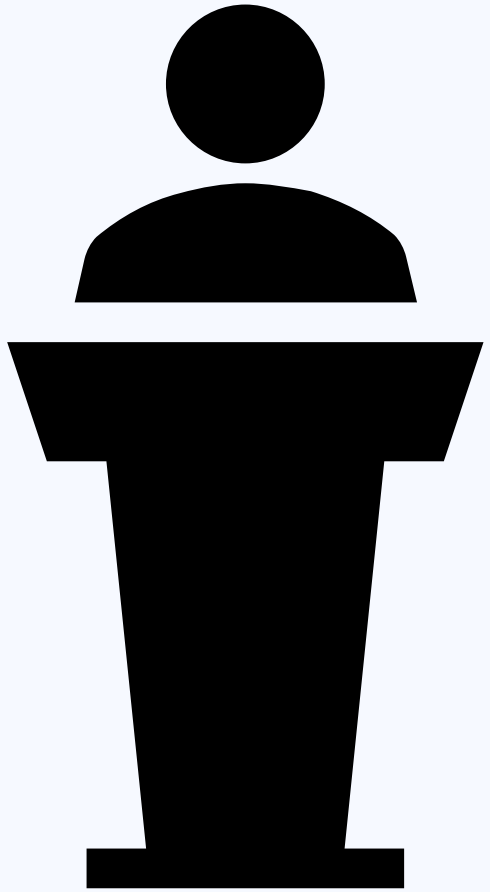
TRUST ACCOUNT MANAGEMENT WORKSHOP

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY



SPEAKER BIOGRAPHIES

Steven J. Christopher is Deputy Chief Disciplinary Counsel of the Investigations Section of the Tennessee Board of Professional Responsibility of the Supreme Court of Tennessee. Prior to working at the Board, Steve was a Managing Attorney at the Legal Aid Society of Middle Tennessee and the Cumberlands, a private non-profit law firm that provides free legal representation to indigent persons in civil and administrative legal matters. Steve is a graduate of Harvard Law School and Vanderbilt University Divinity School.

Douglas R. Bergeron is a Disciplinary Counsel in the Litigation Section of the Tennessee Board of Professional Responsibility. Doug joined the Board of Professional Responsibility in the Investigations section in June 2020 and transitioned to the Litigation section in October of 2020 . Having begun his law career in 1996, Doug spent approximately 24 years in private practice in the practice area of insurance defense. He has practiced and litigated extensively in both State and Federal Courts across Tennessee. Doug received his bachelor's degree from the University of Central Florida in Orlando, Florida, and his law degree from University of Memphis Cecil C. Humphreys School of Law.

TOPICS COVERED

1. Trust Accounts—General Principles
2. Preventing Overdrafts
3. Preventing Misappropriation of Funds
4. Unidentified Trust Account Funds
5. Common Comingling Errors
6. Remote Work and Use of Digital Technologies
7. Clients Experiencing "Settlement Remorse"
8. Trust Account Scams
9. Accepting Client Fees and Expenses by Credit Card and Digital Payment Platforms
10. Attorney Fees

1. TRUST ACCOUNTS—GENERAL PRINCIPLES

WHAT IS A TRUST ACCOUNT?

A trust account is a bank account maintained incident to a lawyer's law practice in which the lawyer holds funds received in a fiduciary capacity on behalf of or belonging to a client or third party.

WHEN DOES A LAWYER NEED A TRUST ACCOUNT?

A lawyer must maintain a trust account when the lawyer receives funds in a fiduciary capacity in the context of their law practice.

The lawyer must have access to the trust account before receiving the funds. See RPC 1.15(a)-(c).

Lawyers who do not receive funds belonging to or on behalf of clients or third parties are not required to establish a trust account.

WHAT FUNDS NEED TO BE DEPOSITED INTO A TRUST ACCOUNT?

1. Attorney fees that have not yet been earned.
2. Pre-paid discretionary expenses and costs.
3. Any other funds received from clients or third parties to be held on behalf of the client or third party.

RPC 1.15(c).

A LAWYER'S OBLIGATION TO SAFEGUARD PROPERTY OR FUNDS

An attorney's ethical obligation regarding trust accounts falls within an attorney's broader fiduciary obligation over property or funds of clients and third parties.

RPC 1.15, Comment [1]: "A lawyer should hold property of others with the care required of a professional fiduciary."

PROHIBITION OF COMINGLING FUNDS

Trust accounts are also required to prevent an attorney from comingling client funds or funds of third persons with personal funds.

"A lawyer shall hold property and funds of clients or third persons that are in the lawyer's possession in connection with a representation separate from the lawyer's own property and funds." RPC 1.15(a).

DOES EACH LAWYER IN A FIRM NEED A SEPARATE TRUST ACCOUNT?

No. Lawyers in a firm may use a single firm trust account as long as adequate records of the funds of each client are maintained.

Multiple firm trust accounts are permissible. However, for good control, oversight, and accountability, firm accounts are preferable to individual accounts.

DUTY TO PROMPTLY TRANSMIT FUNDS

Upon receiving funds or other property in which a client or third party has an interest, a lawyer shall promptly notify the client or third person, and unless agreed upon with the client, deliver to the client or third party the funds that the client is entitled to receive.

RPC 1.15(d)

WHAT IF FUNDS OR PROPERTY ARE DISPUTED?

If a lawyer is in possession of property or funds in which two or more persons (one of which may be the lawyer) have an interest, the property shall be kept separate until the dispute is resolved. Any undisputed portion shall be immediately released.

RPC 1.15(e)

INTERPLEADER MAY BE REQUIRED

If a dispute regarding the ownership of funds is not informally resolved, there may be a need for the lawyer to interplead the funds.

DUTIES TO THIRD PARTIES

Third parties, such as a client's creditors, may have just claims against trust account funds. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client and accordingly may refuse to surrender funds to the client.

RPC 1.15, Comment [11].

HYPOTHETICAL

A lawyer agrees to represent a client in pursuing a personal injury claim. The case is settled for policy limits. What are the lawyer's obligations following settlement with regard to the funds received and disbursement?

Let's assume that after settlement is reached, a dispute arises between the lawyer and the client over the applicable portion of the client's settlement proceeds, as the client did not understand how subrogation claims would be deducted. What are the lawyer's obligations under RPC 1.15?

TYPES OF LAWYER TRUST ACCOUNTS

INDIVIDUAL TRUST ACCOUNTS FOR SPECIFIC CLIENTS

Required when funds will be maintained for a significant length of time and/or are of such a significant value to warrant individual investment of the funds.

INTEREST ON LAWYERS' TRUST ACCOUNTS ("IOLTA")

Required when the client funds are (1) nominal in amount; and/or (2) are only going to be held for a brief period.

REQUIREMENTS FOR BOTH TYPES OF TRUST ACCOUNTS

All trust accounts must be maintained in a financial institution, deposits of which are insured by the Federal Deposit Insurance Corporation ("FDIC") and/or National Credit Union Association ("NCUA"), having a deposit accepting office in the state where the lawyer's office is situated.

RPC 1.15(b).

APPROVAL OF FINANCIAL INSTITUTIONS

Attorney trust accounts shall be maintained only in financial institutions approved by the Board of Professional Responsibility.

TENN. SUP. CT. R. 9, § 35.1.

A list of approved financial institutions is maintained on the Board's website at

https://www.tbpr.org/for-legal-professionals.

OVERDRAFT NOTIFICATION PROGRAM

The financial institution where the trust account is held must participate in the overdraft notification program governed by TENN. SUP. CT. R. 9, § 35.1.

Any financial institution holding an attorney trust account shall send notice to the BPR whenever any properly payable instrument is presented against a trust account containing insufficient funds, irrespective of whether the instrument is honored.

TENN. SUP. CT. R. 9, § 35.1(b).

CONSENT BY ATTORNEYS TO OVERDRAFT NOTIFICATION

Every attorney practicing in Tennessee shall be conclusively deemed to have designated the Board as their agent for the purpose of disclosure of financial records by financial institutions relating to their trust accounts, including overdraft notification reporting.

TENN. SUP. CT. R. 9, § 35.1(e).

OVERDRAFT NOTIFICATION MAY LEAD TO BOARD INVESTIGATION

If an overdraft notice is generated and forwarded to the Board, the circumstances resulting in the overdraft will be reviewed, and an investigative file may be opened pursuant to TENN. SUP. CT. R. 9, § 15.1.

ACCOUNTS MUST BE CLEARLY IDENTIFIED AS "TRUST" OR "ESCROW" ACCOUNTS

The account name of any trust account must clearly identify the account as a "trust" or "escrow" account.

The attorney must take all steps necessary to inform the depository institution of the purpose and identity of the account(s).

TENN. SUP. CT. R. 9, § 35.1(a)(1).

PERSONAL FUNDS MAY ONLY BE DEPOSITED FOR FINANCIAL INSTITUTION SERVICE CHARGES

A lawyer may deposit the lawyer's own funds in a trust account only to pay financial institution service charges or fees on that account. The lawyer should confirm the amount of such charges with the financial institution to avoid depositing excess charges. RPC 1.15(b).

A lawyer may not deposit personal funds into their trust account for any other purpose, including maintaining an amount of funds to avoid an overdraft.

RECORDKEEPING REQUIREMENT

Complete records of trust account funds shall be kept by the lawyer and preserved for a period of five (5) years after termination of the representation.

RPC 1.15(b).

INDIVIDUAL TRUST ACCOUNTS

An individual trust account should be established if the funds at issue are of an amount or are expected to remain in the account for such a duration that the funds would likely earn an amount of income for the benefit of the client to warrant creation of a separate trust account.

For individual trust accounts, interest earned shall belong to the clients or third persons whose funds are deposited, and the lawyer has no right to such interest.

RPC 1.15(b)(1).

Most attorneys who handle funds of clients or third parties will only be required to establish an IOLTA account, rather than individual trust accounts.

INTEREST ON LAWYERS' TRUST ACCOUNT ("IOLTA")

An IOLTA account is a "pooled trust account." A lawyer shall deposit all funds of clients and third persons that are nominal in amount or expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client to warrant creation of a separate trust account.

IOLTA accounts governed by RPC 1.15(b)(2) and TENN. SUP. CT. R. 43.

HOW TO DETERMINE IF FUNDS SHOULD BE DEPOSITED INTO AN IOLTA ACCOUNT

The factors a lawyer should consider in this analysis include the following:

1. The amount of funds to be deposited.
2. The expected duration of the deposit.
3. The cost of establishing and administering a non-IOLTA account for the benefit of the client.

RPC 1.15, Comment [5].

A lawyer's decision whether or not to establish an individual trust account is a discretionary one, and no disciplinary action shall arise due to a lawyer's good faith determination on this issue.

RPC 1.15(b)(3); RPC 1.15, Comment [6].

THE TENNESSEE BAR FOUNDATION

The Tennessee Bar Foundation acts as the organizational administrator of the IOLTA program. TENN. SUP. CT. R. 43, § 1.

The Tennessee Bar Foundation is responsible for determining whether a financial institution is an eligible financial institution which meets the requirements of the IOLTA program. TENN. SUP. CT. R. 43, § 1.

A list of the eligible financial institutions is maintained by the Tennessee Bar Foundation on its website: www.tnbarfoundation.org.

ATTORNEY IOLTA REPORTING REQUIREMENTS

Unless exempt (exemptions are itemized at TENN. SUP. CT. R. 43, § 14), an attorney admitted to practice in Tennessee shall certify IOLTA compliance in their annual registration statement. TENN. SUP. CT. R. 43, § 14.

The certification must include disclosure of the financial institution(s) where any IOLTA funds are held.

The information contained in the attorney's IOLTA reporting shall remain confidential other than as to the Tennessee Supreme Court or the Board of Professional Responsibility. TENN. SUP. CT. R. 43, § 17.

ADMINISTRATIVE SUSPENSION MAY ARISE THROUGH NONCOMPLIANCE WITH IOLTA REPORTING

Attorneys may be administratively suspended for noncompliance with their IOLTA reporting requirement. TENN. SUP. CT. R. 43, § 15.

USE OF INTEREST GENERATED THROUGH IOLTA ACCOUNTS

The interest generated through an IOLTA account is distributed by the Tennessee Bar Foundation for the following purposes:

1. To provide legal assistance to the poor
2. To provide student loans, grants, and/or scholarships to deserving law students
3. To improve the administration of justice.

TENN. SUP. CT. R. 43, §13.

2. PREVENTING OVERDRAFTS

Negligent bookkeeping errors that result in overdraft or insufficient funds notices can most effectively be prevented through the creation and maintenance of reasonable internal controls.

RPC 1.15 REQUIRES EFFECTIVE TRUST ACCOUNT MANAGEMENT PRACTICES

In accordance with their fiduciary duty over the property and funds of clients and third parties, attorneys are required to create and maintain effective trust account management practices.

Attorneys may be subject to discipline for violation of RPC 1.15 and other disciplinary rules arising out of negligent bookkeeping errors and the failure to create and maintain effective trust account management practices.

MANAGERIAL OVERSIGHT

Maintaining good trust account management practices is not only required by RPC 1.15 but also falls within a lawyer's overall managerial responsibilities.

Lawyers with managerial authority over their law practice, regardless of the size of the practice, are required to create and maintain protocols to provide reasonable assurance that the lawyer and their staff will comply with the Rules of Professional Conduct.

RPC 5.1

Neither the Rules of Professional Conduct nor Rule 43 of the Tennessee Supreme Court Rules create any specific mandates regarding the details of your trust account management system (e.g. use of a written ledger or online software).

LAWYERS MUST UNDERSTAND THE TRUST ACCOUNT MANAGEMENT SYSTEM ADOPTED

Whatever account management system is chosen, the lawyer must understand how the system works, how records will be maintained, train and supervise staff, and review trust account records regularly.

SPECIFIC SUGGESTIONS FOR INTERNAL CONTROLS

1. Diversification of financial functions.
2. Regular reconciliation of accounts.
3. Direct reviewing online bank statements or unopened bank statements received by mail.
4. Good case management and communication protocols.
5. Vetting (including criminal background checking) and ongoing training/supervision of employees.

TENNESSEE FORMAL ETHICS OPINION 89-F-121

Tennessee Formal Ethics Opinion 89-F-121 contains a summary of best practices for trust account management.

Many of the specific suggestions in Formal Ethics Opinion 89-F-121 reflect a pre-internet world where written ledgers were the primary means of account management. However, this formal ethics opinion remains an excellent resource for overall trust account management guidelines regardless of whether the attorney uses a conventional or software-based system.

FAMILIARITY WITH FINANCIAL INSTITUTION'S POLICIES

Lawyers should take particular care to review the trust account bank's procedures and practices, including the imposition of charges, the circumstances when a hold will be placed on a check, etc.

INSURANCE

The ultimate risk control mechanism is insurance. Despite all prudent audit control steps a firm may take, it is still possible for theft to occur.

DISCIPLINARY ACTION IMPOSED FOR TRUST ACCOUNT VIOLATIONS

Occasional inadvertent errors that do not result in harm to clients or third parties will typically not result in disciplinary action. However, repeated overdrafts, even if arising out of inadvertent errors, may be construed to breach an attorney's fiduciary duty defined at RPC 1.15, and/or RPC 5.1.

3. PREVENTING MISAPPROPRIATION OF FUNDS

HYPOTHETICAL

Attorney employs Legal Assistant. Attorney uses a conventional check and ledger trust account management system. Attorney reviews the monthly mailed bank statements from the financial institution where the trust account is maintained. Unbeknownst to Attorney, the Legal Assistant forges the bank statements and to conceal frequent withdraws by the Legal Assistant on the trust account.

Has Attorney violated any ethical rules? What steps could have been taken by Attorney to prevent the misappropriation? What steps must Attorney take now?

MISAPPROPRIATION OF FUNDS BY STAFF

Intentional misappropriation of trust account funds by other lawyers or support staff in your office, absent your involvement or knowledge, may result in discipline for violation of RPC 1.15 and RPC 5.1/5.3, where the conduct resulted from inadequate internal controls and/or a failure to take proper remedial action once aware of the conduct.

HYPOTHETICAL

Attorney is a solo practitioner who employs three support staff. There is a slowdown in Attorney's practice and as a result, Attorney does not have the money to pay for the office lease, support staff salaries, and other ongoing expenses. Attorney withdraws funds from the firm's trust account, expecting to return the funds once business picks back up.

What ethical rules has Attorney violated? What protocols could have mitigated the possibility of this action being taken?

THE CARDINAL RULE FOR PREVENTING MISAPPROPRIATION

Diversification of financial functions. Misappropriation frequently arises where an attorney or support staff person experiences personal financial duress and/or manifests addictive propensities, and where the attorney or support staff person is the only individual with regular access to or review of the firm's trust account.

Having more than one person regularly reviewing trust account records can help prevent or mitigate misappropriation of funds.

LAWYER'S OWN INTENTIONAL MISAPPROPRIATION

A lawyer's own intentional misappropriation of trust account funds may be grounds for temporary suspension and the filing of formal disciplinary charges.

Likely Rules of Professional Conduct implicated include RPC 1.15, 8.4(b), and 8.4(c).

4. UNIDENTIFIED TRUST ACCOUNT FUNDS

HYPOTHETICAL

Attorney, a solo practitioner, decides to retire. Attorney completes a reconciliation of their trust account funds and discovers that there are $5,000 funds which cannot be identified.

What is the attorney's proper course of action?

A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds.

If, after 12 months, the lawyer is unable to locate the owner of the funds, the lawyer must remit the funds to the Tennessee Lawyers' Fund for Client Protection.

RPC 1.15(f)

LAWYERS' FUND FOR CLIENT PROTECTION

The Lawyers' Fund for Client Protection is a Tennessee Supreme Court agency that monitors and disburses funds to individuals financially harmed by an attorney's dishonest conduct.

The Lawyers' Fund for Client Protection is governed by TENN. SUP. CT. R. 25. Additional information about the Lawyers' Fund for Client Protection is available at https://tlfcp.tn.gov/.

HYPOTHETICAL

Attorney represents a client in pursuing a civil claim which results in a favorable settlement. After receipt of the settlement funds from opposing counsel, the funds are deposited into trust. Attorney contacts the client, but the client doesn't respond.

What is the attorney's proper course of action?

UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT

RPC 1.15(f) does not apply where the owner is identified but cannot be located. Under this circumstance, the lawyer, after exhausting efforts to facilitate return of the funds, must proceed pursuant to Tennessee law governing abandoned property. See TENN. CODE ANN. § 66-29-101, et seq. (Uniform Disposition of Unclaimed Property Act).

RPC 1.15, Comment [14].

5. COMINGLING ERRORS

COMINGLING OF FUNDS IS PROHIBITED

A lawyer shall hold property and funds of clients or third persons that are in the lawyer's possession in connection with a representation separate from the lawyer's own property and funds.

RPC 1.15(a).

MAKING PERSONAL TRANSACTIONS OUT OF YOUR TRUST ACCOUNT

Attorney obtains a favorable settlement for a client in connection with a civil claim. Attorney deposits the settlement funds into trust following receipt and releases the client's portion of the proceeds. Attorney is in arrears on a personal mortgage obligation.

May attorney send a payment directly from the trust account to the mortgage company?

Even in the circumstance where an attorney's trust account temporarily contains fees earned by the attorney, the funds may not be withdrawn to pay personal expenses.

RPC 1.15, Comment [15]. See also Board of Professional Responsibility v. Allison, 284 S.W.3d 316, 324-325 (Tenn. 2009).

HOLDING A "CUSHION" OF PERSONAL/OPERATING FUNDS

Attorney is reasonably concerned about avoiding overdrafts. May Attorney hold $1,000 of Attorney's operating funds in the Attorney's trust account to mitigate the effects of bookkeeping errors?

For both individual trust accounts and IOLTA accounts, a lawyer may deposit the lawyer's own funds solely for the purpose of paying a financial institution's service charges or fees, and only in an amount reasonably necessary for that purpose.

RPC 1.15(b).

Attorneys are likewise required for ensuring that such financial institution service charges are paid by the attorney and not assessed to the client. RPC 1.15, Comment [4].

PRACTICE SUGGESTION

Be sure to confirm with your financial institution the applicable charges that will be assessed against the account and establish an office protocol to ensure prompt deposit of sufficient funds to cover these charges.

6. REMOTE WORK AND USE OF DIGITAL TECHNOLOGIES

DUTY TO PREVENT UNAUTHORIZED DISCLOSURE OF INFORMATION

An attorney is required to take reasonable steps to prevent the inadvertent or unauthorized disclosure or unauthorized access to information relating to the representation of the client.

RPC 1.6(d).

THIS INCLUDES TRUST ACCOUNT RECORDS

The attorney's general duty to protect confidential information includes trust account records, as such records constitute information relating to the representation of the client.

Trust account records can thereby only be disclosed through the client's informed consent, where impliedly authorized, or where permitted by RPC 1.6(b) or required by RPC 1.6(c).

THE DUTY OF CONFIDENTIALITY APPLIES TO FORMER CLIENTS

The attorney's duty to protect confidential information continues after the attorney-client relationship has ended. On this basis, any trust account information relating to former clients maintained conventionally or digitally must be protected.

RPC 1.6, Comment [20].

THE CREATION AND MAINTENANCE OF APPROPRIATE SAFEGUARDS

RPC 1.6(d) requires attorneys to create and maintain appropriate safeguards to prevent the disclosure of confidential information.

This task is part of an attorney's overall duty to create and maintain appropriate office protocols to ensure compliance with the Rules of Professional Conduct.

RPC 5.1.

The appropriate protocols are going to depend upon the size of the attorney's firm, the nature of the attorney's practice, and whether the attorney uses a conventional or digital trust account management system.

See RPC 1.6, Comment [18] and [19].

REMOTE WORK AND MOBILE BANKING

The Rules of Professional Conduct do not prohibit or proscribe remote work, the use of bookkeeping software or mobile banking.

Whatever bookkeeping system or tools are used, the attorney's fiduciary duty defined at RPC 1.15, Comment [1] and duty to maintain confidentiality defined at RPC 1.6(d) are applicable.

HYPOTHETICAL

Attorney, the Managing Partner of a firm, decides to move the firm to a remote work model where attorneys and support staff will work from home 3 days a week.

What are some specific issues and concerns that the Managing Partner should consider regarding remote trust account management practices, and how should these concerns best be addressed, in order to comply with RPC 1.15 and RPC 5.1?

7. CLIENTS EXPERIENCING "SETTLEMENT REMORSE"

HYPOTHETICAL

Attorney settles Client's civil claims after the filing of suit. Defense counsel forwards a settlement check to Attorney after execution of releases and the settlement check is deposited into Attorney's trust account. Client changes their mind about the settlement and refuses to accept their portion of the funds.

What steps should Attorney take?

THE SETTLEMENT FUNDS MUST REMAIN IN TRUST

Attorney must keep the entire settlement funds in trust until the issue with the client is resolved. If there is a dispute between you and the client about the amount of fees that need to be returned to the client, the disputed portion of the fee needs to remain in your trust account pending the resolution of the fee dispute.

RPC 1.15(e).

COMPLYING WITH THE CLIENT'S DECISION REGARDING SETTLEMENT

Attorney cannot compel Client's decision on the issue. An attorney must comply with a client's decision regarding settlement of a matter. RPC 1.2(a).

However, Attorney's communication obligations defined at RPC 1.4(a) require Attorney to advise Client of the implications of Client's decision (e.g., the triggering of a motion to enforce the settlement).

COMMUNICATION WITH THIRD-PARTIES

Attorney must also notify any third-parties with an interest in the funds that the funds are being held in trust.

RPC 1.15(d).

MAINTAINING CONFIDENTIALITY

During the consultation period with the Client, Attorney should refrain from disclosing to defense counsel or any third-parties that Client has refused to accept the settlement, as this information relates to the representation pursuant to RPC 1.6(a) and does not fall within any exception to disclosure.

WHAT IF ATTORNEY IS DISCHARGED OR WITHDRAWS?

Client persists in rejection of the settlement agreement. If Attorney is discharged by Client or chooses to seek permissive withdrawal (which would be compliant with RPC 1.16(b)), the funds must remain in trust pending the resolution of the issue.

If Client retains successor counsel while the dispute is pending, the funds may be transferred to successor counsel's trust account. Attorney may assert their statutory attorney fee lien against any subsequent recovery by Client in the civil proceeding.

DEFENSE OF A MOTION TO ENFORCE THE SETTLEMENT

If Attorney remains counsel for Client and defense counsel files a motion to enforce the settlement, Attorney is required to raise any available defenses to the motion, as Attorney remains under a duty to provide zealous advocacy for Client.

However, if no nonfrivolous defenses exist under applicable law, Attorney must seek leave to withdraw, as defending would potentially violate RPC 3.1 (assertion of frivolous legal claims).

AN INTERPLEADER ACTION MAY ULTIMATELY BE REQUIRED

If the issue remains unresolved and defense counsel does not affirmatively file a motion to enforce the settlement, Attorney will ultimately be required to file an interpleader action to resolve the issue. The settlement funds cannot indefinitely remain in trust, as this would violate both RPC 1.15 and RPC 1.3 (diligence).

RPC 1.15, Comment [12].

8. TRUST ACCOUNT SCAMS

COMMON SCENARIO 1

Client contacts Attorney by email seeking legal representation in a breach of contract matter. Client alleges that they are owed $100,000 on the contract. Attorney agrees to handle the matter on a contingency fee basis, and a fee agreement is signed. All communications with Client are by email or phone.

Days after the execution of the fee agreement, Attorney receives a check from the alleged breaching party for the full $100,000. Client advises that they need their portion of the funds immediately. Attorney deposits the $100,000 check into the firms' trust account and after the bank provides provisional credit, disburses Client's share.

Weeks later, Attorney receives notice from the bank that the check was fraudulent. The $100,000 is withdrawn from Attorney's account, resulting in an overdraft which impacts other client funds.

COMMON SCENARIO 2

Attorney agrees to represent Client in a transactional matter. An agreement is reached with the opposing party. Attorney provides the Client with the wiring instructions for transmittal of funds into Attorney's trust account. A date is scheduled for Client to sign the documents in connection with the agreement.

Hours before the Client is scheduled to sign the documents, the Client receives an email purporting to be from Attorney with different wiring instructions. Client wires the funds prior to meeting with Attorney. The email turns out to be fraudulent and the funds are lost.

WERE ANY ETHICAL RULES VIOLATED?

No legal authority yet in Tennessee. However, North Carolina State Bar Formal Opinion 2021-2 concluded that several ethical rules are implicated for these types of scams, including RPC 1.1 (competence), RPC 1.3 (diligence), RPC 1.15 (duty to safeguard funds), and RPC 5.1 (managerial responsibilities).

HOW TO PREVENT SCAM 1

1. Speak with your financial institution regarding their policies on provisional credit.
2. When you have reason to be suspicious of whether a check is valid, physically present the check at your financial institution for review.
3. Independently verify the identity of new clients.
4. Look carefully at the date of the check—often the check will be dated prior to attorney's first contact with the prospective client.
5. Consult with your financial institution or an outside professional re fraud prevention.

HOW TO PREVENT SCAM 2

1. Confirm correct email/phone/fax contact information at the commencement of the representation with clients and that communications will not be sent from any other contact information.
2. Request that clients immediately call to verify if they receive communications from any email/phone/fax other than the contact information originally provided.
3. Advise new clients of the proliferation of email scams.

9. ACCEPTING PAYMENT BY CREDIT CARD AND DIGITAL PAYMENT PLATFORMS

ETHICAL ISSUES WITH ACCEPTING PAYMENTS WITH CREDIT CARDS AND DIGITAL PAYMENT PLATFORMS

The acceptance of payments using credit cards or payment platforms raises several ethical issues:

1. Confidentiality
2. Chargebacks
3. Comingling of funds

TENNESSEE FORMAL ETHICS OPINION 2023-F-170

On August 7, 2023, the Board published Tennessee Formal Ethics Opinion 2023-F-170 to address the issue of attorneys accepting payments by credit card or through digital payment platforms.

Formal Ethics Opinion 2023-F-170 vacated Formal Ethics Opinions 82-F-28 and 82-F-28(a).

Formal Ethics Opinions 82-F-28 and 82-F-28(a) generally approved the use of credit cards for acceptance of fees and other payments but imposed a number of technical requirements.

As these formal ethics opinions were published in a pre-internet world, the issue of digital payment platforms was not addressed.

Formal Ethics Opinion 2023-F-170 generally provides that a lawyer may accept payments by credit cards or payment processing services, including for unearned fees, as long as the lawyer complies with applicable ethical rules and the guidelines established in the opinion.

Formal Ethics Opinion 2023-F-170 removed the technical requirements imposed by the 1982 opinions.

CONFIDENTIALITY CONCERNS

Accepting payment by credit card and digital payment platforms implicates an attorney's confidentiality duties.

Attorneys are required to prevent the inadvertent or unauthorized disclosure of information relating to the representation of a client. RPC 1.6(d).

However, information relating to the representation of a client may be disclosed through a client's informed confidentiality waiver. RPC 1.6(a)(1)

Lawyers should advise clients that certain information will be revealed to the credit card company or digital payment platform.

Lawyers should additionally be aware of the privacy risks of digital payment processing services.

BEING AWARE OF PRIVACY SETTINGS

Formal Ethics Opinion 2023-F-170 recommends that lawyers be aware of a digital payment platforms privacy settings and any available adjustments to privacy settings.

The opinion includes proposed language for inclusion in a client's engagement agreement on this issue.

ASSESSMENT OF PROCESSING FEES

Attorneys may pass any processing fees onto the client.

The only limitation is that the overall fee charged to the client must meet the objective reasonableness standard based upon the factors codified at RPC 1.5(a).

CHARGEBACKS

Any unearned advance fees or payments to be held for clients or third parties must be placed in a trust account and may not be comingled with the attorney's own funds. RPC 1.15.

A problem that this creates regarding credit card payments and some digital payment forms is the risk of a "chargeback." A chargeback is the return of a credit card payment in response to a cardholder's dispute of a charge. If a chargeback occurs on an IOLTA account, funds belonging to other clients and third-parties may be withdrawn to satisfy the chargeback.

A lawyer may not keep a reserve of funds in an IOLTA account to cover potential chargebacks, as a lawyer may only deposit funds for the sole purpose of paying financial institution service charges and fees.

RPC 1.15(b)

OPTIONS OTHER THAN USE OF IOLTA ACCOUNT

Attorneys who choose to accept credit card payments from clients will avoid the problems associated with processing fees and chargebacks through having payments deposited into an operating account or personal account.

However, such fees would need to be earned upon receipt, so a fee agreement would need to be signed by the client providing that the credit card payments are nonrefundable.

ESTABLISH INDIVIDUAL TRUST ACCOUNTS

Establishing individual trust accounts will obviate the chargeback issue. However, establishing individual trust accounts may not be logistically feasible or cost effective for high volume law practices.

CREATE A "SUSPENSION" TRUST ACCOUNT

Formal Ethics Opinion 2023-F-170 provides that if an attorney accepts unearned fees or other payments that must be deposited into a trust account through credit card or a digital payment platform that contractually provides chargeback rights, the attorney must create a "suspension" trust account. Credit card funds would be directed to the suspension trust account, and then immediately transferred to the attorney's principal trust account.

The benefit of the "suspension" account is to prevent funds of other clients and third-parties to be impacted by a chargeback.

ISSUE OF CLIENT FUNDS BEING HELD BY THE PAYMENT PLATFORM

An additional issue relating to the use of payment platforms is where the platform at issue employs a model where client funds are held by the platform rather than released to the attorney's trust account.

This would violate the requirement that client funds be maintained in a trust account by an eligible financial institution approved by the Board, and for IOLTA accounts, by the Tennessee Bar Foundation. RPC 1.15(b).

PAYMENT PLATFORMS SPECIFICALLY TARGETED TO LAW FIRMS

There are payment platforms that have been created specifically for use by law firms and have intentionally created their platform in light of the concerns addressed above regarding confidentiality and comingling.

The Board does not endorse specific platforms or services, but attorneys who wish to accept digital payments are encouraged to research the suitability of these platforms.

OTHER SUGGESTIONS FOR USE OF PAYMENT PLATFORMS

1. Make inquiry and analysis of whether a platform will be suitable for maintaining confidentiality of client information.
2. Obtain prior informed consent from clients prior to accepting funds through any platform.
3. Determine if unearned fees or third-party funds will be "held" in a platform account in a manner that would violate RPC 1.15(b).
4. Confirm whether any processing or other transaction fees will be assessed—if these will be assessed against or charged to clients, confirm this in the initial fee agreement.

10. ATTORNEY FEES

WHEN TO DEPOSIT FEES INTO YOUR TRUST ACCOUNT

An attorney is required to hold the funds of clients and third parties in a trust account. On this basis, only unearned fees may be deposited into a trust account. RPC 1.15(a); RPC 1.15, Comment [2].

Once fees are earned, the funds must be promptly withdrawn from the trust account, and timely notice of the withdrawal of funds should be provided to the client. RPC 1.15, Comment [10].

NONREFUNDABLE FEES

A nonrefundable fee is one that is paid in advance and earned by the lawyer when paid. RPC 1.5(f); RPC 1.5, Comment [4a].

A nonrefundable fee shall be agreed to in writing, signed by the client, and the fee agreement must expressly state that the fee is nonrefundable. RPC 1.5(f).

Nonrefundable fees must not be deposited into a trust account, since they are earned upon receipt and are the property of the attorney.

While a nonrefundable fee is earned upon receipt, the fee must be objectively reasonable, based upon the factors codified at RPC 1.5(a). RPC 1.5, Comment [4a].

RETAINER FEES

A retainer is a sum of money which is prepaid by the client to provide security to the attorney for payment of their fee. The attorney bills against the retainer at a rate which must be disclosed to the client. RPC 1.5(b).

If you charge a refundable retainer, the retainer must be deposited into your trust account, to be withdrawn only as fees are earned.

HYPOTHETICAL

Attorney accepts a $5,000 retainer, to be billed against at $250 per hour, to represent Client in pursuing a boundary line dispute. Two weeks after undertaking the representation, Client discharges Attorney.

How much of the retainer, if any, must be refunded to the Client?

PRE-PAID COURT COSTS AND CASE EXPENSES

Pre-paid court costs and case expenses received from a client must be deposited into your trust account, to remain until used in connection with the representation or if unused, promptly returned to the client when the representation is concluded.

RPC 1.15(c).

CONTINGENCY FEES

Contingency fee agreements must be in writing signed by the client and must specify the percentage of the client's settlement/judgment that the attorney will receive, and further specify any pre-paid case expenses for which the attorney will be reimbursed.

RPC 1.5(c).

When a case taken on a contingency fee settles or the client receives a favorable money judgment, the lawyer is required to prepare a settlement sheet for the client, itemizing how the settlement funds/judgment will be allocated.

RPC 1.5(c).

Following the transmittal of the settlement sheet to the client, funds should be promptly disbursed to the client and to any third parties, unless the amount is disputed.

RPC 1.5(c).

Attorneys who handle contingency fee generating cases should take particular care to notify clients prior to settlement about subrogation claims and how this will impact recovery.

See RPC 1.2(a); RPC 1.4.

Attorneys who settle a contingent fee case with the understanding that subrogation claims will be subsequently negotiated are required to proceed with such negotiation diligently.

RPC 1.3.

DUTIES FOLLOWING WITHDRAWAL OR DISCHARGE

At the conclusion of the representation, whether through the completion of the work agreed upon, termination by the client, or the attorney's withdrawal, unearned fees, prepaid costs, and case expenses must be returned promptly to the client.

RPC 1.16(d).

RETENTION OF WORK PRODUCT DUE TO UNPAID FEE

After discharge or withdrawal, the lawyer may retain work product prepared by the lawyer for the client, but for which the lawyer has not been compensated, as security for a fee only if doing so will not have a materially adverse impact on the client. RPC 1.16, Comment [9].

TENNESSEE ATTORNEY'S TRUST ACCOUNT HANDBOOK

An additional resource for trust account management is the Tennessee Trust Account Handbook, available for PDF download on the Board of Professional Responsibility's website at https://www.tbpr.org/news-publications.

INFORMAL ETHICS INQUIRIES

The Board's Ethics Counsel, Laura Chastain, is available to provide informal ethics opinions to attorneys with questions about their own ethical obligations.

Questions may be submitted directly through the Board's website portal at://www.tbpr.org/for-legal-professionals/informal-ethics-inquiries.