

ADVISORY ETHICS OPINION 1998-05

SYNOPSIS:

Compliance with the appropriate Disciplinary Rules is satisfied when a lawyer or a law firm transmits a ledger sheet or similar notification at the end of each calendar month, reflecting receipts for disbursements involving the client's trust account. Withdrawal from a client's trust fund of earned fees is allowed unless the fee is disputed by the client. Withdrawal may occur at the time the invoice is sent to the client. Should the client then dispute the transfer, immediate re-deposit of the funds into the trust account is required. Finally, no advance notice need be given the client before a disbursement is made from his or her trust account unless the agreement between the parties requires such advance notice.

QUESTIONS:

1. DR 9-102 (B) requires that a lawyer shall "promptly notify a client of the receipt of his funds, securities or other properties." DR 9-102(c)(3) requires that every attorney or firm maintain a trust accounting system that includes "records documenting timely notice to clients of all receipts and disbursements from trust accounts." Our first question concerns the meaning of "promptly" in DR 9-102(B) and "timely notice" in DR 9-102 (C)(3). Specifically, in the opinion of your Committee, does a law firm comply with these requirements if, at the close of each calendar month in which there has been a receipt or disbursement to a client's trust account, the lawyer or law firm sends the client a ledger sheet which sets forth the transactions which have occurred during that month?

The alternative, requiring acknowledgment of each deposit and disbursement within one or two business days, would impose a heavy administrative burden on many lawyers and law firms and, we believe, would represent a significant change in the trust accounting practices of most lawyers in Vermont. In contrast, if the month-end procedure complies with the rules, such a procedure ought to present no undue administrative burdens.

2. DR 9-102 (A)(2) deals with co-mingling of lawyer and client funds, particularly when the lawyer's fee is to be paid from the funds in the client's trust account. Rule 9-102 (A)(2) indicates that "the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." Our second inquiry is whether a lawyer or law firm complies with this rule if its engagement agreement with its client provides that invoices are due when rendered, and the lawyer or law firm transfers from the client's trust account to the lawyer's law office account the amount of the invoice at the same time the invoice is sent to the client. If a law firm withdraws the funds from the client's trust account when the invoice is rendered to the client, and immediately redeposits into the client's trust account any amount that the client may later dispute, does the lawyer or law firm comply with this rule?

In other words, does this rule require a "waiting period" after an invoice is provided to the client before the funds in the client's trust account are withdrawn and applied to satisfy the client's bill? If there is a waiting period, how long is that period? If a lawyer or firm fails to withdraw its earned fee for 30 or 60 days, is the lawyer or law firm improperly co-mingling its funds with client funds?

3. Is there any requirement that a lawyer or law firm give a client advance written notice *before* making any disbursement from the client's trust account? Assuming, for example, that the funds in the client's trust account are to be delivered to the opposing party once the opposing party delivers documents to the attorney, must the attorney send the client written notice that the attorney has received the documents in question and intends to disburse the funds to the opposing party? Is there a "waiting period" which must lapse to allow the client to object before the attorney may disburse the funds to the opposing party? If so, how long?

DISCUSSION:

1. The meaning of "promptly" in DR 9-102 (B) and "timely notice" in DR 9-102 (C)(3) will generally depend on the circumstances in the absence of an agreement which would reduce the possibility of misunderstanding. In most instances, the Committee believes that furnishing the client with a ledger sheet, or other document, setting forth the transactions which have occurred during that month reflecting receipts and/or disbursements will adequately comply with the Disciplinary Rules. When transactions involving larger sums, e.g., real estate closings, disbursement to the client should take place as soon as clearance of the deposited funds can be obtained.

2. The Committee believes that the language of Disciplinary Rule 9-102 (A)(2) clearly authorizes the withdrawal of earned funds unless such withdrawal is disputed by the client. Transferring the earned funds to the account of a lawyer or law firm at the time the invoice is sent to the client would suffice. In the event the client then disputes the withdrawal, the immediate re-deposit of the disputed sum would be in compliance with the Rule. The Committee does not believe that a waiting period before withdrawal of earned funds is required. Conversely, the Committee believes that failure to withdraw earned fees within a reasonable period would constitute co-mingling of those funds with the client's funds.
3. Similarly, the Committee opines that a lawyer or law firm need not give a client advance written notice before making any disbursement from the client's trust account provided the matter of disbursement is made clear to the client at the inception of the account. In the customary situation, a "waiting period" would not be required unless notice was specifically required by the engagement agreement.

However, in the hypothetical situation posed by the requesting attorney, the client could question the adequacy of the documents submitted and, in such a case, the documents should be shown to the client before disbursement of the funds.

CONCLUSION:

Generally speaking, the Disciplinary Rules requiring that a lawyer "promptly notify a client of the receipt of his funds, securities or other properties" and further requiring that a trust accounting system be maintained, including "records documenting timely notice to clients of all receipts and disbursements from trust accounts" will be met by the transmittal by the lawyer and/or law firm to the client of a ledger sheet or similar notification at the end of each calendar month during which a receipt or disbursement involving the client's trust account has occurred.

The Rules allow for the withdrawal from the client's trust fund of earned fees "unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion should not be withdrawn until the dispute is finally resolved." Such withdrawal may occur at the time the invoice is sent to the client. Should the client dispute the transfer, the immediate re-deposit of the funds into the trust account places the lawyer or law firm in compliance with the Rule.

The client need not be given advance notice by the lawyer or law firm before he or it makes a disbursement from client's trust account unless the engagement agreement between the parties requires such advance notice.

In addition to responding to the questions posed by the requesting attorney, the Committee believes it important to note that bookkeeping records should be retained for a minimum of six years after the events they record, including copies of all:

1. Books of account affecting all attorney, trust and office operating accounts;
2. Checkbooks and check stubs, bank statements, renumbered canceled checks and duplicate deposit slips;
3. Statements to clients showing disbursements of their funds;
4. Bills and statements rendered to clients;
5. Records showing payments to other lawyers or non-employees for services rendered; and
6. Retainer and closing statements.

In the event that a law firm dissolves, appropriate arrangements must be made for the maintenance of the firm's records either by a former partner or the successor law firm.