

New York State Bar Association

Committee on Professional Ethics

Opinion 759 – 12/10/02

Topic: Deposits into special accounts

Digest: Lawyer may use ATM for making deposits into special account.

Code: DR 9-102

QUESTION

May an attorney use an automated teller machine (“ATM”) for the purpose of making deposits into a special account required by DR 9-102(B)?

OPINION

DR 9-102 contains several provisions regarding the safekeeping of client property, including the rules on maintenance of client trust accounts and the maintenance of required bookkeeping records. The many demands of DR 9-102 are designed to safeguard clients’ funds from loss and to avoid the appearance of impropriety by the lawyer. The rules also assist the lawyer in providing an audit trail to the client documenting the history and status of the funds entrusted to the attorney’s care. A discussion of the aspects of DR 9-102 that are relevant to this inquiry follows.

A lawyer possessing funds belonging to another person incident to the practice of law must maintain them “in a banking institution within the State of New York which agrees to provide dishonored check reports” in accordance with rules of the Appellate Division. DR 9-102(B). The funds must be maintained in a “special account” separate from any business or personal accounts of the lawyer or the lawyer’s firm. *Id.* The lawyer must identify the special account as an “Attorney Special Account,” “Attorney Trust Account,” or “Attorney Escrow Account,” and must obtain checks and deposit slips bearing such title. DR 9-102(B)(2).

DR 9-102 also imposes rigorous record keeping requirements. DR 9-102(C)(3) requires the lawyer to maintain complete records of all funds of a client or third person coming into her possession and to render accounts to the client or third person regarding same. DR 9-102(D)(1) requires a lawyer to maintain the

records of all deposits in trust accounts and “any other bank account which concerns or affects the lawyer’s practice of law.” See N.Y. State 680 (1996). The record must “specifically identify the date, source and description of each item deposited.” DR 9-102(D)(1). The lawyer must also maintain a record for all special accounts showing, among other things, the source of all funds deposited in such accounts. The lawyer must also retain a copy of all “duplicate deposit slips with respect to the special accounts specified in DR 9-102(B).” DR 9-102(D)(8). The latter three requirements, imposed by DR 9-102(D), provide that the lawyer must maintain the records for seven years after the events they record. All of the financial records required by DR 9-102 must be made available for inspection on demand at the firm’s principal New York State office. DR 9-102(I); see also 22 NYCRR § 603.15 (1st Dep’t), 22 NYCRR § 691.12 (2d Dep’t) (establishing procedures for random review of bookkeeping records). DR 9-102(J) emphasizes that a lawyer who fails to retain the records required by DR 9-102, or who fails to produce the records, “shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.”

In N.Y. State 680 (1996), we concluded that, for purposes of complying with the mandatory record-retention provisions of the Code, some records may be maintained in the form of computer images, while other records must be maintained in their original, hard-copy form. In that regard, we concluded that duplicate deposit slips must be maintained in paper form for the seven-year period. In addition, all of the other records noted in the previous paragraph must be maintained in their original form. See also N.Y. State 758 (2002).

We believe that it is permissible for an attorney to use an ATM for the purpose of making deposits into a special account, provided the above requirements are satisfied. Therefore, in making the deposit, the attorney must use a deposit slip bearing the title of the special account and must maintain a copy of a duplicate deposit slip recording such transaction for seven years. The record provided by the ATM must also show the amount, account, date, time and place of the transaction so the attorney will have sufficient proof of the deposit prior to receiving official verification from the bank. This record must be maintained with the duplicate deposit slip. The attorney must also verify that the deposit is accurately recorded in the subsequent bank statement.

The attorney must also maintain an independent record of the deposit that includes the “date, source and description of each item deposited.” DR 9-102(D)(1).

Although we could find no case in New York addressing a lawyer’s use of an ATM in conjunction with a special account, authorities in other jurisdictions have condoned its use if accompanied by careful oversight and review of the transaction. See *Matter of Heiner*, 1 Cal. State Bar Ct. Rptr. 301, 316-317 (Cal. Bar Ct. 1990); see also Vapneck, Tuft, Peck and Weiner, *California Practice Guide, Professional Responsibility*, p. 9:246-247 (2001) (use of ATM card for

deposits only does not pose real danger to client trust funds, provided lawyer can document amount deposited on behalf of each client); Vecchione, *Working with Client's Trust Accounts*, www.state.ma.us/obcbbo/ctatips.htm (use of ATM for deposits is permitted, but ATM should never be used for withdrawals).

While we believe that a lawyer depositing funds in a special account via an ATM can comply with the requirements of DR 9-102, a lawyer may not use an ATM for withdrawals from a special account. Doing so would, in effect, violate the dictates of DR 9-102(E), which provides that “[a]ll special account withdrawals shall be made only to a named payee and not to cash.”

CONCLUSION

An attorney may use an ATM for the purpose of making deposits into a special account if the attorney carefully reviews the transaction and otherwise complies with the requirements of DR 9-102.

(27-02)
