

Nebraska Ethics Advisory Opinion for Lawyers  
No. 79-3

AN ATTORNEY MUST NOT COMMINGLE A CLIENT'S  
FUNDS WITH HIS OWN.

QUESTIONS PRESENTED:

1. May funds received from a client for filing costs and other general costs be placed in and paid out of the attorney's general office account?
2. May retainer fees received be placed in an attorney's office or general account as long as it is going to be earned in a very short period of time?

DISCUSSION

DR 9-102A provides:

"All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

1. Funds reasonably sufficient to pay bank charges may be deposited therein.
2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

The first part of the disciplinary rule very carefully states that advances for costs and expenses are excluded from the rule.

Likewise, the rule is very explicit in providing that "funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein...."

Question numbered 2 indicates a desire to commingle fund as long as the client's funds are "going to be earned in a very short period of time". The disciplinary rule is a positive rule and makes no distinction between the present or the future. It specifically states that if the funds belong in any part to the client, they are to be placed in the trust account.

Disciplinary rule 9 is part of Canon 9 which provides, "A lawyer should avoid even the appearance of professional impropriety." Canon 9 of the Code of Professional Responsibility presently in existence is a revision of Canon 11 of the American Bar Association's Code of Professional Ethics which provided in part: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly." The present Canon 9 has been adopted under the Code of Professional Responsibility of the State of Nebraska and Sub-paragraph A of DR9-102 of the Code of Professional Responsibility of the State of Nebraska is the same disciplinary rule as presently exists in the Code of Professional Responsibility of the American Bar Association. Our present disciplinary rule is much more specific than the original Canon 11 of the American Bar Association Code of Professional Ethics, but even under Canon 11 it was held that an attorney must not mingle the client's funds with his (See Drinker, page 92.)

Disciplinary rule 9 found in the Code of Professional Responsibility and Canons of Judicial Ethics of the American Bar Association is footnoted with reference to the case of *Black v. State Bar*, 57 Cal. 2nd 219, 225-26, 368 P.2nd 118, 122, 18 Cal. Rptr. 518, 522, which

footnote states:

"Commingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors. The rule against commingling was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money."

#### CONCLUSION

1. Advances for costs and expenses may be placed in the attorney's office or general account.
2. Retainer fees received from a client must be placed in the trust account and may not be withdrawn until due the attorney.

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