

Disciplinary Counsel's Report

A client trust account check should **never** be dishonored or returned for insufficient funds (unless the bank has made a rare mistake); yet banks continually report, as mandated, numerous instances of bad checks and overdrawn trust accounts. While an attorney's mistake is an explanation, it is not an excuse when HRPC 1.15 is violated. Reliance on a bookkeeper or CPA likewise does not nullify an attorney's responsibility. The attorney is always ultimately responsible for the maintenance of his or her client trust account and for protecting client funds and property. Mishandling client funds can, in some instances, result in disbarment.

A number of our investigations reveal violations of HRPC 1.15 that could have been avoided by simply referring to the rule. This rule is detailed and

clear, and each word has meaning. Thus, we are again reviewing some basic precepts to assist the bar. Every attorney in private practice in this state who receives or handles client funds, no matter how infrequently or what amount, must maintain a trust account. HRPC 1.15(a): The trust account must be at a bank (or savings and loan association), not a credit union which by its very nature is a sharing or pooling of funds.

The trust account must be in the attorney's own name, the name of the attorney's partnership, the name of the professional corporation of which the attorney is a member, or the name of the lawyer or partnership of lawyers by whom the attorney is employed. The trust account cannot be in the name of a lawyer who is not so affiliated with the attorney. The trust account cannot be in the name of any other business, company, partnership, or person, including the "Hawai'i Justice Foundation," the recipi-

ent of the IOLTA interest that has its own accounts.

Each trust account, as well as deposit slips and checks drawn thereon, must be prominently labeled "client trust account." HRPC 1.15(b). There are no permissible substitute phrases or words (not even "clients" or "client's"). Any additional descriptive designation, however, for a specific trust account is permissible, such as "IOLTA" where applicable. (Under RSCH 11, there is more than one type of client trust account.) Accounts labeled as "client trust account" must, in fact, be so, and not used as a business or any other kind of account.

Client trust account checks must bear preprinted consecutive numbers, and only a Hawaii-licensed attorney can be an authorized signatory. HRPC 1.15(b) and (e). Counter checks drawn on a client trust account are prohibited as are ATM and debit cards. Signature

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stamps are not prohibited by the rule, but the practice is dangerous.

The trust account must be completely separate from the attorney's business and personal accounts. HRPC 1.15(a)(1). Trust accounts may not have overdraft protection. The attorney must deposit into this trust account, intact (no cash back on deposits), all funds entrusted to the attorney's care, including funds belonging to clients and others. HRPC 1.15(a)(1) and (d). Retainers and fee and cost advances must be deposited into the trust account. In other words, all funds from a client or third party that are not completely the property of the attorney at the time of receipt must be deposited into the client trust account. Such funds must never be deposited into any other account. The deposit slip for each transaction must be sufficiently detailed to identify each item. HRPC 1.15(d).

The funds must remain in the trust account until earned (the work is performed). HRPC 1.15(d). Funds cannot be withdrawn from the trust account until they are actually in the trust account. Thus, checks deposited into the account must clear the payor's or issuer's bank

before the funds may be disbursed.

No funds of the attorney may be deposited into the trust account except funds reasonably sufficient to pay or to avoid paying bank charges (including minimum deposit service fees). In the case of checks made payable jointly to the attorney and the client, fees and expenses owed to the attorney must be promptly withdrawn after the checks clear to avoid commingling. HRPC 1.15(c). Note that leaving, versus depositing, earned funds in the account to pay or avoid paying bank charges violates this rule. In all other instances, an attorney may not deposit earned fees into a trust account; this account is not a clearing account.

In situations involving a joint check, should the client disagree with the attorney's claim to a portion of the funds, the attorney must pay to the client any undisputed sums owed to the client, withdraw any undisputed sums attributable to the attorney's fees and expenses, and keep the disputed sums in the trust account until the disagreement is resolved. HRPC 1.15(c).

Trust account funds cannot be commingled with the attorney's own; neither

can an attorney misappropriate the funds. "Borrowing" client and third party funds is conversion, no matter the amount or the reason.

All trust account withdrawals must be made only by authorized bank transfer or by check to a named payee. HRPC 1.15(e). Trust account checks cannot be made payable to "cash." Earned fees can only be withdrawn by check (not wire transfer) from the trust account and be payable only to the lawyer, law partnership, or professional law corporation. No personal or non-client business expenses of the lawyer or law firm may be paid directly from the trust account. Non-client business expenses include rent, payroll, utilities, and supplies. A trust account should never be used for personal purposes. Using an account labeled a trust account which contains no client funds and is used primarily as an operating or personal account is unethical.

For how to handle credit card payments, refer to Disciplinary Board Formal Opinion 45 (2003).

Please be sure to contact us, before you act, if you have any questions regarding client trust accounts.

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