

WSBA Formal Ethics Op. No. 186 (1990) [*withdrawn* *December 9, 2005*]

Issue:

What is the proper way for a lawyer to handle advance fee deposits and retainers paid by clients?

Discussion:

The distinction between “advance fee deposits” and “retainers” has been explained by the California Supreme Court in *Baranowski v. State Bar*, 154 Cal. Rptr. 752, 593 P.2d 613 (1979): “Advance fee deposits” are funds given to a lawyer for providing future services. Those funds are to be earned in the future as the lawyer performs services for the client. Those funds belong to the client until they have been earned by the lawyer.

“Retainers” are funds paid by a client to secure a lawyer’s availability over a given period of time. The funds are considered earned at the time of payment. Provided that the client agrees to such an arrangement, the funds are not refundable and the lawyer is entitled to the funds regardless of whether any services are actually performed for the client.

593 P.2d at 618, fn. 4.

Rule 1.14(a) of the Rules of Professional Conduct provides in pertinent part:

All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

* * *

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The general rule is that *all* funds of clients must be put into a trust account. A lawyer’s funds may not be put into the trust account, except that a lawyer’s funds must be deposited into the trust account when those funds belong in part to the client and in part either presently or potentially to the lawyer. An example of funds belonging in part to a client and in part to the lawyer would be a recovery in a personal injury lawsuit when the lawyer is to be paid a contingent fee. Even though a percentage of the recovery belongs

to the lawyer, the entire recovery must be deposited in the trust account and the lawyer's fee then withdrawn.

Therefore, advance fee deposits, which are funds which presently belong to a client but potentially belong to the lawyer, shall be deposited into the trust account. As the services are performed and fees are earned, unless the right of the lawyer to receive the fees is disputed by the client, the lawyer shall withdraw the earned fees from the trust account and provide a proper accounting to the client. On the other hand, if the lawyer and client agree that funds paid to the lawyer are a retainer earned by the lawyer when paid, which the lawyer will not refund and which is a charge for merely hiring the lawyer to handle the client's case, the retainer shall not be deposited into the trust account since it consists entirely of the lawyer's funds.

The distinction between retainers and advance fee deposits is clear and is the appropriate method by which client funds are to be characterized in determining whether they shall or shall not be deposited into lawyer trust accounts. As long as the lawyer's client knows and agrees with what the lawyer intends to do with a fee payment, the appropriate method for handling the funds can be determined. The recommended practice would be to have a written fee agreement in all cases which could be easily referred to in case a question were later raised regarding the agreement of the parties as to the disposition of the fee paid.

Any fee paid to a lawyer that the client has agreed is not refundable and is earned upon receipt for handling the client's case shall not be deposited in the lawyer's trust account. Such a fee is a true retainer. But if the client pays a fee to the lawyer with the understanding that the client may receive any unearned fee back, and that the lawyer will draw against the funds as earned, such a fee must be deposited into the lawyer's trust account. The requirement that unearned fees be placed in the lawyer's trust account insures the integrity of clients' funds separate from a lawyer's personal funds.

The benefits to clients of being assured of the separate integrity of their funds have been repeatedly emphasized by the Washington State Supreme Court. *See, e.g., In re Deschane*, 84 Wn.2d 514, 527 P.2d 683 (1974).

Benefits to the profession are also present when lawyers are required to put advance fee deposits in a trust account. First, a lawyer will be able to comply with the requirement of RPC 1.15 (d) which provides that when withdrawing from representation of a client a lawyer has a duty of "refunding any advance payment of fee that has not been earned."

Second, a clear indication that advance fee deposits will be treated as client funds until they are earned permits lawyers to take advantage of Tax Court rulings that advance fee deposits are not income when they are placed in the lawyer's trust account, but become income when the lawyer earns an undisputed amount.

In conclusion, "retainers" as defined above, *must not* be deposited in a lawyer's trust account; "advance fee deposits", as defined above, *must* be deposited in a trust account

until the fee is earned. Obviously, there must be an agreement between the lawyer and the client as to the purpose for which funds are paid. The better practice would be to have a written fee agreement.