

Trust Account Basics Under the New Rules

by Charlene M. Norris

DO YOU MAINTAIN a client trust account?

DO YOU PERFORM monthly reconciliations for the account?

DO YOU PRESERVE adequate records for the account?

DO YOU KNOW that the Supreme Court of Hawai'i entered an Order Amending the Hawai'i Rules of Professional Conduct ("HRPC") on June 25, 2013, and the Court entered a final Order Amending the HRPC and an Order Amending Rule 4 of the Hawai'i Rules Governing Trust Accounting ("RGTA") on December 16, 2013? *The final amendments to the HRPC and the RGTA became effective on January 1, 2014*, the full text of which (with comments) are found on the Hawai'i State Judiciary website www.courts.state.hi.us/legalreferences/rules/rulesof-court/html and on the Office of Disciplinary Counsel website odchawaii.com/resources.

Every Hawai'i licensed attorney who receives client funds and maintains a trust account under the Rule 11 of the Rules of the Supreme Court of Hawai'i ("RSCH") is required to comply with Rule 1.15 of the HRPC and Rule 4 of the RGTA. Therefore, each attorney is encouraged to review the full text of these Rules.

The following is the full text of HRPC Rule 1.15:

Rule 1.15. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT OR THIRD PERSON.

(a) 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, as a fiduciary. The lawyer shall not commingle such funds or property with his or her own or misappropriate such funds or property to his or her own use or benefit. Funds shall be kept in a separate account in Hawai'i in accordance with Rule 11 of the Rules of the Supreme Court of the State of Hawai'i, and Rule 4 of the Hawai'i Rules Governing Trust Accounting. Other tangible property owned by a client or third person shall be identified as such, appropriately safeguarded, and a record kept of the item's receipt and disbursement. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 6 years after the termination of the representation.

(b) A lawyer may deposit into a trust account the lawyer's own funds reasonably sufficient to either pay bank charges or avoid paying bank charges on the account, or to cover unanticipated overages.

(c) A lawyer shall deposit into a client trust account legal

fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving or disbursing funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claims interests, the property shall be kept separate by the lawyer until the dispute is resolved. Disputed client funds shall be kept in a client trust account until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute. (Amended October 21, 2013, effective January 1, 2014; further amended December 16, 2013, effective January 1, 2014.)

Notable changes to Rule 1.15 are that small sums may be deposited into the lawyer's trust account to cover "unanticipated overages," prompt notification to the client is required upon the lawyer's receipt or disbursement of funds, both advanced fees and expenses must be deposited into trust and only withdrawn by the lawyer when earned or expenses are incurred, and all of the specific accounting and recordkeeping requirements have been transferred to the RGTA, Rule 4. The prohibition against a lawyer's commingling and misappropriation of client funds, however, has been retained in Rule 1.15.

The key to a lawyer's compliance with Rule 1.15 is the handling of client funds and property as a fiduciary, with the highest level of care. This means that the client's or prospective client's money must be identified, kept separate from the lawyer's money, and deposited and maintained in a trust account until it is earned. The new Rules also clarify that flat fees, advanced fees and any other form of retainer fee or engagement fee for legal services to be performed must, upon receipt of payment, be deposited by the lawyer into trust because the funds are presumed to be unearned until they are earned. See HRPC Rule 1.5(b).

The Comments to Rule 1.15 are very helpful in delineating the parameters of a lawyer's fiduciary obligations. For example, Comments [1] - [3] specify that a lawyer should maintain on a current basis books and records in accordance with the generally accepted accounting practice and must comply with any recordkeeping Rules established by law or court order; that accurate records must be kept regarding which part of the funds belong to the lawyer; that, if a dispute arises over