

# LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

**OPINION NO. 484: OCTOBER 16, 1995**

## **SUMMARY**

### **COMMINGLING OF CLIENT TRUST ACCOUNT FUNDS.**

Where, by express agreement with a client, an attorney holds a portion of a retainer as an advance against fees to be earned pursuant to the last statement to be rendered to the client, the attorney may not utilize those funds for any other purpose. Holding such funds in the client trust bank account until such time as those fees have been earned does not constitute commingling, even if fees owed by the client pursuant to earlier, unpaid statements exceed the amount of the retainer earmarked to pay the last statement.

## **AUTHORITIES CITED**

Black v. State Bar, 57 Cal. 2d 219 (1962).

In the Matter of Fonte, (Review Dept. 1994)

2 Cal. State Bar Ct. Rptr. 752.

California Rules of Professional Conduct, Rule 4-100(A).

Cal. Practice Handbook: Attorney Ethics (Matthew Bender 1993).

Handbook on Client Trust Accounting for California Attorneys (State Bar of California (1992)).

## **FACTS AND ISSUES PRESENTED**

Law firm received a \$10,000 retainer from client for services to be rendered on client's behalf. The retainer agreement provided that

- (1) the \$10,000 would be placed in law firm's client trust bank account;
- (2) law firm was authorized to draw upon the first \$5,000 of the retainer to pay law firm's monthly statement;
- (3) client agreed to pay all further sums billed within five days of receipt of law firm's statements;
- (4) the remaining \$5,000 would be held as a security deposit to be used to pay the last statement rendered by the law firm to client, with the balance, if any, to be returned to client at the conclusion of the representation; and
- (5) in the event the \$5,000 security deposit did not offset the full amount of the final bill, client would promptly pay the remaining amount due and owing law firm.

Thereafter, the \$10,000 retainer was deposited into law firm's client trust bank account. The first few statements rendered by the law firm to client totalled \$5,000; law firm then withdrew the first \$5,000 of client's retainer from the trust account. Over the course of the next several months, law firm sent statements to client totalling \$10,000. Client did not object to these statements, and represented that the \$10,000 would be paid. However, client never paid these statements, and law firm kept the remaining \$5,000 of the retainer in the trust account as security for the last statement to be rendered. Thereafter, a final statement was rendered by law firm to client for an additional \$5,000 of services; that is, the balance due reflected on the final billing to client was \$15,000.00. Client objected to the full amount of the final statement.

The issues presented to the Committee are as follows:

1. May law firm withdraw the remaining \$5,000 of the original retainer from the client trust bank account, since client still owes law firm \$10,000 on the "interim" statements?
2. Is law firm obligated to withdraw the remaining \$5,000 of the original retainer from the client trust bank account, so as to avoid commingling <sup>(1)</sup> of funds belonging to law firm with funds belonging to its clients?
3. Does the retention of client funds in the client trust bank account as an advance against future fees (i.e., as a "security deposit") violate the California Rules of Professional Conduct?

## **DISCUSSION**

Rule 4-100(A) of the California Rules of Professional Conduct provides as follows:

"All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account", "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

"(1) Funds reasonable sufficient to pay bank charges.

"(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

Rule 4-100(A) requires that an attorney "withdraw any funds from the client trust account when those funds become property of the attorney. The attorney must withdraw such funds at "the earliest reasonable time" after the attorney's interest in them becomes fixed." Cal. Practice Handbook: Attorney Ethics (Matthew Bender 1993), 5.02[2], at 244. If there is a dispute over the lawyer's right to withdraw such funds, however, "the disputed amount must remain in the trust account until the dispute is resolved." Id. 5.04[1], at 250.

Here, pursuant to the retainer agreement, law firm and client expressly agreed that the "second" \$5,000 of the \$10,000 retainer would be held as a security deposit, to be used to pay the last statement rendered by law firm to client. The Committee finds that the retainer agreement that was prepared by the law firm is ambiguous as to whether or not the retainer was to be held to pay for only the services rendered as pertains to the last statement period or for all services reflected on the last statement. Because the several "interim" statements totalling \$10,000 were not the last statement rendered by law firm to client in the representation and the client has objected to the entire last statement, law firm may not now withdraw the remaining \$5,000 of the retainer to pay down those "interim" statements.<sup>(2)</sup>

Law firm may not withdraw the \$5,000 remaining of the retainer to pay the final \$5,000 statement rendered to client, however, because client is disputing the full amount of that last statement. Pursuant to Rule 4-100(A)(2), "when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved." Thus, law firm is obligated to retain the funds in the client trust bank account until the dispute regarding the final statement is resolved. See also Handbook [on Client Trust Accounting for California Attorneys](#) (State Bar of California 1992), at 3 ("Money held in a client trust bank account becomes yours and not the client's as soon as, in the

words of rule 4-100(A)(2), your 'interest in that portion becomes fixed.' BUT -- and this is a big but -- you can't withdraw any fees that the client disputes. As far as you're concerned, from the moment a client disputes your fee, that money is frozen in the client trust bank account until the fee dispute is resolved. As soon as your interest becomes fixed and is not in dispute, you are obligated to withdraw that money promptly from the client trust bank account").

<sup>1</sup> Commingling occurs "when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors." Black v. State Bar, 57 Cal. 2d 291, 255-56 (1962).

<sup>2</sup> The Committee's opinion in this matter may have reached a different result had the retainer agreement not been ambiguous, such as for example, providing the law firm the right to withdraw the funds in its client account for payment of the interim statements as they were rendered or had permitted withdrawal if the balance due exceeded the amount held in trust and the client is not disputing the portion of fees equal to the amount held in trust. The facts of this inquiry do not clearly indicate this to be the case. See: In the Matter of Fonte (Review Dept. 1994) 2 Cal.State Bar Ct. Rptr. 752, holding that "If a client contests fees charged or paid, the disputed funds must be placed in a trust account until the conflict is resolved."

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based only on such facts as are set forth in the questions submitted.