Trust Account Ethics Rules: Sensible, Bizarre, or a Combination?

Roger E. Kohn, Esq.

Introduction

This article was prompted by Advisory Ethics Opinion No. 2002-4 of the Vermont Bar Association Professional Responsibility Committee (hereinafter "VBA Ethics Opinion 2002-4") which drew into question the way many lawyers in the state have been dealing with their trust accounts. The purpose of this article is to examine the important issue of when funds deposited in a lawyer's trust account can ethically be disbursed.

VBA Ethics Opinion 2002-4 deals with a number of issues regarding trust accounts. This article analyzes in detail only the question of when checks can be written from trust accounts, based upon the types of instruments received for deposit. Before discussing this issue, however, it is worthwhile to take a moment to note three other trust account ethics issues that are often misunderstood.

First, Rule 1.15(a) of the Vermont Rules of Professional Conduct ("V.R.P.C.") arguably does not permit a lawyer to keep money in a trust account to cover bank service charges, even if the amount proposed to be kept in the trust account is small.[1] Rather, when a bank assesses service charges, the lawyer must promptly place an equal amount of funds in the trust account. VBA Ethics Opinion 2002-4 states that the VBA Committee encourages amendment of the Rule "to allow attorney funds to be held in the client trust account to cover bank service charges as long as those funds are separately accounted for and designated for this purpose." Such a change appears to make a great deal of sense.

Second, it is relatively clear that when funds have been held in the trust account for an extended period of time, and the lawyer cannot determine to whom these funds belong, they

should be dealt with in accordance with Vermont law governing unclaimed property, 27 V.S.A. §§ 1208-1238.

Third, it is important to remember that client funds may never be commingled with the attorney's funds, even for a short period of time. Accordingly, if a personal injury settlement check is received, the check may not be deposited in the law firm's general checking account, and separate checks simultaneously written to the law firm for its fee and to the client for the balance; the check must be deposited in the firm's trust account.

With these somewhat unintuitive issues out of the way, this article now turns to its primary focus – how can one, as a practical matter, deal with tort settlement checks, real estate closings, and other client matters, while following the ethical rules required for lawyers' trust accounts.

Historical Background - Rampant Ambiguity

The American Bar Association adopted thirty-two Canons of Professional Ethics in 1908; these did not deal with the issue in question. The American Bar Association adopted a model Code of Professional Responsibility in 1969, which was adopted by the Vermont Supreme Court in 1971.

Disciplinary Rule 9-102 stated:

> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) 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.

(b) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities and other properties of a client coming into the possession of a lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The ABA included some commentary ("notes") following the Disciplinary Rules; only one dealt with the question we are considering. This note added nothing relevant to this issue,

other than to explain that the purpose of the rule was to prevent commingling, and cited a case defining commingling as follows:

> [C]ommingling 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 the 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 the clients' money.[2]

Thus, there was nothing in Disciplinary Rule 9-101 which stated – or even indicated with any degree of clarity – that it was improper to deposit a client's personal check in a trust account, and then immediately disburse checks based upon the deposited funds. Of course, if a check was dishonored, it was relatively clear from the rest of the Code that it was the lawyer's duty to immediately deposit funds to cover the dishonored check. There may or may not have been opinions stating that this was not proper practice; the point being made is simply that from reading the Code of Professional Responsibility, it would be difficult to conclude that this practice was prohibited. In fact, the author believes that this was the practice of most Vermont attorneys for many years.

In 1999, the Vermont Supreme Court adopted the Rules of Professional Conduct, which were based upon the American Bar Association's Model Rules of Professional Conduct.[3] Rule 1.15 discusses safekeeping of clients' property, and requires that property of clients or "third persons" in a lawyer's possession in connection with representation be kept separate from the lawyer's own property. Rule 1.15A requires every law firm or attorney in private practice (or attorneys not in private practice who receive client funds) to maintain one or more trust accounts,

and specifies how records are to be maintained. Rule 1.15B deals with interest earned on trust account funds, and provides for the IOLTA system. Rule 1.15C provides for overdraft notification to the Professional Conduct Board.

A comment to Rule 1.15 states that "[a] lawyer should hold property of others with the care required of a professional fiduciary," and provides that if the property is money it should be kept "in one or more trust accounts." Except for this comment, there is nothing in Rule 1.15, 1.15A, 1.15B, or 1.15C that directly states when funds may be disbursed, based upon the type of check deposited in a trust account, or that even appears to bear on this issue. The sole exception is the comment to Rule 1.15 requiring funds be held "with the care required of a professional fiduciary." The author knows of no principle of general fiduciary law that makes it improper to disburse funds against clients' or commercial checks believed to represent good funds (if the fiduciary is willing to make good any check that is dishonored)[4] – although various bar association ethics committees disagree with this conclusion, as will be discussed below.

V.R.P.C. 1.15(b) states that a lawyer shall deliver to the client or third person funds that this person "is entitled to receive." From this language, VBA Ethics Opinion 2002-4 infers that accepting checks that have not "cleared" is not permitted. But the applicability of this language to the issue being discussed is hardly clear.

It is of interest that the half-dozen treatises reviewed by the author make no reference whatsoever to the issue of when disbursements may be made from trust accounts based upon the type of instruments deposited. The ABA/BNA Lawyers' Manual on Professional Conduct, published in 2003, which is probably the most authoritative and comprehensive resource, has an extensive, detailed discussion of the ethics of trust accounts, yet makes no reference whatsoever

to this issue. Moreover, the author has found no court decisions specifically dealing with this issue.

Various ethics committees around the country have dealt with this issue. Most have concluded that a lawyer may not make disbursements from a trust account based upon a check received until that check has been deposited and "cleared" in some manner, although a number of committees have found exceptions to this rule. A number of states have adopted statutes and court rules that provide exceptions. The rationale of the ethics committee opinions is the same as presented in VBA Ethics Opinion 2003-4. If a check has not "cleared," funds of other clients held in the trust account could be considered to be covering the disbursements that have been written; if a check were to be dishonored, the funds of other clients would be at risk.

It is fair to ask how these committees reached this conclusion. The rules themselves do not, by their language, dictate this result. Waiting for checks to "clear" was not the common practice of most attorneys in Vermont, and it is doubtful that this was common practice in other states. It seems exceedingly strange to conclude, in the absence of clear language in the applicable ethics rules, that a course of conduct practiced by most attorneys is unethical. There seems to have been an assumption by these ethics committees that reasonable fiduciary responsibility required disbursing funds only against checks that have "cleared," but the opinions cite no authority, and the author knows of no court decisions holding that fiduciaries must act in this manner. It could just as easily been concluded that an attorney does not act unethically if he or she uses reasonable care, and promptly makes good any check that is dishonored.

In Vermont, aside from some discussions at miscellaneous ethics seminars, the issue has not been dealt with until recently. In January of 2004, the Professional Responsibility Board held that an attorney should receive a private admonition for disbursing funds at a real estate

closing on the understanding that funds had been wired to his account. The funds had been intercepted by the federal Office of Foreign Asset Control and were thus not deposited in his account, and the attorney did not check to see that the funds had actually been received. The Vermont Professional Responsibility Board stated:

> Generally lawyers are prohibited from drawing against funds that have been deposited to their trust accounts but have not had time to clear. We are, however, aware that it is common practice in Vermont real estate closings for attorneys to write checks against instruments that have been deposited to their trust accounts but have yet to clear. Our ruling does not cover that situation.
>
> . . . .
>
> . . . We do, however, wish the bar to understand that this practice [the decision does not make it clear whether "this practice" is not confirming that wired funds have been received, or if "this practice" is drawing funds against checks that have not cleared] violates the Vermont Rules of Professional Conduct and that in the future should an attorney write checks on unverified funds, a more severe sanction may be imposed.[5]

The decision of the Professional Responsibility Board cites no authority for the assumption that lawyers are generally prohibited from drawing against funds in their trust accounts that have not had time to clear.

In April 2004, VBA Ethics Opinion 2002-4 was published. As to the issue in question, this opinion holds that trust account checks can only be drawn on client funds "after the deposit on which the check is drawn clears." The opinion specifically states that this includes checks drawn on another attorney's IOLTA account or a real estate broker's IORTA account. The

opinion also provides that settlement funds paid by insurance companies may not be disbursed from a trust account "until the check from the insurance carrier clears and the funds covered by the check are available."

Practical Problems

If the VBA Advisory Ethics Opinion is correct, a number of practical problems are presented. A number of attorneys deposit insurance settlements of tort cases in their trust accounts, and simultaneously provide clients with checks for their share. Other attorneys disburse insurance settlements when their bank informs them that the funds are available for withdrawal – but this may be an earlier date than the date the check is irrevocably credited to the trust account. If VBA Ethics Opinion 2002-4 is correct, and particularly if it is interpreted as requiring that funds not be disbursed until a check is honored by the bank it is drawn on, clients will be delayed in receiving their checks.

The most difficult issues are presented in real estate transactions. Attorneys and real estate agents typically bring trust account checks to closings, and it is common to accept personal checks for the small amount of additional funds needed to fund the settlement.

Moreover, VBA Ethics Opinion 2002-4 would make it very difficult to deal with the common practice of "back to back" closings, being a closing in which the funds received by a buyer are used by that buyer to purchase another home the same day.

In addition, as discussed below, what is meant by a check "clearing" or funds "being available" is not as clear as it might seem at first glance; if strictly construed, there might be a very substantial delay before a disbursement could be made against a check which has been received.

Finally, it is important to remember that trust accounts are used for purposes other than settlements of tort cases and closing of real estate transactions. VBA Ethics Opinion 2002-4 is likely to create difficulties in these other contexts as well. For example, how should a lawyer handle the situation if all or a portion of a fee retainer check deposited in a trust account is to be refunded to the client within several days because the matter becomes moot or the attorney's work is quickly completed? Attorneys often hold deposits for the sale of real estate, the purchase and sale of a business, or pursuant to other types of contracts – what if these need to be unexpectedly returned or disbursed shortly after receipt?

Policy Questions

It is appropriate to ask what ethics rule would best serve the public.

The problem is that there are conflicting interests. On one hand, it is clear that it is of primary importance to protect the safety of client funds. On the other hand, if safety can be reasonably assured, roadblocks should not be created that make it difficult for clients to carry out transactions with the assistance of their attorneys. There is an important public value in permitting commercial transactions to proceed in a reasonable manner, without undue difficulty and expense (and without creating additional legal work, for which the client must pay the attorney).

When a thorough analysis is undertaken, it becomes obvious that there is no way to have an absolute guarantee of safety, other than by accepting cash (which creates a number of other problems, including reporting requirements), a cashier's check or similar instrument (which can be dishonored, but only in unusual circumstances),[6] or wired funds. With regular checks, funds

may be "available," in that a bank will disburse funds based upon that deposit, but the check can still be dishonored by the payor bank (the bank on which the check is drawn).

With the exception of very large checks, checks drawn on foreign banks, or checks that are otherwise unusual, banks will generally make funds available for withdrawal on the next business day after deposit. "Local" checks, being checks drawn on banks within the same Federal Reserve Board Region, are usually honored by the banks on which they are drawn within two or three business days. Checks from banks in other regions are usually honored within five business days, although this can occasionally take seven business days. In extremely unusual circumstances this can take eleven days. Banks are not notified that checks have been honored by the payor bank, but are only notified if they have been dishonored.[7]

What is needed is to strike a proper balance between safety and practicality, with the understanding that safety is paramount. And it must be remembered that if there are some circumstances in which the funds might not be honored in a trust account, it is quite clear ethically that the lawyer must pay those funds, subject to whatever rights the lawyer has against the defaulting party. The question is when is it unethical for the attorney to be willing to take that risk.

A further consideration is that the ethical rule was designed to prevent commingling of funds – because that could lead to the embezzlement by the attorney of clients' funds. Very little, if any, consideration appears to have been given by the drafters of the rule to the question raised here – as evidenced by the fact that the Code of Professional Responsibility does not unambiguously deal with this issue. And it is particularly important to note that the problem has historically been embezzlement by attorneys, not the failure of attorneys to make good on dishonored checks. There are numerous cases of attorneys being disbarred for embezzling client

funds. The author is not aware of any case in which a client has lost money because a check, innocently deposited in a trust account, has been dishonored and the lawyer has not subsequently made up the funds.[8] It does not make sense to create substantial practical problems in order to solve a theoretical problem that has not historically created difficulties.

Where then to strike the balance? It seems particularly clear that cashier's checks should be considered funds that are immediately available – any risk of dishonor is extremely small. Similarly, the extensive regulation of attorney's trust accounts and realtor's trust accounts would make it appropriate to accept checks drawn on those accounts as immediately available. It would also seem that checks from insurance carriers licensed in Vermont[9] and from governmental agencies should be considered to be immediately available. Finally, the author would argue (although this proposal may require a rule change) that the Florida Supreme Court rule discussed below – that no ethical violation occurs if a dishonored check is promptly paid by the attorney - is the best policy. Alternatively, relatively small checks of clients, such as those needed to make up relatively small amounts of money needed at real estate closings, should be accepted if the attorney is willing and able immediately to cover any dishonored check.

The author believes that the best policy would be to leave to the professional judgement of the attorney the decision of when trust account checks can be disbursed, with appropriate education of attorneys as to the risks involved. Different transactions and different payors may dictate different practices. Nevertheless, if attorneys are not going to be permitted to disburse funds until certain types of checks have "cleared," it is crucial to develop a workable standard as to when this occurs.[10] It is simply not practical, and may not even be possible, for an attorney to determine with certainty whether a check has been honored by the bank on which it is drawn and irrevocably credited to a trust account. It would certainly not be feasible for a law firm to make

this determination for a substantial number of checks on a regular basis. The sensible policy would be to allow lawyers to assume, in the absence of bank notice to the contrary, that checks that have been deposited for a certain period of time have "cleared." Three business days for local checks, seven business days for checks drawn on banks from a different Federal Reserve Board region, and a longer period for foreign banks might be the appropriate period of time.

What is the Law?

Despite VBA Ethics Opinion 2002-4, the law remains unsettled. To understand this, it is important to understand the difference between a VBA Ethics Opinion, a Professional Responsibility Board decision, and a Supreme Court decision.

The Rules of Professional Conduct are "the law." Once interpreted by the Vermont Supreme Court, the Court opinion becomes part of "the law." Since the Rules of Professional Conduct are ambiguous, and there is no Vermont Supreme Court decision interpreting them, it seems fair to say that the law is unsettled.

The Professional Responsibility Board is an official body that disciplines attorneys, subject to an appeal to the Supreme Court. Accordingly, its decisions are analogous to a lower court's decision on a point of law – precedent, but not dispositive precedent. To date, there is only a decision from the Professional Conduct Board that states, *in dictum*: "Generally lawyers are prohibited from drawing against funds that have been deposited to their trust accounts but have not had time to clear."

Decisions of the VBA Professional Responsibility Committee are not "the law." The Vermont Bar Association is a private trade organization, and the Professional Responsibility Committee is simply one of its appointed committees. Its decisions have no binding legal effect.

That said, it must be recognized that the Committee is composed of private practitioners who are extremely well respected, and have spent substantial time in the thankless and difficult task of interpreting the Code of Professional Responsibility. The opinions of the VBA Professional Responsibility Committee accordingly carry substantial weight. They are analogous to the decisions of commentators or authors of treatises (e.g., the Corpus Juris Secundum; *Corbin on Contracts*). Thus, a decision of the Committee is important and deserves serious consideration.

What Do Other States Do?

One possible way to clarify the situation would be for the legislature to adopt a statutory solution. For example, a Georgia statute[11] permits funds to be written against a certified check, cashier's check, treasurer's check, or similar primary obligation of a federally insured banking institution, a check issued by a lender approved by HUD, a check issued by a lender qualified to do business in Georgia, a trust account check of a Georgia attorney, a check drawn on the escrow account of a real estate broker licensed in Georgia, a check issued by the federal government, a check issued by the State of Georgia, a check issued by any political subdivision in the State of Georgia, or personal checks not exceeding $5,000 per loan closing.

A better solution would be for the Vermont Supreme Court to adopt a clarifying rule on trust accounts. The Delaware Supreme Court adopted a rule similar to the Georgia statute, providing that disbursements could be made against uncollected funds when the deposit is made by a certified, treasurer's or cashier's check, a check from any federally or state chartered banking institution, a check of the State of Delaware or the U.S. Treasury, a check drawn on the trust account of a licensed Delaware lawyer or (up to a statutory limit) a Delaware real estate

broker, or a check issued by an insurance company licensed to transact business in Delaware. A check for less than $10,000 can also be drawn against even if uncollected.[12]

The Florida Supreme Court also adopted a similar rule, providing that disbursements could be made against uncollected funds when the deposit is made by a certified check or cashier's check, a check from any federally or state chartered banking institution, a check of the State of Florida or any agency or political subdivision of the State of Florida, a check drawn on the escrow or trust account of a licensed Florida lawyer or real estate broker, or a check issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the State of Florida.[13]

The Florida Supreme Court rule has an additional provision that brings Florida practice in line with former Vermont practice. If a lawyer accepts a check other than the specified instruments and "personally pays the amount of any failed deposit or secures or arranges payment from sources available to the lawyer other than trust account funds of other clients, the lawyer shall not be guilty of professional misconduct."[14]

Although an exhaustive review of court rules around the country has not been undertaken, it is likely that a number of other courts have adopted similar rules.

Some states, without detailed rules on the issue, have incorporated the provisions of statutes regulating real estate settlements. A Virginia ethics opinion[15] has interpreted Virginia's rules as permitting disbursements on funds that have not yet cleared in accordance with Virginia's "Wet Settlement Act" (which applies only to transactions involving not more than four residential dwelling units).[16]

North Carolina also allows such disbursements in connection with its Good Funds Settlement Act.[17] A North Carolina ethics opinion holds that a lawyer may issue trust account

checks drawn against funds which have not been collected, if they are the types of instruments referred to in the Georgia statute and Florida and Delaware rules.[18] North Carolina allows any check drawn on the trust account of a North Carolina lawyer, and checks totaling $10,000 or less per closing drawn on the trust account or escrow account of a licensed real estate broker, and personal or commercial checks totaling $5,000 or less per closing.

Vermont has a similar statute – the Funded Settlement Act.[19] This statute, which applies to loans secured by first mortgages on owner-occupied one-to-four-unit residential real estate, requires the delivery of loan funds at or before the closing in cash, wired funds, certified, cashier's or teller's checks, checks from state or federally chartered financial institutions, or checks from insurance companies licensed in Vermont. The settlement agent must disburse funds at the closing or on the first business day after a right of recission expires.

Accordingly, if guidance is taken from other states ethics opinions, it appears that Vermont attorneys complying with the Funded Settlement Act would not be in violation of the ethics rules.

There remains the question of when funds are considered "collected" if collected funds are required. The author knows of no court decisions specifically deciding this issue in the context of the ethics rules.

In summary, a number of states have, by rule or statute, specified the types of funds against which trust account checks can be immediately disbursed. These include cashier's checks, as well as lawyers' and real estate brokers' trust account checks. And it is not uncommon to permit personal checks to be used up to a specified amount per real estate closing, if the attorney immediately covers any check that does not clear.

How Can the Issue Be Clarified in Vermont?

Our options in Vermont, if we disagree with VBA Ethics Opinion 2002-4, or if we want further clarification, are as follows:

1. An individual lawyer can, if he or she is willing to take the risk that his or her action will be considered unethical, conclude that the VBA Ethics Opinion is wrong, and continue to accept attorneys' trust account checks and real estate brokers' trust account checks, unless and until the Supreme Court rules otherwise. If the attorney is willing to take an even greater (probably much greater) risk, the attorney could take the position that small personal checks could also be collected at closings.
2. The Vermont Supreme Court could be asked to pass a rule incorporating the provisions set forth by the rules of other state courts that have specifically dealt with the situation.
3. The legislature could be asked to pass a statute.

Attorneys will have to make up their own minds as to when funds should be considered "collected" under the present ethics rule, or the VBA Committee can be asked to clarify this issue.

How Do We Live with the Ethics Opinion If It Is Correct?

If the VBA Ethics Opinion is correct, and the rules are not changed, how can lawyers conduct their practices?

For insurance settlements in tort matters:

- Attorneys may simply have to wait until the insurance company check has "cleared," whenever they conclude that has occurred.

- Attorneys can ask insurance companies to provide cashier's checks or wire settlement funds to their trust accounts.
- It is possible that, if the attorney trusts the client a great deal, the full check can be given to the client, and the client requested to write a check (or obtain a cashier's check) for the legal fee. Although it is clear that the check cannot be deposited in a lawyer's business account, it may be possible to give the check to the client in these circumstances. There seems to be no reason why this would violate the rule, and an ethics opinion from North Carolina has specifically approved this procedure.[20]

With regard to real estate transactions, there are two possibilities:

- Attorneys can insist on wired funds or cashier's checks.
- Attorneys can have the buyer accept funds directly from the seller, if the buyer is willing to do so. In other words, the buyer could pay all or a portion of the disbursements that are normally paid from the attorney's trust account directly from the buyer's own checkbook.

As to both tort and real estate matters (and any other types of matters), there are two other possible creative approaches:

- If the attorney is willing to go through the difficulty and expense of setting up a separate trust account or trust accounts, which have no other client's funds in them (this would usually be a newly opened account, although it is possible this could be an account in which the attorney is certain that all previous checks that were written have actually been cashed by the recipients), that account could presumably be used to disburse funds for a specific tort settlement or closing. Using such an account would not put any of the attorney's other clients' funds at risk, because there are no

other clients' funds in the account. This procedure was approved by a Kansas ethics opinion.[21]

- It is possible that, with a client's approval, funds could be paid to an independent third party escrow agent who would hold and disburse the funds under an agreement with the client. Nassau County Bar Association Opinion 91-30 provides that this may be done for real estate transactions if the lawyer determines that the "escrow agent is fiscally responsible and that the terms of the escrow are consistent with his client's needs."

Perhaps the most intriguing solution, which if approved could solve all of the problems set forth in this article, is an approach which was approved by an ethics opinion of the Washington State Bar Association in 1984. That opinion held:

> An attorney may enter into an arrangement with a financial institution whereby the attorney's credit is used to permit immediate payment of trust obligations, providing there is a written agreement with the financial institution guaranteeing that the trust deposits of any other clients are never affected.[22]

Accordingly, if Vermont lawyers are able to reach an arrangement with banks whereby the banks agree that they will never allow a "bounced" trust account check to affect their payment of other trust account checks, all the problems discussed in this article might be solved. Whether such an agreement can be reached with a bank is unknown, but is certainly worth exploration by the Bar. Whether the Vermont Supreme Court, the Professional Responsibility Board, or the VBA Ethics Committee will agree with the analysis of the Washington State Bar Association that this is ethical is also unknown. It would seem that this would resolve the issue of guaranteeing that client funds will not be adversely affected by trust account practices.

Summary

The ethics rules were written to prevent commingling of clients' and attorneys' funds, and to prevent embezzlement by attorneys. It is difficult to determine from a reading of the rules that they provide other restrictions on the disbursement of funds, beyond requiring an attorney to act reasonably to protect the other funds in a trust account. However, a gloss has been placed on these rules by ethics committees in a number of states, and such a gloss has now been placed on them by the VBA Professional Responsibility Committee.

A debate should ensue as to what policy is in the best interests of the public, and what interpretation or revision of the ethics rules is appropriate to protect these interests. Further clarification from the VBA Professional Responsibility Committee, a new rule from the Vermont Supreme Court, or legislation from the state legislature would certainly be helpful, and may be necessary, to formulate the policy that best strikes a balance between the competing concerns of safety of client funds and the ability of clients to transact business without unnecessary delay and difficulty.

Roger E. Kohn, Esq., *is in general practice with Kohn & Rath, LLP, in Hinesburg (www.kohnrath.com). He was graduated in 1971 magna cum laude from the University of Pennsylvania Law School, where he was Comment Editor of the Law Review, and received the Henry C. Loughlin prize for legal ethics.*

[1] This issue is not completely clear. Disciplinary Rule 9-102 (A)(1), discussed *infra*, specifically allowed funds to be deposited "reasonably sufficient to pay bank charges." Accordingly, in 1995, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee, in Formal Opinion 485, held that a lawyer may keep a small amount of personal funds in a client trust account to cover bank service charges such as check printing. It is not clear that the Rules of Professional Conduct, which replaced the Disciplinary Rules, intended to change this provision.

It should be noted that this same Los Angeles County Bar Association opinion held that a lawyer may not

maintain a "buffer" against overdrafts and bank errors. The rationale for not permitting a "buffer" against overdrafts and bank errors is commonly stated as an intention to make certain that any overdrafts and bank errors are reported to the Professional Responsibility Board, and investigated for possible attorney fraud.

[2] Note 10, *citing* Black v. State Bar, 57 Cal.2d 219, 225-26, 368 P.2d 118, 122, 18 Cal.Rptr. 518, 522 (1962).

[3] The Rules are published in the volume of Vermont statutes which includes the rules of probate procedure, under "Administrative Rules."

[4] The author has found no Vermont case or statute prohibiting fiduciaries from so acting. The Uniform Fiduciaries Act, adopted by the National Conference of Commissioners on Uniform State Laws and adopted by the ABA in 1922, does not deal with this issue.

[5] P.R.B. Dec. No. 62 (Jan. 28, 2004).

[6] This article uses the term "cashier's checks" to include cashier's checks, certified checks, treasurer's checks, and similar instruments. Payment cannot be "stopped" on a cashier's check, in that a bank cannot be ordered to refuse to pay such a check. Nevertheless, some banks will refuse payment as an accommodation to a customer, although the Uniform Commercial Code discourages this by imposing penalties for wrongful dishonor. *See* VT. STAT. ANN. tit. 9A, §3-411, n. 1.

[7] This information has been provided by a local bank branch manager. *See also* Fed. Res. Bd .Reg. CC.

[8] It is also relevant that there is a client's security fund, managed by the Vermont Bar Association, that provides an additional layer of protection for clients.

[9] There is little risk of dishonor of checks issued by national insurance carriers (assuming care is taken to be certain the endorsement is correct).

[10] If a check must "clear," does this mean that the funds are available for withdrawal pursuant to Federal Reserve Board Regulation CC, or when final settlement is made by the payor bank in accordance with the Uniform Commercial Code?

[11] GA. CODE § 44-14-13.

[12] DEL. LAWYERS' RULES OF PROF'L. CONDUCT R. 1.15(n).

[13] RULES REGULATING THE FLA. BAR R. 5-1.1(i). All the rules and statutes cited in this article require that the lawyer have a reasonable and prudent belief that the instrument will clear and constitute collected funds within a reasonable period of time.

[14] *Id.*

[15] Standing Committee on Legal Ethics, Virginia Bar Association, Legal Ethics Opinion No. 183 (Oct. 31, 1980).

[16] VA. CODE § 6.1-2.10 *et seq.*

[17] N.C. GEN. STAT. ch. 45A.

[18] N.C. State Bar, 2001 Formal Ethics Opinion 3 (Apr. 27, 2001); *see also* N.C. State Bar, 1995 Formal Ethics Opinion 191 (Oct. 20, 1995).

[19] VT. STAT. ANN. tit. 9 §201 *et seq*.

[20] N.C. State Bar, 2001 Formal Ethics Opinion 3, *supra* note 18.

[21] Kan. Bar Ass'n., Ethics Advisory Committee, Opinion 99-04 (issued July 14, 1999).

[22] Wash. State Bar Ass'n., Formal Opinion 177 (1984).