


The Top 10 Mistakes Lawyers Make with Their Trust & Business Accounts & More

Emphasizing Those Errors
Commonly Made in Real
Estate, Personal Injury, and
Estate Practices



Presented by the **New Jersey Supreme Court**
Office of Attorney Ethics

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(1) Ignoring Opinion 454

- Real Estate Exception to the Doctrine
 - Supreme Court Advisory Opinion 454
- What are “good funds?”
- Uncollected Funds Doctrine
 - “Availability of Funds” Schedule
 - Electronic Transfers = Same Day
 - Cashier and Official Bank Checks = One - Two Days
 - Other Types of Checks = Three or More Days
 - In re Moras, 131 N.J. 164 (1993)
- All banks retain the right of offset against deposited checks.

(2) Failing to Maintain Accurate Ledger Cards

- *Individual* Running Balance
- Mini Bank Account
 - Client's Name
 - Date for all transactions
 - Amount
 - Disbursements, including trust check numbers
 - Payee and Purpose
 - Deposits
 - Source and Description (include payor check # here)

(3) Preparing Inaccurate or Uncorrected RESPA Statements

- *In re Andril*, 188 NJ 385 (2006) Attorney must make reasonable efforts to ensure the conduct of real estate secretaries was compatible with his professional obligations [that all charges have been accurately recorded on the RESPA], although title companies have been utilized now.
- Attorney is responsible for all changes made at closing which are at variance with the original RESPA and for all trust checks you sign.
- Wire transfers out may only be made by an attorney licensed in NJ and may not be online or by phone

(4) Failing to Reconcile the Trust Account Monthly

- Outline of the Rule brochure, Appendix J
 1. Proof of Cash
 2. Reconciling the Bank Statement to the Book Balance, with outstanding checks and deposits in transit
 3. Schedule (trial balance) of Open Ledgers
- Bank statements should cycle at EOM to facilitate proper reconciling to that date

(5) Failing to Ensure that Accounting is Compliant with R.1:21-6

- **Accounting Model**
 - Double Entry Bkkg: Journals & Ledger
 - Generally Accepted Accounting Practice
- 1. Manual - see the Outline of the Rule booklet
- 2. One write – Safeguard,
- 3. Software: PC Law, TAME, TAS, Cosmo Lex, Quick Books, Quicken, Time & Billing
- Rule of Professional Conduct 1.15(d) requires compliance with **R.1:21-6**

(6) Failing to Review Escrows Monthly

- **RPC 1.15(b)** requires that the attorney promptly pay third parties funds to which they are entitled.

Unpaid taxes, sewer and condo assessments are liens on property

- *In re Hollendonner*, 102 NJ 21 (1985)
Escrow holder (trustee) acts as agent for both parties

(7) Failing to Ensure that Trust Checks are Negotiated Promptly

- Issuing a trust check to a client or third party does not absolve the attorney's duty under **RPC 1.15(b)** if the check is not negotiated and remains outstanding for a prolonged period of time
- Monthly reconciliations which list old outstanding checks with detail, alert the attorney to follow-up on why the payee has not negotiated the check

(8) Failing to Resolve Small Balances in the Trust Account

- Small accretions of interest on interest-bearing (for the client) after the bank has been informed that interest must be stopped
- Inaccuracies in addition or excess funds following a refinance, closing or settlement
- Bank errors in underpaying or overpaying on trust checks

(9) Commingling by Failing to:

- Promptly remove earned fees after a closing or refinance or from attorney's personal closing
 - Fees to be divided with another attorney should be deposited to the business account (Referral Fees)
- **RPC 1.15(a)** requires an attorney keep his funds separate from those of his clients.
- Commingling by loaning funds to clients by depositing them to the trust account

(10) *There Is No Such Thing as a Negative Balance*

- By paying out funds for Client A which results in a minus balance because Client A has no funds in trust, funds of Client B are impacted in order for the check for Client A to clear the bank

***In re Wilson*, 81 N.J. 451 (1979)**

- Misappropriation is defined as any unauthorized use by the lawyer of clients' funds entrusted to him, includes not only stealing, but any unauthorized use by the lawyer, whether or not he personally benefits

Knowing Misappropriation

In re Freimark, 152 NJ 45 (1997)

- *Attorney knowingly misappropriated client funds, borrowing from one client's trust fund, using those funds for attorney's own purpose, then borrowing from another client's trust fund to repay the first client. ["Bag of Rice" defense]*

Reminder: Pay Executors the Sale Proceeds

- Proceeds should not be paid to estate beneficiaries to “save” the Executor from the requisite responsibility to deposit the funds into an Estate account
- **R.1:21-6(a)(1)** prohibits depositing fiduciary funds (e.g., executor, administrator, receivership, trustee, conservator, guardian) in an attorney trust account; use of the trust account requires an attorney-client relationship

New Jersey Earned Fees Must Be Deposited to the Business Account

- Fee checks may not be cashed, but must be deposited intact to the business account
- Fee checks may not be deposited to the trust account or to personal accounts
- Fee checks drawn from the trust account may only be by a trust check drawn to the business account – ONLINE TRANSFERS FROM TRUST ARE NOT PERMITTED

Attorneys with Multi-state Practices Must Deposit Fees to a NJ Business Account

- Insure that fees earned in New Jersey are deposited to a New Jersey business account and recorded on the books and records for the New Jersey practice
- Both business and trust accounts must be “domiciled” at a New Jersey branch of a multi-state bank

Personal Injury Settlements

- Must comply with R.1:21-7
- Retainer agreements may not permit deduction for overhead expenses
- Settlement statements must be:
 - signed by an attorney and the client
 - show fee calculated on **net** recovery
 - not have deductions for overhead expenses

Personal Injury Shared Fees

- *Referral Fees* are the obligation of the certified civil or criminal attorney and should be paid from **attorney business account**
- *Quantum Meruit Fees* are the obligation of the client (and the attorney) for prior work on the client's case and should be paid directly from settlement proceeds in **attorney trust account**

Practicing as a PC, PA, LLP, or LLC

- Must carry professional liability insurance according to standards set in **R.1:21-1-1A**
- **Certificate of insurance** must be filed by the broker with the ***Clerk of the Supreme Court*** (named as the certificate holder)
- Filed annually for new policies or renewals by the broker, who is probably not the agent of the insurer, but agent for purchaser

Records Retention

- 7 years from the date of the last financial transaction
- Failure to promptly pay funds may mean the matter is closed, but financial records will have to be retained an additional 7 years from when funds are finally disbursed
- Receipt of trust bank statement does not permit discarding deposit slips or any original bank records, changing bank records that have errors (use a copy)

Retainers

- Are not required to be deposited to the attorney trust account, **R.1:21-6(a)(2)**
- Retainers in trust must be billed down, and await client time to object before withdrawal
- Office staff may not transfer funds to the business account from the trust account
- Retainers can be segregated into a separate bank account which should be designated as *Attorney Business Account - Retainers*

Unclaimed and Unidentified Funds

- Must be at least 2 years old and
- Diligent search for 1 year
- Unclaimed: Outstanding (unnegotiated) checks or balances for missing, but identified owners
- Unidentified: Surplus unattributable to any client
- Payable to **Clerk of the Superior Court, Trenton: Trust Funds Division** (see Appendix N in Outline Booklet)

When Installing or Changing Software

- The trust account must be reconciled for outstanding checks and a listing of client trust ledgers balances that prove ***exactly*** to the date of a bank statement
- Unreconciled trust account - open a ***new*** trust account to begin using the software
- Reminder: each bank account = new ledger for the client

FAQ by Attorneys

- May an attorney licensed in another state sign on a trust account?
- Are Signature Stamps for trust accounts permitted?
- Must an attorney business accounts be reconciled?
- May checkstubs on computer checks be retained in client case file?
- Must EVERY trust check show the client whose funds are charged for the check?

FAQ [2]

- Must EVERY deposit slip show the client credited for each amount on the slip?
- Are ATM cards or overdraft protection permitted for the trust account?
- **What is proper “Image Processing?”**
- **What is an “Approved Institution?”**
- **What is IOLTA vs. Interest-bearing?**

FAQ [3]

- May closed ledgers (originals) be retained in the client case file?
- May routine Powers of Endorsement be procured ?
- What IRS Form is needed for reporting “cash” deposited to trust and for what sum?
- How much Attorney Funds may be in the trust account and is a ledger required?

FAQ [4]

- What is the best way to reconcile a trust account with sub-accounts?
- What is the best solution for depositing high volume collection monies from debtors for a specific client?
- What will happen if the attorney has a trust overdraft due to a check drawn on insufficient vs. unavailable funds, regardless of whether the check is “dishonored” or paid by the bank?

FAQ [5]

- Must all voided checks be recorded and/or retained?
- May trust checks be postdated if requested to do so?
- May a rubber stamp be utilized for trust account endorsements?
- Is it permissible to retain “& Associates,” when the last associate departs?

FAQ [6]

- May earned fees be deposited to personal accounts if a separate record is carefully maintained?
- May personal obligations be paid from an attorney business account?
- Should an attorney endorse a check payable to himself and a client, over to the client?
- May an attorney charge a small percentage of interest (1/2%) on interest-bearing accounts as a service (administrative) fee?

FAQ [7]

- Random Audits, Select Audits, Demand Audits, what is the difference?
- May payment be ethically stopped on trust checks?
- What are the choices for business account designations?
- What is the preferred way to handle loans **to** clients from the attorney and **from** clients to the attorney?
- Must “*in house counsel*” maintain attorney trust and business accounts?

FAQ (last slide)

- When unclaimed or unidentified funds are sent to the Superior Court in Trenton, after what period of time do the funds *escheat* to the State of New Jersey?
- If you have a number of guardianship or other fiduciary accounts, may you avail yourself of an “umbrella” or “escrow” type of bank account?
- What if the bank is unwilling or unable to image process checks in compliance?