

Trust Accounts

Frequently Asked Questions during the COVID-19 Pandemic

The Washington State Bar Association Office of Disciplinary Counsel auditors have received many questions from lawyers regarding how to handle their trust accounts during the COVID-19 pandemic, including questions about banking remotely or electronically. For the benefit of all members who may have the same or similar questions, we are publishing answers to some of the most common questions.

- 1. How do we deposit and disburse settlement funds or Department of Labor & Industry payments that we regularly receive at our office if we are no longer allowed to go the office?**

Like other businesses, yours will have to figure out a way to complete certain critical functions with minimal contact with other people. Try to arrange for incoming funds to be sent to your trust account electronically, such as by wire or ACH transfer, etc.

One advantage of electronic deposits is that once the bank posts them to your trust account, you do not have to wait for a deposited check to clear in order to disburse those funds.

- 2. Are there any restrictions on how deposits are made to a trust account? Are wire and ACH deposits allowed?**

There are no rules addressing how to deposit funds into a trust account. You can deposit cash or paper checks or have someone send you funds electronically, such as by wire or ACH transfer. Please remember that although you may change your banking practices to include electronic transactions, you are still responsible for maintaining required records such as check registers and client ledgers as outlined in RPC 1.15B. You may not rely solely on the electronic records maintained by the bank.

There are, however, restrictions on how funds can be disbursed from a trust account. You may not withdraw cash from a trust account. RPC 1.15A(h)(5) states that a disbursement must be made only by a payment to a named payee (not cash) or by an electronic transfer. You should ensure that only you or another lawyer who is a signatory on your trust account authorize electronic payments from your trust account. You may also consider issuing electronic checks from your trust account using your bank's bill payer option, if available.

3. I want to disburse funds from my trust account by electronic transfer. May I allow a staff person to perform the perfunctory task of completing these transfers through the bank's online portal?

The RPCs do not directly address whether a lawyer may authorize a staff person to perform certain online tasks with regard to disbursing funds. If you are considering doing this, you should first consider the following:

- a. Lawyers who are signatories on the trust account are ultimately responsible for trust-account activity. Any electronic payment from the trust account must be authorized by a lawyer who is a signatory on the trust account.
- b. You should limit who has the ability to enter online transactions. For example, you may have an office manager who is able to have access to enter transactions online using the form described below. This person would have a login name and password known only to that person and you. If you have sufficient staff, the person entering the online transactions should not be the same person reconciling the account. If you do not have enough staff to divide accounting duties, then you must be especially diligent in reviewing the reconciliation when complete.
- c. You should create a form to be used by a signatory on the trust account to convey instructions for online payments, such as the date when funds are to be sent, name of client, the payee, payee's bank information, amount of transfer, and the purpose of the transaction. The lawyer authorizing the electronic transfer should sign these forms. If the lawyer is not available to sign these forms in person, they could be signed electronically and sent by email.

Keep these forms and give them to the bookkeeper to record in the check register and client ledgers. Then provide these forms to the person who performs the trust-account reconciliations to verify each transaction duly authorized. Finally, the lawyer in the office who reviews the monthly reconciliations should review these forms. Keep these forms for seven years, just as you do cancelled checks and deposit slips in compliance with RPC 1.15B(a).

A staff person who is entering an online payment should not make any changes to the instructions without approval of the signing lawyer.

4. Is there a problem giving my bank account and routing number to someone who wants to send me client funds by electronic transfer?

The apprehension of sending bank information to a third party is understandable. You should only send this information to a person or entity about whose identity you feel reasonably certain. As stated above, only a lawyer who is a signer on your trust account should authorize outgoing electronic transfers. Every time you send a check to someone you are sending your bank account and routing number to the payee on the check.

Related to scams, you should keep good records and reconcile every month so you can detect if someone is attempting fraud on your trust account. Currently there is an ongoing fraud scheme where scammers are hacking into email accounts and looking for email instructions for sending funds electronically. The scammer then sends an email that appears to be coming from the person to whom you are to send funds, but changing the bank information. You should not accept these emails at face value. Always contact the intended recipient of the funds, preferably by a phone number that you know is valid, and confirm if they really changed the bank instructions.

5. My client wants me to pay his or her settlement in cash. Can I do that?

You cannot withdraw cash from a trust account or write a check payable to cash. You could obtain a cashier's check for your client. You might also make yourself available for a call from the bank in order to facilitate your client's ability to cash the check. If your client wants to obtain cash for a check over \$10,000, the bank will require extra paperwork related to reporting the cash withdrawal to the IRS.

6. There are several RPCs related to trust accounts that require lawyers to take certain actions "promptly." Does the pandemic affect the interpretation of the term "promptly?"

Some examples of rules that require a lawyer to act promptly are RPC 1.15A(d) that requires a lawyer to promptly notify a client or third person of the receipt of money on that person's behalf, and RPC 1.15A(f) that requires a lawyer to promptly pay or deliver property (including funds) to the person entitled to receive them.

As with most of the RPC that include terms such as "promptly," or "reasonably," there are no absolutes as to how many days constitute being prompt or what actions constitute being reasonable. Evaluate each situation on a case-by-case basis. The time it takes you to make a deposit and issue checks may take longer than it used to if you are reducing the number of trips you make to the bank or if you have to set up information necessary to receive and disburse funds electronically.

You should try to accomplish these tasks as promptly as the circumstances allow, while still taking care to comply with other ethical obligations. For example, if it takes longer to deposit a settlement check than it used to, you should not disburse the funds more quickly than your regular procedures dictate. Remember, although a bank may make funds available to you that does not mean your bank has received the funds. Good communication with your client at this time is crucial. Prepare your client for what needs to happen when the settlement arrives in order for you to disburse the funds, and keep your client advised as the funds progress through your trust account.

The auditors are available to take your questions. The best way to contact us is by sending an e-mail to Audit Manager Cheryl Heuett at cherylh@wsba.org.

April 8, 2020