



A Banker's Perspective on Section (e) Compliance

by Timothy P. McMahon

The entire text of Rule 1.15 of the *Rules of Professional Conduct* was published in the November 2007 issue of *The Alabama Lawyer*. Changes in that rule have recently taken place, as most are aware. However, a part of the rule has been in effect since July 1, 1997 and apparently requires the attention of the bar.

Rule 1.15 (e) requires a lawyer to enter into an agreement with a bank, where the lawyer maintains a trust account, that provides for the bank to report certain overdraft activity on the trust account to the Office of the General Counsel of the Alabama State Bar. Pursuant to the agreement, the rule requires reporting when an item is presented against a trust account with insufficient funds, and the item is returned for insufficient funds or the item is paid, but the overdrawn account is not covered within three business days of the date the bank sends notification of the overdraft to the lawyer.

It appears that the obligations of Section (e) are infrequently observed. Both an informal survey conducted several years ago and another more recent informal survey indicated inadequate compliance with Section (e) and often a lack of knowledge of the requirements it imposes.

Every attorney has a duty to assure that a trust account he or she uses is in conformity with Rule 1.15 (e). The Rule is very specific in that respect. No matter what the practicalities may be for the possibility of sanctions for failure to comply with Section (e), an agreement with the bank should be put in place by each lawyer who has a trust account.

No lawyer should be lulled into a sense of complacency by the notion that the bank will make sure that the agreement is put in place. Again, the Rule is very specific. ***The duty rests with the lawyer and not the bank.*** Also, bank officers and employees were questioned as part of the previously mentioned surveys. Typically, bankers know less about the requirements of the Rule than lawyers.

It is also suggested that lawyers reach an agreement with their bank that is very specific about the circumstances that have to be

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reported. Big banks are streamlined and small banks lack specialization. The results are bank employees who are often in too much of a hurry or who are uninformed about the circumstances that trigger a bank's obligation to report. Since bankers are typically unaware of this rule, lawyers should emphasize the specific circumstances where a reporting is necessary and make sure their bankers stay abreast of the requirement. It is interesting to note that of the three lawyers surveyed who knew about the rule and had an agreement in place, two

had been reported and both thought the bank was in error for reporting the circumstance. Both emphasized the time-consuming nature of the inquiry for both the Office of the General Counsel and the lawyer.

While it is beneficial to make sure that the bank employees know the circumstances that trigger reporting, a mistake of "over-reporting" should not give rise to a cause of action in favor of the lawyer who has been erroneously reported. Rule 15 of the *Rules of Disciplinary Procedure* provides immunity from suit for a bank, acting in the course of its official duties in com-



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plying with Section (e). The language of Rule 15 does present some doubt whether the veil of immunity applies in the situation of an erroneous reporting.

The requirements of Section (e) should not be confused with the requirements of Rule 1.15(d) relating to disbursement of uncollected funds from a trust account that holds the funds of more than one client. However, section (e) could come into play if uncollected funds were disbursed but not collected as expected. A subsequent attempt to disburse another client's funds could create an item drawn on insufficient funds if the earlier funds are not collected. Section (d) affords a lawyer five business days at most from the date of notice of non-collection of funds to replace the uncollected funds that have been disbursed.

Section (d) provides a measure of latitude for the lawyer who is inclined to disburse uncollected funds from a trust account. If the lawyer has a reasonable and prudent belief that a deposited item will be collected, the uncollected funds may be disbursed. Analysis of whether a lawyer has complied with this subjective standard will depend on the facts. If the deposited item is not collected the lawyer must cover the funds as soon as practical, but in no event more than five working days after notice of non-collection.

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is serious business. While few examples of reportable conduct under Section (e) come to mind, instances that should be reported do in fact occur. Such conduct, no matter what the amount, does not encourage the public to hold lawyers in high regard, calls the lawyer's professional reputation into question and subjects the lawyer to possible financial catastrophe and sanctions by the bar.

Proper handling of a trust account is extremely important. Section (e) is a component of responsible and professional operation of a trust account. The section is an aid to the bar in addressing situations where some overdrafts on attorney trust accounts take place. Though the section is not a cure-all, it is an important tool for the bar. Compliance is not optional, it is mandatory. ▲▼▲



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