

**FORMAL OPINION NO 2022-199**  
**Safekeeping Property:**  
**Depositing Funds into Trust Accounts**

**Facts:**

Oregon lawyers must maintain their Lawyer Trust Accounts at certain financial institutions for the purpose of holding clients' property separate from lawyers' property. Lawyer wishes to deposit Lawyer's money into Lawyer's Lawyer Trust Account to correct problems outside of the Lawyer's control, such as third-party theft from a security breach or identity fraud, in order to safeguard funds in the Lawyer Trust Account or to disburse funds promptly upon clients' requests.<sup>1</sup>

**Question:**

May Lawyer deposit Lawyer's own funds into Lawyer's Lawyer Trust Account after third-party theft or identity fraud in order to safeguard funds in the Lawyer Trust Account or to disburse funds promptly upon clients' requests?

**Conclusion:**

No; however, Lawyer may use Lawyer's own funds to restore the client's funds that should have been maintained in the Lawyer Trust Account, as long as proper notice of the initial loss and transfer of property is given to the client.

**Discussion:**

**1. Duty to Hold and Safeguard Property**

Oregon RPC 1.15-1(a) provides:

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,

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<sup>1</sup> "Outside of the lawyer's control" refers to situations involving third-parties that the lawyer has no relationship with or control over and does not refer to employees, staff persons, or contractors, including bookkeepers employed by the lawyer, or any person that the lawyer may direct or otherwise exercise control over. *See* Oregon RPC 5.3.

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. . . .

ORPC 1.15-1(b) provides:

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

OSB Formal Ethics Opinion No. 2005-145 concluded that Oregon RPC 1.15-1(b) does not allow for a financial “cushion” of the Lawyer’s own money in the event of a good-faith bookkeeping error or bank error that results in an overdraft on the Lawyer Trust Account.

Likewise, Lawyer may not deposit Lawyer’s own money into the Lawyer Trust Account to mitigate losses arising from security breach, identity theft, or other causes.

To comport with the duty to hold and safeguard client property found in Oregon RPC 1.15-1(a), however, upon notice to the affected client(s) as described below, Lawyer may write a check to the affected client(s), drawn on the Lawyer’s own funds, to restore the funds, or otherwise repay those funds to the client(s).

## **2. Conflict of Interest**

Oregon RPC 1.7(a)(2) provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

. . . .

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer[.]

Oregon RPC 1.7(b)(1) and (4) provide:

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation of each affected client;

....

(4) each affected client gives informed consent, confirmed in writing.

There is an increased likelihood that a self-interest conflict will exist if the amount at issue is material to the representation. Lawyer must determine whether Oregon RPC 1.7(a)(2) applies and, if so, must seek written informed consent to continue the representation.

### **3. Communication with Client**

Oregon RPC 1.4 provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information[.]

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Oregon RPC 1.15-1(d) provides:

Upon receiving funds or property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.

Taken together, Lawyer must inform the client of the loss of the client's property from the Lawyer Trust Account, the receipt of Lawyer's own funds into the Lawyer Trust Account, and sufficient information to allow the client to make informed decisions regarding representation. Lawyer must include a statement that clearly conveys that Lawyer is using the Lawyer's own funds to replace the client's property and disclaim all rights to those funds. Lawyer must determine whether the degree of loss and subsequent restoration of lost funds creates a material limitation on Lawyer's ability to represent the client. If Lawyer determines a conflict of interest exists, Lawyer must obtain written informed consent from the client for continued representation.

#### **4. Other Ethical Obligations**

This opinion does not venture into the impact that using Lawyer's own funds to replenish a client's missing funds may have on other ethical obligations of Lawyer, including but not limited to the duty to safeguard property (Oregon RPC 1.15-1), the duty to review the Lawyer Trust Account (Oregon RPC 1.15-2(e)), or the duty to supervise attorneys to remedy conduct of other attorneys (Oregon RPC 5.1(b)).

**Approved by the Board of Governors, June 2022.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.4 (client communication), § 9.2-1 to § 9.2-1(b) (personal-interest conflicts), ch 12 (lawyer trust accounts), § 16.4-14(a) (conflicts and liability exposure), § 16.4-14(b) (waiving potential conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 44 (safeguarding and segregating property) (2000).