

Inside the Office of Bar Counsel:

## Show Me the Money

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“Show me the money” was a football player’s mantra in *Jerry Maguire*, a movie in which Tom Cruise starred as a wheeling and dealing sports agent. “Show me the money” is a motto equally applicable to attorney trust accounts.

Virginia’s attorney trust account rules are set out in Rule of Professional Conduct 1.15 (RPC 1.15). Although some lawyers claim the trust account rules are incomprehensible, from an accounting standpoint, the requirements of RPC 1.15 are neither unusual nor difficult. The rule requires careful documentation of the receipt and disposition of funds belonging to clients and/or third parties. Satisfying these requirements enables attorneys and their staff to comply with demands to “show me the money.” Inability to comply with such demands may lead to revocation or suspension of an attorney’s license to practice law, or—in less egregious cases—a public reprimand.

This column describes six types of serious trust account violations and the discipline imposed for those violations. The cases cited may convince even accounting phobic members of the bar that lawyers are not disbarred, suspended or publicly reprimanded for technical trust account violations.

### Failing to Open a Trust Account and Misappropriating Trust Funds

If an attorney takes custody of client funds, or funds belonging to a third party, the attorney must deposit the funds in a trust account at a financial institution approved by the Virginia State Bar. Unfortunately, not all attorneys heed this rule. Some attorneys do not bother to open trust accounts. *See, e.g.*, In the Matters of Alan E. Koczela, VSB Docket Nos. 99-051-1441, *et al.* (Aug. 1999) (respondent’s license revoked for misconduct that included failing to maintain a trust account for client funds).

Some lawyers have trust accounts but fail to deposit trust funds in those accounts. *See, e.g.*, In the Matter of Marlow Webster Cook, VSB Docket No. 95-041-1390 (March 1999) (respondent suspended for nine months with terms for taking a retainer from a client, depositing it in his personal account and then lying to his law firm about receiving a retainer); In the Matter of Steven Paul Hanna, VSB Docket No. 01-032-1083 (Oct. 2001) (respondent publicly reprimanded for failing to deposit a client retainer in a trust account and neglecting the client matter); and Robert Michael Short, VSB Docket No. 01-052-1365 (May 2001) (public reprimand with terms issued to respondent who

failed to deposit wrongful death settlement funds in his trust account and disburse them for more than two years).

Other attorneys misappropriate funds that have been, or should have been, deposited in their trust accounts. *See, e.g.*, In the Matter of Robert Stanley Powell, VSB Docket No. 99-041-2484 (Sept. 2001) (respondent surrendered his license to practice law before hearing on multiple charges of misappropriation, conversion and/or embezzlement of funds tendered to him on behalf of a client, as well as failure to maintain his trust account and related records in accordance with the disciplinary rules).

### Inadequate Trust Account Records

Attorneys who deposit client funds in trust accounts may fail to account for the funds in a systematic fashion. Sometimes the only trust account records attorneys keep are their bank statements. *See, e.g.*, In the Matters of Ann Musulin, VSB Docket Nos. 99-060-3137, *et al.* (June 2000) (respondent’s license revoked for failing to maintain trust account records for four years and other misconduct). More often, sloppy trust account records are replete with discrepancies that subsidiary client ledgers or account reconciliations would disclose. *See, e.g.*, In the Matter of Paul Cornelious Bland, VSB Docket No. 97-031-2677 (May 1999) (public reprimand with terms imposed for respondent’s failure to maintain a subsidiary client ledger and other misconduct).

Rule 1.15 permits trust accounts to be tracked manually or via a computerized accounting system. Claims that computerized trust account information exists but is irretrievable will not spare a lawyer from discipline. *See, e.g.*, In the Matters of James Charles DeWees, VSB Docket Nos. 00-033-0600, *et al.* (June 2001) (respondent surrendered law license after being ordered to produce his computer hard drive to the bar so that a forensic expert could retrieve trust account information purportedly stored on the hard drive); and In the Matters of Charles Jefferson McCall, VSB Docket Nos. 01-033-1115, *et al.* (August 2001) (respondent’s law license suspended for 13 months for trust account mismanagement and other misconduct, notwithstanding his claim that his trust account records were hopelessly garbled when they were transferred from one accounting software program to another).

Whatever accounting system is used, RPC 1.15 requires a systematic means of ascertaining how much money each client has in trust at any given time. A manual system must include individual client ledgers, known as subsidiary ledgers. Computerized systems can sort each client’s

account information and prepare a customized client report. Many trust account problems come to light when clients complain that their lawyer cannot, or will not, account for funds paid to the lawyer. *See, e.g.*, In the Matters of Joel Steinberg, VSB Docket Nos. 01-051- 0755, *et al.* (Nov. 2001) (respondent surrendered his license before hearing on client complaints that he could not account for money paid to him and other misconduct).

### **Bouncing Trust Account Checks**

Over one hundred sixty financial institutions are currently approved as depositories for attorney trust funds. A list of approved institutions is published in the *Virginia Lawyer Register*. Approval is predicated upon financial institutions executing a Trust Account Notification Agreement with the bar. The agreement requires financial institutions to notify the bar whenever there is an overdraft on an attorney trust account, even if the account has overdraft protection or the bank covers the overdraft.

Rule 1.15(f)(1)(i) requires lawyers to inform financial institutions in writing which accounts are trust accounts, so the institutions can fulfill their contractual obligations to the bar. Under certain circumstances, banks may have third party liability for failing to investigate or report apparent trust account irregularities. *See, e.g.*, *New Jersey Title Insurance Co. v. New Jersey National Bank*, A-108-98 (March 22, 2000) (holding a bank acted in bad faith by failing to investigate a sole practitioner, known by the branch manager and assistant manager to love gambling, who cashed checks totaling \$242,150, all drawn on his trust account, over a three day period; the funds belonged to clients involved in real estate deals with New Jersey Title Insurance Co.).

Each year the bar receives and investigates hundreds of trust account overdraft notices. Most overdrafts are occasioned by attorney or bank error and are easily explained. A few trust account overdrafts are actually the product of attorney misconduct and result in disciplinary action. *See, e.g.*, In the Matters of George C. Rawlings, Jr., VSB Docket Nos. 00-061-0739, *et al.* (Dec. 2000) (trust account investigation initiated by bank overdraft notice; respondent surrendered his law license before a hearing on multiple charges of misappropriation and trust account irregularities).

### **Borrowing Trust Funds**

Trust funds do not belong to attorneys who deposit them in trust accounts. Therefore, attorneys cannot “borrow” trust funds to satisfy their personal needs or financial obligations. “Borrowing” trust funds is a disciplinary offense. *See, e.g.*, In the Matter of Robert Howard Labstain, VSB Docket No. 01-061-0890 (Dec. 2001) (respondent’s license to practice law revoked after the bar received a trust account overdraft notice and it was discovered that more than \$60,000 was missing from the respondent’s law firm trust account; respondent asserted that he intended to repay

the missing trust funds but admitted that he destroyed trust account records after taking the funds for personal needs).

If an attorney accepts a retainer, deposits it in a trust account and does not exhaust the retainer through payments for work performed, the unearned fees must be returned to the client. *See, e.g.*, In the Matters of Linda Louise Immler, VSB Docket Nos. 00-022-3278, *et al.* (Sept. 2001) (respondent surrendered her law license before hearing on multiple charges of neglecting client matters and failing to refund unearned fees).

Rule 1.15(b) provides that if there is a dispute as to the ownership of money in an attorney’s trust account, the attorney must segregate the funds in dispute until the dispute is resolved. *See, e.g.*, In the Matter of Ava Maureen Sawyer, VSB Docket No. 95-052-1280 (Sept. 1999) (after living on the lam to avoid arrest and attorney disciplinary proceedings, the respondent’s license was revoked for withdrawing disputed settlement funds from her trust account without her client’s consent, taking some of the funds as her fee and using other funds to make charitable contributions totaling \$50,000); and In the Matter of William Gray Sykes, VSB Docket No. 97-022-1951 (Oct. 1998) (respondent suspended for 120 days after he was unable to return \$154,367 that a mortgage company had erroneously wired to his trust account).

Attorneys are ethically obligated to satisfy statutory and other liens on client funds held in escrow. If a client objects to payment of a lien, the disputed funds should be paid into court for the court to decide whether the lien payment should be made. *See, e.g.*, In the Matter of Oscar de Leon Noblejas, VSB Docket No. 01-052-0781 (Jan. 2002) (respondent publicly reprimanded for failing to honor physician’s liens on three clients’ personal injury settlements).

### **Commingling Personal Funds with Trust Funds**

Trust accounts must be separate from firm operating accounts and contain only funds held in trust for others. While Rule 1.15(a)(1) permits lawyers to keep funds sufficient to pay service charges or other fees imposed by the financial institutions in their trust accounts, this exception does not permit lawyers to keep a slush fund in their trust account to cover overdrafts.

Retainer fees deposited in a trust account must be promptly withdrawn from the trust account as the attorney earns them. Only money, belonging in whole or in part to a client or third party, can be deposited or remain in an attorney trust account. *See, e.g.*, In the Matter of Barry L. Flora, VSB Docket No. 97-080-1576 (Feb. 2001) (respondent’s license suspended for depositing loan proceeds, that he ostensibly obtained for the benefit of his title insurance company but actually to provide cash to a friend and business associate who could not qualify for the loan, in his real estate escrow account even though the loans were not related to the respondent’s real estate practice).

Fraudulent trust fund transfers, perhaps intended to reduce personal net worth for equitable distribution purposes or to avoid paying taxes on earned income during the current tax year, may result in disciplinary action. *See, e.g.,* In the Matter of Douglas Fredericks, VSB Docket No. 96-021-0282 (Oct. 1999) (respondent received a public reprimand with terms for failing to keep adequate trust account records and writing large checks on his trust account to another attorney for deposit in that attorney's trust account with no explanation of the client or matter with respect to which the funds were being trafficked).

### **Turning over Trust Account Record Keeping to a Non-Lawyer**

A lawyer who delegates complete responsibility for his or her attorney trust account to a non-lawyer staff member is asking for trouble. The nonlawyer may appear to be the most honest person in the world, but if he or she is greedy or caught in a financial bind, the temptation to dip into the attorney trust account may prove irresistible. *See, e.g.,* In the Matters of Robert Larry Lambert, VSB Docket Nos. 99-022-0899, *et al.* (June 2001) (respondent received a public reprimand for violating his responsibility to ensure that non-lawyer personnel preserved client funds and kept accurate

records of those funds by, through lack of supervision, allowing a longtime friend and paralegal to embezzle more than \$800,000 from real estate closings before she committed suicide; upon discovery of the embezzlement, the respondent sold personal assets to cover the losses).

Taking responsibility for your trust account means that payments should be checked against invoices. Numbered receipts should be issued for every cash payment clients make. Each month bank statements should be delivered, unopened, to the responsible lawyer for review. Cash receipts and cash disbursements should be reconciled on a monthly basis, and client subsidiary ledgers must be reconciled on at least a quarterly basis. Failure to reconcile trust account records can result in patent irregularities lurking undetected and uncorrected for long periods of time.

As the misconduct cases cited above attest, failure to comply with the dictates of Rule 1.15 can adversely affect, or even end, an attorney's practice of law. Accounting irregularities, misappropriation or conversion of trust funds, may also trigger criminal proceedings. Therefore, "show me the money" should be the motto of every lawyer who maintains a trust account. 