

Who Controls a Disbarred Lawyer's Trust Account?

– Proposed Amendments to DR 9-102(G)

BY ROY SIMON

This column is about a Disciplinary rule that you and your law firm have probably never encountered but that profoundly affects the public image of the legal profession. It is about DR 9-102(G), one of the many provisions in the rule governing attorney trust accounts, the longest and most finely detailed rule in the Code of Professional responsibility. DR 9-102(G) is woefully inadequate in its present form but may soon be amended. This column talks about the problems with DR 9-102(G) and the proposed amendments, which I fully support.

Background: An Attorney Trust Account Primer

Let's start with a short, basic look at the rules governing attorney escrow accounts. The first basic principle is stated, quite logically, in DR 9-102(a), the first provision of New York's multi-page rule governing an attorney's handling of client funds:

A. Prohibition Against Commingling and Misappropriation of Client Funds or Property. A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

How does an attorney abide by DR 9-102(a)? That is covered in the next subparagraph, DR 9-102(B), which provides, in part:

B. Separate Accounts. 1. a lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law, shall maintain such funds ... in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts which the lawyer may maintain as executor ... or in any other fiduciary capacity ...

2. a lawyer or the lawyer's firm shall identify the special bank account or accounts required by DR 9-102(B)(1) as an "attorney Special account," or "attorney Trust account," or "attorney Escrow account," and shall obtain checks and deposit slips that bear such title. ...

That covers getting the money into the account. Getting the money out is covered by DR 9-102(E) ("Authorized Signatories"), which provides: "only an attorney admitted to practice law in New York State shall be an authorized signatory of a special account."

For more detailed information about attorney trust accounts, it pays to read through all of DR 9-102. More information is available at the excellent web site maintained by the New York Lawyers Fund for Client Protection (the fund that reimburses clients when their attorneys steal trust account funds) at <http://www.nylawfund.org/pubs>. The site contains many publications which can be downloaded and

printed, including the concise and helpful publication, *A Practical Guide to Attorney Trust Accounts and Recordkeeping*. The definitive work on attorney trust accounts, escrow agreements, IOLA accounts, and the NEW YORK LAWYERS' FUND FOR CLIENT PROTECTION IS PETER COFFEY & ANNE REYNOLDS COPPS, EDs., ATTORNEY ESCROW ACCOUNTS: RULES, REGULATIONS AND RELATED TOPICS (NYSBA 2d ed. 2006), which is available at www.nysba.org. Your law firm should own that book and use it, for the reasons I cover next.

Your Supervisory Responsibilities

If you practice in a law firm of more than a few lawyers, you probably are not concerned with the details of maintaining the firm's trust accounts. Your firm probably instructs a book-keeper or the firm's accounting department to maintain the escrow account, and perhaps assigns a partner to supervise the bookkeeper. That's generally fine, but if you are a partner in the firm, you need to ask questions once in awhile because, under DR 1-104(a), "A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules." If you help manage the firm, you may have slightly stronger responsibilities because DR 1-104(B) provides: "A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules." And one of those rules is DR 1-104(C), which provides:

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter. [Emphasis added.]

In my view, properly maintaining an attorney trust account in conformance with the many and highly detailed requirements of DR 9-102 requires a large "amount of work" and poses a high "likelihood that ethical problems might arise in the course of working on the matter." Therefore, even if your firm has a trusted and experienced nonlawyer taking care of the escrow account, you should take adequate steps to ensure that a partner in the firm is specifically responsible for supervising the nonlawyer, and you should make reasonable efforts to ensure that the partner is taking that responsibility seriously and is actively monitoring the operations of the attorney trust account. Otherwise, your firm may end up in a blurb like this one from the march 3, 2008 New York Law Journal:

Bookkeeper Who Stole From Firm Pleads Guilty

Anthony Galasso, the Long Island bookkeeper who stole more than \$4 million from his brother's law firm, pleaded guilty last week to 22 charges, including two counts of grand larceny... Mr. Galasso was arrested in January 2007 after the 22-count indictment was brought by the Nassau County District attorney's office. His brother, Peter J. Galasso, a partner in Galasso, Langione & Botter of Garden City, notified authorities after finding a client's escrow account depleted. In court last week before County Judge George r. Peck, Mr. Galasso admitted using client money to fund personal expenses, including private jet trips, a luxury car and tickets to shows and sporting events (NYLJ, Nov. 13, 2007). ...With that background in place, I can move on to the existing version of DR 9-102(G), then examine the proposed amendments.

When A Sole Signatory Dies: Existing DR 9-102(G)

When a sole signatory to an attorney trust account dies, the situation is governed by DR 9-102(G), which provides as follows:

G. Designation of Successor Signatories.

1. Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account who shall be a member of the bar in good standing and admitted to the practice of law in New York State.
2. An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this rule.
3. The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

The problem lies in the first four words of the rule. DR 9-102(G) applies only "[u]pon the *death of*" a lawyer who was the sole signatory on an attorney trust account. What happens when a sole practitioner does not die but instead steals from an attorney trust account and is disbarred? Beyond that, what happens to the funds in a sole signatory's trust account funds if the attorney becomes disabled, or disappears, or resigns under investigation, or is suspended, or abandons the practice of law? The current version of DR 9-102(G) does not cover any of these situations. It covers death and only death.

Proposed Amendments to DR 9-102(G)

Fortunately, the courts are now considering amendments to DR 9-102(G) that will address these problems. (I'll give details of the amendments below.) The origin of the proposed amendments was a joint recommendation by the New York County Lawyers association ("NYCLA") and the New York Lawyer's Fund for Client Protection ("Lawyer's Fund"). The NYCLA Committee on Professional Discipline (co-chaired by attorneys Michael Gary Hilf and Lewis F. Tesser), together with Timothy J. O'Sullivan, Executive Director of the New York Lawyer's Fund for Client Protection, proposed a number of related rules designed to safeguard client funds held in trust, escrow, special, or IOLA accounts in cases where attorneys had been disbarred or suspended or had ceased to practice law by reason of resignation, retirement, or abandonment of a practice. The proposed rules would have limited or removed control over the funds from the former attorney by creating a mechanism to secure and transfer the funds to a trustworthy individual or entity.

Specifically, the Committee proposed a new DR 9-102(K) entitled “money and property in possession of an attorney who is suspended, disbarred, or ceases to practice law”. The rule would have been coupled with related amendments to appellate Department rules found at 22 NYCRR § 603.4(e) (1st Dep’t), § 691.4(1) (2d Dep’t), § 806.4(f) (3d Dep’t), and § 1022.20(e) (4th Dep’t) these would have given the appellate Divisions discretion to (a) freeze the escrow accounts of lawyers, or (b) appoint a successor signatory, or (c) transfer the funds to the New York Lawyer’s Fund for Client Protection for safekeeping, if evidence indicated that the lawyer was guilty of professional misconduct immediately threatening the public interest (which is the standard for interim suspension pending an investigation or disciplinary proceeding).

In march of 2006, the NYCLA and the Lawyer’s Fund submit-~~ted~~ted their proposals by letter to both Chief Judge Judith Kaye and the Administrative Board of the Courts. The proposals are available at www.nycla.org/siteFiles/Publications/Publications271_0.pdf or on the NYCLA’s home page at www.nycla.org (click on “news and Publications.” then on “Board reports and resolutions”).

The NYCLA/Lawyers’ Fund 2006 proposals were motivated in part by the high incidence of thefts from attorney escrow or trust accounts in real estate matters, especially in recent years. Over the ten years preceding the proposed amendments, the Lawyer’s Fund reimbursed \$22.7 million for real estate escrow thefts alone, and 36% of all reimbursements from the Lawyer’s Fund since 1982 have involved thefts in the sale and purchase of real property. In addition, the Lawyer’s Fund had become aware that suspended and disbarred lawyers in all kinds of matters (not just real estate matters) were retaining control of escrow and trust funds and were not always distributing the funds as required.

The courts have never acted directly on the NYCLA /Lawyer’s Fund proposals, but the concepts in those proposals somehow wound their way around to the New York State Bar association Committee on Professional Discipline (probably to obtain wider input from the bar), and on April 17, 2008, the Committee on Professional Discipline circulated to the bar for public comment a draft proposal of an amended DR 9-102(G) and a brief explanatory report. The bar was generally favor-able or silent, so the Committee on Professional Discipline made only minor modifications to the proposal and transmitted it to the New York State Bar association House of Delegates accompanied by the following explanatory report:

... New York lawyers who have disappeared, abandoned their law practices, become permanently or temporarily incapacitated, resigned during the pendency of a disciplinary investigation or proceeding, or have been disbarred or suspended, sometimes remain signatories on their attorney escrow, special or trust accounts. If such lawyers were members of a law firm and other lawyers in the firm are also signatories on the accounts, there is unlikely to be a problem with protection of the funds and the firm’s clients. However, if the attorney was a sole practitioner and sole signatory on a law firm escrow or special account, and made no provision for a designated successor signatory, there is potential for harm to clients and third parties. There may be a risk that the attorney will misuse the funds in the account or, more likely, the funds will be needed for a matter or time-sensitive transaction, such as a real estate closing. There is currently no mechanism to apply for the designation of a successor signatory, except in the case of the death of the sole practitioner.

The NYSBA Professional Discipline Committee therefore recommends the adoption of an amendment to the Code to address this situation and provide uniform procedures for the appointment and designation of successor signatories in a wider range of situations, including disability, disappearance, and discipline, including disbarment and suspension. The proposed amendment to DR 9-102(G) ... has the support of the New York State Lawyer's Fund for Client Protection and the New York County Lawyers' association.

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The proposed amendment to DR 9-102(G) retains the pro-vision authorizing the Supreme Court to designate a successor signatory and to direct the safeguarding and/or disbursement of funds in these designated accounts, including authorizing the deposit of the funds with the Lawyers' Fund for Client Protection. The proposed amendment also specifies that the provision does not preclude any action on the part of the appellate Division with respect to these designated accounts.

The provision prohibiting the charging of a legal fee by a lawyer making an application pursuant to this rule has been modified in the proposed amendment to DR 9-102(G) because retaining the ban on charging a fee might make it difficult for would-be applicants, such as the legal representative of a disabled lawyer, to retain an experienced lawyer to make an application under this provision. The Committee acknowledges that some situations involving solo practitioners who have disappeared, become disabled or been disciplined, may be complicated by numerous other considerations, which will entail considerable legal work for an attorney retained to advise on the matter. In appropriate situations, such counsel should be compensated, if that is approved by the appointing court. There will be no extra costs imposed on the Supreme Court, appellate Divisions, or the grievance or disciplinary committees as a result of the proposed amendment to DR 9-102(G).

On June 21, 2008, the New York State Bar association House of Delegates overwhelmingly approved the proposed amendments to DR 9-102(G), which provide (in legislative style) as follows:

G. Designation of Successor Signatories.

1. Upon a showing that a lawyer who was the sole signatory on an attorney trust, escrow or special account has died, disappeared, abandoned his or her law practice, become temporarily or permanently incapacitated, resigned during the pendency of a disciplinary investigation or proceeding, or been suspended or disbarred, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account who shall be a member of the bar in good standing and admitted to the practice of law in New York State.
2. An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law, upon such notice as the court shall direct. The application may be made by the legal representative of the deceased lawyer or the lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city, or county or state bar association; or counsel for an attorney

disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this rule, unless approved by the court.

3. [Identical to existing DR 9-102(G)(3)]

4. The provisions of this section shall not preclude the appellate Division of the Supreme Court from taking such other or further action regarding the lawyer or the lawyer's trust, escrow or special account as it may deem appropriate, including designation of a successor signatory.

The new State Bar President, Bernice Leber of Arent Fox, soon transmitted the proposed amendments to the courts, which are now considering them. The courts may decide that the proposed amendments to DR 9-102(G) are adequate, or they may take additional measures to deal with lawyers who continue to control escrow funds after they are suspended or disbarred or otherwise cease to practice law. If the courts consider it necessary or appropriate, the courts may adopt or amend related court rules to help implement the amended Disciplinary rule. If the courts adopt the proposed amendments to DR 9-102(G) (and/or parallel court rules), then a mechanism will finally be in place to designate a successor signatory not only when that sole signatory has died but also when the sole signatory has (a) disappeared, (b) abandoned law practice, (c) become temporarily or permanently incapacitated, (d) resigned during a disciplinary investigation or proceeding, (e) been suspended, or (f) been disbarred.

Conclusion: The Proposed Amendments Merit Quick Adoption

Currently, when a sole practitioner (or any sole signatory to an attorney trust account) ceases to practice law due to disability, disappearance, disbarment, abandonment, or any other reason except death, no provision of the existing New York Code of Professional responsibility expressly prohibits the former attorney from maintaining complete control over funds in the lawyer's trust, escrow, special, or IOLA accounts, and no rule expressly empowers lawyers to apply for a successor signatory or empowers courts to appoint a successor signatory.

The result is an embarrassing situation in which even suspended and disbarred lawyers – sometimes even after conviction of a felony – continue to write checks from an attorney trust account, treating it as a private bank account to be used for personal purposes. This does not happen every day, but when it does happen (and it happens more often than we may think) the ripple effects are enormous and devastating, tarnishing the image of the entire legal profession, from large firms to small ones, upstate and downstate, in every kind of practice.

The proposed amendments to DR 9-102(G) would go a long way toward solving these problems. The proposals are well thought-out and have been carefully studied by intelligent, diverse, and hardworking bar committees for more than three years. I hope for the sake of both the public and the profession that the courts will approve the proposals in the near future and make them effective immediately, before another disaster strikes.

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