

FORMAL OPINION NO 2005-149

Trust Accounts: Replenishing Account When Fees Are Disputed

Facts:

Lawyer has agreed to perform work for Client on an hourly basis and to bill Client monthly. Client provides a \$10,000 advance retainer from which Lawyer is to be paid. The retainer is properly deposited in a trust account. Lawyer sends Client a bill for \$2,000 and then withdraws the \$2,000 from the trust account and spends it.

Questions:

1. May Lawyer withdraw \$2,000 from the trust account when Lawyer sends the bill?
2. If Client objects to the bill, must Lawyer replenish in full the trust account?

Conclusions:

1. Yes, qualified.
2. No, qualified.

Discussion:

Oregon RPC 1.15-1 provides:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be

kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges on that account or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving 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) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Funds in a trust account may be withdrawn for payment when earned,¹ if Lawyer is not aware of any dispute over Lawyer's right to payment. Oregon RPC 1.15-1(e). In fact, a lawyer who leaves personal, as distinct from client, funds in a trust account is subject to discipline for commingling in violation of Oregon RPC 1.15-1(a) and (b). *Cf.* OSB

¹ For a discussion of when fixed fees are earned and properly withdrawn from trust, see OSB Formal Ethics Op No 2005-151 (rev 2011). We assume that, pursuant to applicable substantive law and in the absence of contract language to the contrary, hourly fees will ordinarily be considered to have been earned when the client is invoiced therefor. In other words, a lawyer may withdraw funds from trust to cover hourly fees simultaneously with sending the client an invoice.

Formal Ethics Op No 2005-145; *In re Mannis*, 295 Or 594, 668 P2d 1224 (1983). Although not required to do so, Lawyer may wait a reasonable period of time—such as 30 days—after Client has been invoiced before withdrawing earned funds. *In re Whipple*, 320 Or 476, 480–81, 886 P2d 7 (1994).

If Lawyer has withdrawn funds from a trust account in the absence of any knowledge of a dispute by Client, must Lawyer return the funds to the trust account if Client later disputes the withdrawal? Because Oregon RPC 1.15-1 does not expressly mandate replenishment after Lawyer has withdrawn funds without knowledge of a dispute, we conclude that replenishment is not required. Nevertheless, there is no basis to conclude that Lawyer, who returns funds to trust under these circumstances, would be commingling in violation of Oregon RPC 1.15-1(b). *See also Guzzetta v. State Bar*, 43 Cal 3d 962, 978–79, 741 P2d 172 (1987) (“An attorney’s restoration of funds wrongfully withdrawn from a trust account is not a further violation of the Rules of Professional Conduct as a prohibited ‘commingling’ of attorney and client funds.”).

Approved by Board of Governors, August 2005.

COMMENT: This opinion replaces OSB Formal Ethics Op No 2005-88. For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 12.3-6(d) (exceptions and limitations to rules regarding funds in trust accounts), § 12.3-7(b) (payment of attorney fees and disbursements from trust account) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 44–45 (2000) (supplemented periodically); and ABA Model RPC 1.15.

