NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1176 (10/29/2019)

Topic: Escrow Account

Digest: A lawyer may make nominal deposits of the lawyer's own funds into a trust or escrow account to avoid the account being closed for inactivity or failure to maintain minimum balance.

Rules: 1.15(a), (b)(1), (b)(3)

FACTS

1. The inquirer's trust or escrow account has had a zero balance of funds for a period of time. The inquirer apprehends that the bank may close the account for inactivity or failure to maintain the requisite minimum balance. The inquirer is concerned that, if the inquirer deposits lawyer funds into the account to avoid bank sanction and thereafter receives client funds for deposit into the trust or escrow account, the inquirer could be impermissibly commingling funds.

QUESTION

2. May a lawyer make a nominal deposit of the lawyer's own funds to avoid having the lawyer's trust or escrow account closed for inactivity or failure to maintain a minimum balance?

OPINION

3. The N.Y. Rules of Professional Responsibility (the "Rules") regulate lawyer trust or escrow accounts in Rule 1.15. For current purposes, three provisions of Rule 1.15 govern the conclusion of the inquiry. First, 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 banking institution . . . in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. . . . Such funds shall be maintained, . . . in a special account or accounts, separate from any business or personal accounts of the lawyer . . ." Rule 1.15(b)(1). Second, "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 . . . must not . . . commingle such funds or property with his or her own." Rule 1.15(a). *See* N.Y. State 1127 ¶ 3

(2017); N.Y. City 2014-3 (2014). As Comment [1] to Rule 1.15 provides, "All property that is the property of clients or third persons . . . must be kept separate from the lawyer's business and personal property . . ."

4. Third, and most pertinent to this inquiry, is Rule 1.15(b)(3), which says that funds "reasonably sufficient to maintain the account or to pay account charges may be deposited therein." This is simple common sense – that a lawyer may provide a cushion from the lawyer's own funds to maintain the account and cover account charges. This is no license to pad the account with the lawyer's money: the words "reasonably sufficient" mean than that a lawyer may pay into the account such amounts as may be reasonably adequate to meet whatever bank requirements exist to sustain the account, pay the bank's charges, and meet the minimal thresholds that the bank imposes for the account to endure. Amounts beyond those "reasonably sufficient" to maintain the account may cross the line of commingling. In light of the variety of possible banking requirements to maintain an account, no bright lines of dollars may be set to establish the amount constituting the scope of the what constitutes "reasonably sufficient," but we are confident that a lawyer who uses the lawyer's own funds to sustain the account within the bank's guidelines faces no fear of crossing the line into commingling.

CONCLUSION

5. A lawyer may make nominal deposits in the lawyer's trust or escrow account to maintain the account or to pay account charges.

(26-19)