

Limited Scope Representation a/k/a Unbundled Legal Services

by Sara Rittman

The Supreme Court adopted rule changes, effective July 1, 2008, clarifying the duties and procedures that apply when an attorney provides limited scope legal services to a client. Although the adoption of these changes was somewhat controversial, it was common, and ethically permissible, for attorneys to provide limited scope legal services prior to the adoption of these changes. However, the previous method by which this was accomplished by attorneys, and the manner in which it was treated by various courts and judges, differed greatly.

The new version of Rule 4-1.2(c) makes it clear that the client must give “informed consent in a writing signed by the client.” A sample form is included in the comment. Attorneys who engage in limited scope representation should pay close attention to the written agreement to make sure it spells out what the attorney will do *and* what the attorney will not do. In general, a good fee agreement or engagement letter, for any type of representation, will spell out what is excluded as well as what is included. Complete coverage of excluded as well as included services is paramount in a limited scope representation fee agreement.

The requirement of a signed writing does not apply to: (1) an initial consultation, (2) pro bono services provided through a non-profit organization, a court-annexed program, a bar association, or an accredited law school, or (3) services provided by a not-for-profit organization funded in whole or in part

by the Legal Services Corporation. However, better practice dictates that the attorney will document the contact and the services provided, even if a signed writing is not mandated.

The exception for initial consultations will likely be the most commonly used exception to the signed writing requirement. Paragraph [2] of the comment recognizes that an attorney may provide legal advice during an initial consultation: “The initial consultation ends when the lawyer and the client agree that the lawyer will or will not undertake the representation.”

The requirement of a signed writing only applies to limitations on the scope of the representation in a particular matter. For example, it would apply if the attorney agreed only to review pleadings and other documents to be filed by the client *pro se*. It would apply if the attorney agreed to draft a trust but not to be involved in transferring title of property to fund the trust. It would also apply if the attorney agreed to represent the client at trial, but not on appeal.

The signed writing requirement would not apply to a situation in which an attorney agrees to fully represent a defendant in a damages case but does not agree to handle a related subrogation action. It would not apply if the attorney agreed to fully defend a client against a criminal charge but does not agree to handle civil litigation arising from the same facts. Malpractice and other concerns make it advisable to exclude the other actions in writing, but Rule 4-1.2 would not require a signed written agreement. In these situations, the attorney is not limiting the scope of the

representation in the matter for which the attorney was hired.

Several other rules were amended to establish uniformity in relationships among attorneys who provide limited scope representation, the courts, and opposing counsel. One of these rules is Rule 55.03. If an attorney provides assistance with preparation of pleadings, that fact may be shown on the pleading without constituting an entry of appearance by the attorney. Rule 55.03(b)(2).

These rules specifically provide that an attorney may enter a limited appearance. The attorney must specify the purpose(s) for which he or she is entering a limited appearance. As a general rule, during the period the limited appearance is in effect, the opposing party will continue to serve papers on the otherwise self-represented party. However, the limited appearance attorney may serve opposing counsel “with a copy of the notice of limited appearance setting forth a time period within which service of papers shall be upon the attorney for the otherwise self-represented party.” Rule 44.03(b). Similarly, under Rule 4-1.2(e), the otherwise self-represented party will be treated as unrepresented under Rules 4-4.2 and 4-4.3, unless the limited appearance attorney “provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-represented.”

Withdrawal is automatic once the limited appearance attorney “has fulfilled

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Trust Account Recordkeeping: What You Need to Know to Stay Out of Trouble

By Nancy L. Ripperger

Attorneys frequently hold client or third party money in trust. This is a profound responsibility upon the part of an attorney; however, many attorneys do not take the time to ensure that their practices and procedures are adequate for protecting client/third party funds. This is a huge mistake, as an attorney can suffer dire consequences if the attorney fails to take appropriate safeguards.

Rule 4-1.15 addresses an attorney's duties when holding client/third party money in trust. The Supreme Court of Missouri imposes harsh discipline against attorneys who violate Rule 4-1.15. The Court often disbars attorneys who convert client money.¹ Moreover, the Court has noted on several occasions that *even unintentional mishandling of client funds by an attorney can justify disbarment.*² Thus, it is crucial that attorneys establish adequate practices and procedures regarding their client trust accounts.

WHAT IS THE PURPOSE OF A TRUST ACCOUNT?

It is much easier to understand the trust accounting rules if one first considers the purpose of a trust account. The purpose is to safeguard client and third party funds from loss and to avoid *even the appearance of impropriety by the lawyer.*³ Accordingly, a trust account must be separate from the attorney's personal or business operating account

and other fiduciary accounts such as those maintained for estates, guardianships and trusts.

WHO SHOULD HAVE A TRUST ACCOUNT?

Every Missouri attorney who is in private practice should maintain a trust account if the attorney holds funds for a client or third party. This would include, but not be limited to: (a) attorneys who collect advance fees,⁴ (b) attorneys who collect court costs from clients, (c) attorneys who collect court fines from the client, and (d) attorneys who receive settlement proceeds.

HOW SHOULD A TRUST ACCOUNT BE TITLED?

Rule 4-1.15 requires that the trust account be specifically designated "Client Trust Account" or words of a similar nature and that the account be maintained in the state in which the attorney has his or her office.⁵

WHAT ARE THE BASIC REQUIREMENTS OF RULE 4-1.15?

What are the primary requirements of Rule 4-1.15 regarding trust account funds? Rule 4-1.15 requires the lawyer to:

- keep client/third party funds in a separate account;
- not commingle the lawyer's funds with client/third party funds;⁶
- promptly notify the client/third party of the receipt of funds;

- promptly pay the client/third party his or her funds;
- upon request by the client/third party, promptly provide an accounting of funds held in trust;
- separate funds if there is a dispute between the client and a third party about the ownership of the funds and promptly distribute all portions of the funds which are not in dispute; and
- maintain complete trust account records for five years after the representation ends or from the last disbursement of funds whichever occurs later.

WHAT CONSTITUTES "COMPLETE TRUST ACCOUNT RECORDS"?

Most of the requirements of Rule 4-1.15 are self-explanatory, except for the requirement that the attorney maintain "complete trust account records." The rule fails to detail what the Supreme Court of Missouri considers "complete trust account records." Nevertheless, the comments to the rule do provide an answer in a round-about way.

The comments state that a lawyer should maintain up-to-date trust records in accordance with "generally accepted accounting practice." The comments then cite to the ABA Model Rule On Financial Recordkeeping. I suspect very few attorneys are familiar with "generally accepted accounting practice." However, a review of the ABA Model Rule on Financial Recordkeeping is very helpful in determining what trust account records an attorney should maintain. The model rule requires the

following:

1. receipt and disbursement journals which record all deposits and withdrawals from the trust account specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement;

2. a ledger book showing for each trust client the source of funds, name of all persons for whom the funds are held, the amount of the funds, the amount of withdrawals and the names of all persons to whom money is disbursed;

3. copies of written retainer and compensation agreements with clients;

4. copies of statements to clients or third persons showing the disbursement of funds to them or on their behalf;

5. copies of bills for legal fees and expenses delivered to clients;

6. copies of records showing payments to lawyers, investigators, or other persons not in the lawyer's regular employ;

7. checkbook and check stubs, bank statements, pre-numbered cancelled checks, and duplicate deposit slips for the trust account;

8. copies of monthly trial balances;⁷ and

9. copies of documents reasonably necessary for a complete understanding of the financial transactions affecting the trust account.⁸

Maintaining the records recommended by the ABA is the first step in ensuring compliance with Rule 4-1.15.

These records can be kept manually or electronically via some type of accounting software program. If the records are kept manually, the lawyer must record each trust account transaction a number of different times. For example, for a check, the attorney would have to prepare the check, enter the check into the check registry, enter the check in the subsidiary client ledger, and enter the check in a disbursement journal.

The use of computer software for trust accounting permits the attorney to only make one computer entry and the software will enter the information into the correct ledgers and journals. This lessens the chance of errors occurring and saves a considerable amount of time for the attorney. While an attorney can purchase software specifically designed for attorney trust accounting, generic accounting programs such as Quicken or Quickbooks can be modified to provide the necessary trust account records.⁹

HOW DO I RECONCILE MY TRUST ACCOUNT RECORDS?

Maintaining the records set forth above is only the first step in avoiding problems with a client trust account. Next, the attorney must ensure that the trust account records are *reconciled on a regular basis, preferably monthly*.¹⁰ This involves much more than reconciling a personal bank account where someone merely compares the bank's monthly statement with their own check register. To reconcile a trust account the attorney should complete a three-way reconciliation. The three-way reconciliation ties together all the records and allows the attorney to identify mistakes in internal accounting records or the bank's records.

To complete a three-way reconciliation the total cash receipts and cash disbursements should be added to the beginning cash balance to provide the ending cash balance. The ending cash balance is then compared to the bank statement. In order for the two records to match, adjustments must be made for items such as outstanding checks and deposits not credited to the account by the bank. Finally, and most importantly, the attorney should total all the individual client or third party ledger balances and compare with the ledger balance for the trust account.¹¹

If a mistake is discovered, it should be corrected immediately. A brief memorandum should be prepared noting the error and what was done to correct it. The memo should be retained with the reconciliation for later reference in the event of an audit.¹²

An attorney who uses a computer program to maintain his or her trust account should print and retain, on a monthly basis, the trial balance for cash receipts and disbursements and each client or third parties' ledger along with the reconciliation reports.¹³ It is also critical that the attorney back up his or her electronic records on a regular basis. It logically follows that the more activity the attorney has in his or her trust account, the more often the computer files should be backed up.¹⁴ Ideally the records should be backed up on a daily basis.

CAN AN ATTORNEY DELEGATE TRUST ACCOUNT BOOKKEEPING FUNCTIONS?

The attorney has sole responsibility for ensuring that his or her trust account is in compliance with Rule 4-1.15. This duty or responsibility cannot be delegated.¹⁵ That being said, Rule 4-1.15 does not require the attorney to make the actual entries in the trust account records or even perform the actual trust account reconciliations. The attorney's activities can be delegated to staff as long as the attorney closely reviews the staff's work.

The need to closely review staff's work is very evident when one looks at *In re Williams*, 711 S.W.2d 518 (Mo. banc 1983). In *Williams*, a trust account check was returned by the bank for insufficient funds.¹⁶ The attorney asked the Court to mitigate the level of discipline imposed because the attorney's wife, not the attorney, had handled the trust account bookkeeping. The Court did not accept the attorney's argument and held

that it was the attorney's responsibility to review the account and rectify any recordkeeping problems. The Court then disbarred the attorney.

WHAT SAFEGUARDS SHOULD AN ATTORNEY TAKE WHEN DELEGATING TRUST ACCOUNT RECORDKEEPING TO STAFF?

There are many safeguards an attorney should take when delegating trust account recordkeeping to staff. First, to lessen the risk of theft by staff, non-attorneys should not have signatory authority over the trust account.¹⁷ In addition, before an attorney signs a trust account check, he or she should always check the balance in the account to ensure there are sufficient funds available to pay the check. If there are not funds available, the attorney should investigate the matter immediately.

Second, the attorney should ensure that the staff person assigned the task of maintaining the trust account records understands the requirements of Rule 4-1.15 and has received proper training in accounting procedures. If there are sufficient staff to do so, it is best to split up various portions of the trust account recordkeeping among several staff members. For example, the staff member preparing trust account checks should not be the staff member preparing the reconciliations. Splitting the duties makes it harder for staff to hide discrepancies with the trust account recordkeeping.

Third, the attorney should establish explicit written trust account policies and procedures. For deposits, the attorney should require:

- deposits to be made on a daily basis;
- receipts to be deposited intact, i.e. a portion of the deposit should not be taken in cash or a portion of the deposit should not be deposited into the operat-

ing account; and

- records of deposits should be sufficiently detailed to identify each item deposited.

For withdrawals, the attorney should require:

- staff to provide complete documentation setting forth the reason for the issuance of a trust account check before the attorney signs the check;
- withdrawals to be made only by preprinted, numbered checks payable to a named payee, wire transfers or other traceable methods, with no disbursements made via cash;
- voided or unused checks should be periodically reviewed by the attorney;¹⁸

• when funds are transferred from the trust account to the firm's operating account, the transfer should be done by issuing a check from the trust account and depositing it into the operating account. Before preparing the check, the staff member should require documentation supporting the transfer; and

- the trust account checkbook should be kept under lock and key.

Fifth, the attorney should skim the bank statement for unusual transactions, including copies of cashed checks to ensure they have the proper signature and the checks are endorsed by the appropriate person.¹⁹ The attorney should also ensure that the account did not have a negative balance anytime during the month. The review of the bank statement should occur before staff has access to the statement. Otherwise, the potential exists that staff could alter the statement before presenting it to the attorney.

Sixth, the attorney should require the reconciliations to be completed promptly and the attorney should review and sign and date his or her review of the reconciliations.²⁰ When reviewing the reconciliations, the attorney should

randomly spot check some deposits and checks with information in the individual client files.²¹

Seventh, the attorney should review the individual client ledgers on a monthly basis to ensure that there are no negative balances.

Finally, the attorney should consider having an annual audit of the trust account by a certified public accountant, especially if there are several people in the firm handling trust account matters.

The recommendations set forth above are not necessarily the only precautions an attorney should take when delegating actual trust account bookkeeping to staff members. However, these recommendations will go a long way in ensuring the attorney is in compliance with Rule 4-1.15.²²

CONCLUSION

Although many attorneys may feel that they cannot divert time from the "practice of law" to oversee the client trust account, it is imperative that they take the time to oversee their account. Failing to properly handle a trust account can lead to an attorney's suspension or even disbarment. By following some fairly simple rules the attorney can protect their clients' interests and ensure that their license is not subject to discipline for poor trust account recordkeeping and procedures.

ENDNOTES

1. See *In re Mendell*, 693 S.W.2d 76 (Mo. banc 1985).

2. See *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986).

3. New York Lawyers' Fund for Client Protection, *A Practical Guide to Attorney Trust Accounts and Recordkeeping*, 152 PLI/NY 119 (2005).

4. It is the Office of Chief Disciplinary Counsel's position that classifying attorney fees as "flat fees" or "nonrefundable fees" does not allow the attorney to deposit the entire fee into

his or her operating account upon receipt of the fees. Rather, the unearned portion of the fee should be deposited into the trust account and then transferred from the trust account to the operating account as earned. Rule 4-1.15(e).

5. Rule 4-1.15(c); effective January 1, 2008, Rule 4-1.15 began *requiring* attorneys to maintain their trust accounts in an “Interest On Lawyer Trust Account” (“IOLTA”) unless exempted by Rule 4-1.15(i). Rule 4-1.15 also now requires IOLTA funds to be deposited with an institution paying rates similar to the institution’s non-IOLTA customers. This article does not address any of the IOLTA requirements found in Rule 4-1.15. The reader should refer to Rule 4-1.15 for the specific IOLTA requirements.

6. Rule 4-1.15(d) permits a lawyer to deposit his or her own funds into a client trust account for the sole purpose of paying bank service charges on the account but only in an amount necessary for that purpose. The preferred method of handling bank service fees is to have the bank take the trust account fees from the attorney’s operating account.

7. A trial balance is a worksheet listing the balance of each ledger in two columns, one for debits and the other for credits. The trial balance is prepared in each financial period as a summary of the activities since the closing of the previous ledger. The total of the debit side should always equal the total of the credit side. The trial balance serves as a tool to detect errors, which may have occurred during the double-entry system of the ledger. Trial Balance, Wikipedia,

retrieved July 9, 2008, at http://en.wikipedia.org/wiki/Trial_balance.

8. ABA Model Rule On Financial Recordkeeping §1 (1983).

9. The Minnesota Lawyers Professional Responsibility Board and the Minnesota Office of Lawyers Professional Responsibility have developed a website explaining how to set up attorney trust accounting records on Quicken. The cite is <http://www.mncourts.gov/lprb/Quicken%20Basic%202002%20color.htm>.

10. Reconciling is the process whereby one verifies that internal accounting records agree with the bank statement. Usually adjusting entries must be made for checks that have been issued but have not cleared the bank, deposits that have not been recorded by the bank yet and electronic transactions such as bank fees that have not been entered in the internal accounting records.

The ABA Model Rule On Financial Recordkeeping requires quarterly reconciliation but acknowledges monthly reconciliation is the preferred method so that errors can be timely discovered and corrected. See Comments to the Rule.

11. Susan Lieberum, Practical Approach To Trust Account Maintenance, 15 No. 4 Acct. & Fin. Plan. For L. Firms 1 (2002).

12. *Id.*

13. Appendix 1 to the Minnesota Rules of Professional Conduct – Maintenance of Books and Records § 7 (2008).

14. *Id.*

15. *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986).

16. *Id.*

17. ABA Model Rule On Financial Recordkeeping § 2.(1)(1983).

18. ABA Model Rule On Financial Recordkeeping § 2.(3)(1983).

19. Susan Lieberum, Practical Approach to Trust Account Maintenance, 15 No. 4 Acct. & Fin. Plan. For L. Firms 1 (2002).

20. *Id.*

21. The Creation, Nurturing And Protection Of Your Firm’s Client Trust Account(s) or “How To Avoid Claims,” 63- Mar. J. Kan. B.A. 19 (1994).

22. For other helpful tips regarding trust account recordkeeping, please refer to the Lawyer Trust Funds Handbook developed by The Missouri Bar. A copy of the handbook can be found on the bar’s website at http://members.mobar.org/pdfs/practice_resources/iolta.pdf.



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the duties as set forth in the notice and files a termination of limited appearance with the court.” Rule 55.03(b)(3). See also, Rule 4-1.16(c).

In terms of liability for sanctions, an “attorney providing drafting assistance may rely on the otherwise self-represented person’s representation of facts, unless the attorney knows that such representations are false....” Rule 55.03(c)(3).

At the same time these rules were adopted, the Supreme Court adopted Rule 88.09, which applies to the related subject of parties not represented by counsel in dissolution related proceedings. That topic is beyond the scope of this article.

ENDNOTES

1. The rules were originally adopted by Order dated December 21, 2007. A new order was issued with revisions

to Rule 4-1.2 on June 23, 2008. The most recent revisions are not in the bound version or the May 15, 2008 supplement to the *Missouri Court Rules* handbook. The complete rule is available online through the www.courts.mo.gov website.



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