

Handling Client Funds: Wait Until The Check Clears!

From time to time, our office receives a report from a bank stating that it bounced (or paid against insufficient funds) a lawyer's client trust account check. Such an occurrence should never happen, but can result from a number of causes. While bank error is one possible cause, our investigations also discover attorney errors which result in a grievance, and which can be averted. This article discusses one such attorney error -- failing to wait until a client check clears after deposit into the attorney's client trust account.

A simple example of the error is as follows: Attorney has three clients (Clients 1 through 3) with three separate unrelated cases. Attorney has client funds in the amount of \$1,500.00 for Client 1 ("Client 1's funds") and \$1,500.00 in his client trust account for Client 2 ("Client 2's funds") for a total of \$3,000.00. Attorney has no client trust account funds for Client 3 ("Client 3's funds"). Attorney's agreement with Client 3, however, requires that there be client funds in the client trust account from which the attorney can draw from time to time to pay himself/herself fees and reimbursement for costs. Pursuant to this agreement, Client 3 forwards a \$3,000.00 check, which the attorney deposits into his/her client trust account immediately after it is received.


The next day, the attorney sends Client 3 an invoice for \$1,500.00 for fees owed to the attorney and on the same day transfers that amount to the attorney's business account. Unbeknownst to the attorney, Client 3's bank has refused to honor or negotiate Client 3's check due to insufficient funds in Client 3's bank account. Client 3's bank notifies the attorney's bank in the normal course of business and returns the check to the attorney's bank.

Based upon this example, the attorney has paid himself/herself \$1,500.00 in fees for services for Client 3, but not from Client 3's funds. There were no Client 3 funds in the attorney's client trust account at the time, because Client 3's check was not negotiated. Therefore, the \$1,500.00 transfer for fees for services for Client 3 was actually drawn from Client 1's and Client 2's funds. Absent consent of Clients 1 and 2 (an unlikely scenario here), the attorney has misappropriated Client 1's and Client 2's funds. Since the actual balance in the attorney's client trust account is \$1,500.00, i.e., \$3,000.00 (Client 1's and 2's funds) less \$1,500.00 (Client 1's and 2's funds) transferred for fees for Client 3 equals \$1,500.00. Because Client 3's check did not clear, further activity in the client trust account can result in a check bouncing or being paid against insufficient funds, and thereafter leading to the attorney's bank generating a report to this office. For example, thinking that he/she has enough to pay himself/herself

\$1,000.00 for services for Client 1 and \$1,000.00 for services for Client 2 (because the attorney wrongly believes there is \$1,500.00 for each client for a total of \$3,000.00 in the client trust account), the attorney transfers or attempts to transfer \$2,000.00 to his/her business account. Whether or not the transfer is honored, the bank will report the transfer to ODC either because the bank did not honor the \$2,000.00 transfer that exceeded the \$1,500.00 balance, or because the bank paid the check against insufficient funds. ODC then discovers that the attorney transferred funds for fees for services for Client 3 before Client 3's check cleared.

The "bottom line" is that Client 3 funds are not actually in the trust account until Client 3's check has been negotiated. ODC therefore recommends that the attorney wait until a check deposited in the client trust account clears or is negotiated before making any withdrawal to pay his/her fees or any other intended use of the funds. (The attorney may wish to advise the client at the beginning of the representation that the client's funds will be handled in this manner to avoid any misunderstanding.) If there is any concern regarding whether the client's check has cleared, or if it is believed that immediate use of the funds is necessary, the attorney should contact the financial institution to confirm the availability of the funds in question. (Reminder: Withdrawal of funds from the client trust account may be only as allowed by HRPC 1.15(e) and other provisions in HRPC 1.15.)

Of course, an attorney has other ethical obligations with which he/she must comply, so the attorney cannot always wait until a check clears before performing services for a client. For example, the statute of limitations to file a complaint or a court deadline to file a motion may be approaching. In such circumstances, if a filing fee is required, the attorney can advance his/her own funds out of the attorney's business account (not the client trust account) as allowed by HRPC 1.8(e)(1).



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Dan Bent
Mediator & Arbitrator
Dispute Prevention and Resolution, Inc.
1001 Bishop Street • Pauahi Tower
Suite 1155 • Honolulu

www.FairMediation.com • 548-0080