps to minimize the risk of an overdraft in an IOLTA account arising because of the reversal of an electronic funds transfer. If a reversal occurs, the attorney must act immediately to protect other clients' funds or funds of third parties in the trust account that may be at risk as a result.

BACKGROUND

Electronic funds transfers have skyrocketed in usage over the past several decades. There are several types of EFTs, including wire transfers and Automated Clearing House (ACH) transactions, which have been utilized for over 40 years. There are a number of regional Automated Clearing Houses that process tens of millions of transactions daily and a total of over 25 billion per year. Wire transfers differ from ACH transactions in several ways, among them: There is increased verification of the sender's and recipient's identity, in that wire transfers are processed individually, whereas ACH transactions are done in batches. In addition, wire transfers are generally irrevocable, whereas ACH transfers can be reversed. When a bank receives a reversal request, it typically will attempt to obtain authorization from the individual whose account was credited before making a reversal. See North Carolina State Bar 2013 Formal Opinion 13. There are three reasons for reversal under the rules governing ACH transfers: wrong money amount, wrong account, or duplicated transactions.

APPLICABLE RULES

Vermont Rule of Professional Conduct 1.15 governs attorney trust accounts. Rule 1.15 states, in part:

(a)(1) 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 accordance with Rules 1.15A and B.

The purpose of Rule 1.15 is to keep funds owned by clients and third parties separate from attorneys' funds, to, among other things, prevent a client's funds from being seized from an attorney's account. In certain circumstances, according to Rule 1.15(g), an attorney may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not yet constitute collected funds, if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer's trust account within a reasonable period of time:

When the deposit is either a certified check, cashier's check, money order, official check, treasurer's check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing.

Rule 1.15(h) further states:

If an uncollected deposit in reliance upon which a lawyer has disbursed trust account funds fails, the lawyer, upon obtaining knowledge of the failure, shall immediately act to protect the funds or other property of the lawyer's other clients or third persons held by the lawyer in accordance with this rule.

DISCUSSION

The Vermont Professional Responsibility Program publishes a booklet entitled "Managing Client Trust Accounts - Rules, Regulations and Tips," last revised October 14, 2014. There is no mention of ACH transactions in the booklet. It is clear that real estate transactions pose special problems for attorneys engaging in them. Money is sent to the closing attorney, often via ACH transfer, and there is generally not time to wait for the transaction to clear before the closing. See Rule 1.15(g), above.

Some states have taken steps to include ACH transactions and other electronic transfers in their IOLTA manuals. See, e.g., "Managing Your Client Trust Account, Manual and Workbook," Wisconsin Office of Lawyer Regulation, 2016 ed., which suggests a separate, E-Banking Trust Account to hold electronic transfers temporarily until the funds have cleared. The Wisconsin attorney conduct rules also include the following provision: "In addition, a lawyer cannot authorize a third party to electronically deposit funds to a trust account if that deposit can be reversed without the lawyer's authorization." Wisconsin SCR 20:1.15(f)(2)(c).

The North Carolina State Bar has issued 2013 Formal Ethics Opinion 13 dealing with the reversal of ACH deposits. The Opinion concluded:

A lawyer is not guilty of professional misconduct if that lawyer, upon learning that an ACH or EFT has been reversed, immediately acts to protect the funds of the lawyer's other clients on deposit in the trust account. This may be done by personally depositing the funds necessary to address the deficit created by the reversal or by securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. (citation omitted).

This condition is in line with the provisions of Vermont Rule of Professional Conduct 1.15(h).

It is clear that the banking world has changed and checks are utilized much less frequently than they were previously. Some banks now offer protection against ACH reversals, with names like ACH Debit Block or ACH Positive Pay. Some possible actions for an attorney to take to protect against ACH reversals are to ask the attorney's bank to block reversals of ACH deposits, to set up a separate IOLTA account for ACH transfers, to set up a subsidiary account

for a particular client that can only receive funds, and to give the attorney's bank a list of entities that are authorized to withdraw from the IOLTA account. If all precautions fail, however, and a reversal of an electronic funds transfer occurs, the attorney must act to protect other clients' funds or funds of third parties that may be at risk in the trust account. The Professional Responsibility Section further requests the Rules Committee adopt more specific provisions concerning EFT transfers in general and ACH transfers in particular.

CONCLUSION

It is not a violation of the Vermont Rules of Professional Conduct for an attorney to accept ACH transfers into IOLTA accounts. An attorney can take steps to minimize the risk of an overdraft because of the reversal of an electronic funds transfer. However, if a reversal occurs, the attorney must comply with V.P.R.C. 1.15(h) and, upon obtaining knowledge of the failure, act immediately to protect other clients' funds or funds of third parties that may be at risk in the trust account.