"THE CARE REQUIRED OF A PROFESSIONAL FIDUCIARY"

### **September 16, 2021**

Gary West, Deputy Disciplinary Administrator

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# WHAT'S NEW IN ATTORNEY DISCIPLINE?

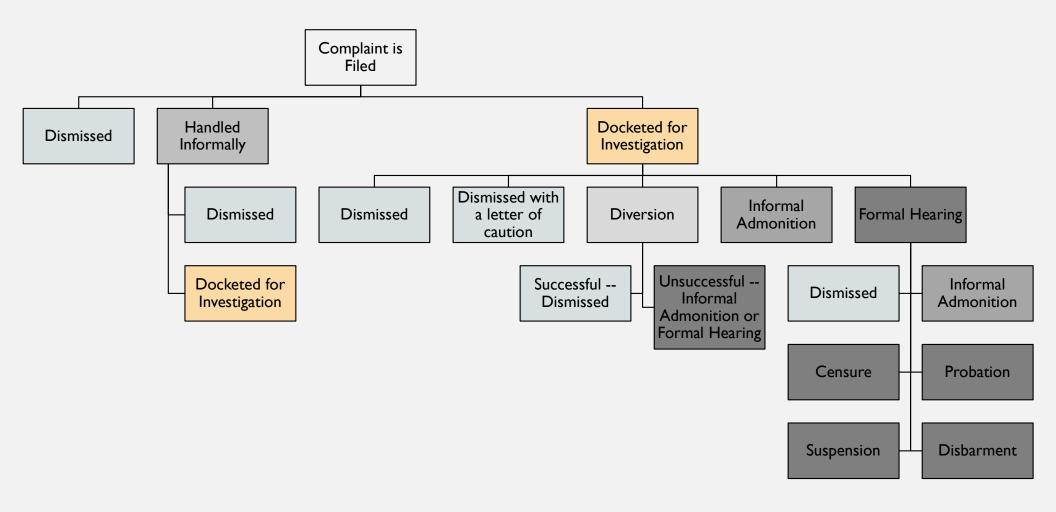
# THE RULES RELATING TO DISCIPLINE OF ATTORNEYS HAVE BEEN UPDATED

- Effective January 1, 2021, the Court overhauled the Rules Relating to Discipline of Attorneys. This includes Rules 200 through 239.
- The rule amendments sought to:
  - Speed up the time it takes for a disciplinary complaint to be fully considered by adding many deadlines where none previously existed
  - Clarify the procedure for the benefit of the respondent by codifying existing practices
  - Retool the language to align with the language used in other Supreme Court rules
  - Restyle the format of the rules to be able to quickly find the applicable rule using many more subsections and subsection titles
- There are a few new procedures, but much of the process remains the same

# THE KRPC REMAIN THE SAME FOR THE TIME BEING

- The Kansas Rules of Professional Conduct (KRPC) were not amended on January 1, 2021. Those remain the same, for now, but may receive some revisions soon.
- The last time the KRPC were amended was in 2007.

# The Anatomy of a Complaint



# WHERE CAN YOU GO FOR HELP WITH UNDERSTANDING THE NEW RULES?

### https://www.kscourts.org/Rules-Orders/Rules

Updated Rules Available on the Court's Website

785-435-8200

Deputy Disciplinary Administrators available 8am-5pm every weekday to help with ethics questions





Trust Account Checkbook



Individual Trust Ledger For Each Client

Trust Account Receipts Journal



Trust Account Disbursements Journal

The trust account ledger and client ledgers means entries will be shown in two different places.

These should always balance out. Client A Ledger 09/01/2021 Client A Retainer Deposit \$1,000.00 Trust Account Ledger 09/05/2021 Client A Court Filing Fee \$245.00 09/01/2021 Client A Retainer Deposit \$1,000.00 Client B Retainer Deposit \$5,000.00 ▼ Client B Ledger 09/04/2021 Client A Court Filing Fee 09/04/2021 Client B Retainer Deposit \$5,000.00 09/05/2021 \$245.00 Client C Retainer Deposit \$2,000.00 09/10/2021 Client B Case Expense \$504.00 09/07/2021 09/10/2021 Client B Case Expense \$504.00 Client C Ledger 09/12/2021 Client C Records Fee \$76.00 09/07/2021 Client C Retainer Deposit \$2,000.00 09/12/2021 Client C Records Fee \$76.00

### Lawyer trust account checkbook register

Date	Check no.	Payee or deposit source	Explanation	Amount of check	Deposit amount	Balance

Lawye	er trust accoun	t receipts journal	Month of	20	_
Trust b	oank account no	):	Page no:		
Date	Receipt no.	Source/Client/Case no.	Explanation	Deposit amount	Running total

Lawye	r trust accoun	t disbursements journal	Month of	20	
Trust b	ank account no	):	Page no:		
Date	Check no.	Payee	Explanation	Amount of check	Running total

Name	of client of third part	v.			
vanic	or eneme or time part	· 3 ·			
Legal	matter or adverse par	ty:			
File or	case number:				
Date	Description of	Check no.	Funds paid	Funds	Balance
Date	Description of transaction	Check no.	Funds paid	Funds received	Balance
Date	_	Check no.	Funds paid		Balance
Date	_	Check no.	Funds paid		Balance
Date	_	Check no.	Funds paid		Balance

#### Reconciliation of Ledgers

Lawyer Trust
Account
Checkbook
Register

Must = Combined
Balance of
Lawyer Trust
Account
Receipts and
Disbursements

Must – Total Balance of all the Lawyer's Client Ledger Sheets

Must =

Monthly Bank Statement Balance

### KRPC AND TRUST ACCOUNTS

### KRPC I.15 ~ SAFEKEEPING PROPERTY

#### Matter of Hawkins, 310 Kan. 988 (2019)

- No evidence of conversion of client funds by attorney
- Attorney deposited her personal funds into her trust account
- Sanction = Disbarment

#### KRPC I.I5 AND I.5 ~ FEES

#### *In re Thurston,* 304 Kan. 146 (2016)

- Not exactly a KRPC 1.5 case but does involve fees.
- No KRPC 1.5 violation found, but violation of KRPC 1.15 was found for attorney who charged flat fee and failed to deposit those funds in his trust account or refund unearned amount when representation terminated.
- Court adopted into its decision Hearing Panel's finding and conclusion that:

"A lawyer may charge a flat fee to a client for a specific task to be undertaken. When the flat fee is paid to the lawyer, it must be deposited into the lawyer's trust account and the fee cannot be withdrawn until it is earned. Since a flat fee is not earned until completion of the task, the entire flat fee must remain in the lawyer's trust account until that task is completed unless the lawyer and client otherwise agree to partial withdrawals based upon the amount earned for completion of specified subtasks."

Thurston, 304 Kan. at 149, 154.

# KRPC 5.3 ~ RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

Pennsylvania: "Lawyer who gave 'perfect' secretary a second chance after theft is suspended after misjudging her"

The Pennsylvania Hearing Board found, among other Rules violated, that Krzton violated the Pennsylvania equivalent of KRPC 5.3

"While it is understandable that Respondent felt betrayed, he should not have been surprised, as he was on notice that his employee was dishonest as early as 2013." "Respondent made no efforts to enhance supervision of her activities to ensure compliance with recordkeeping responsibilities and prevent further thefts."

## TRUST ACCOUNT TROUBLES

**Pro Tip:** Ensure that your trust account is designated as a trust account, is deposited in a bank with a Kansas presence that is FDIC insured, and that you are informed on the FDIC insurance coverage limit for all funds deposited. It is a red-flag if one client has more than the FDIC insurance limit in a single trust account. Client deposits over \$250,000 may require opening more than one account with different FDIC-insured institutions.

#### **2008 Recession - Bank Closures**

- FDIC Insurance for 2021 = \$250,000 per depositor, per FDIC-insured bank, per ownership category
- According to the ABA, IOLTA Trust Accounts enjoy FDIC insurance of "\$250,000 per owner of the funds (client), per financial institution, assuming that the account is properly designated as a trust account and proper accounting of each client's funds is maintained."

## TRUST ACCOUNT TROUBLES

**Pro Tip:** Find out when checks and other transactions actually clear with your bank and create a firm policy to wait for a specified period of time for all checks and transactions to clear before disbursing those funds. Such a policy will avoid both problems discussed here.

#### **Scams**

- "Prospective client" with contingent case against fake company.
- "Client" who sends check for more than requested retainer fee.

# TRUST ACCOUNT TROUBLES

**Pro Tip:** Before you decide to accept a form of payment, be sure that you understand the way those payments are processed, how long they take to clear, and how they might impact your obligations under KRPC 1.15.

#### **Types of Payment**

- Cash
- Check
- ACH Check
- Credit Cards
- Peer-to-Peer payment processing companies
- Cryptocurrency

### ETHIC REFRESHERS



#### **QUESTION:**

Attorney trust account records must be preserved:

- A. For a period of two (2) years after termination of representation.
- B. For a period of three (3) years after termination of representation.
- C. For a period of five (5) years after termination of representation.
- D. Until the termination of the representation.



**ANSWER:** 

C

A lawyer must keep complete trust account records and preserve them for a period of five years after termination of the representation. KRPC 1.15(a).



#### **QUESTION:**

You like to keep about \$1,000 of your own money in your attorney trust account. You have never been a very good record-keeper and you think this is a good way to make sure that trust account checks do not bounce. You recently hired an associate who told you this violates the Kansas Rules of Professional Conduct concerning trust accounts. Your associate:

- A. Ought to mind her own business.
- B. Is wrong.
- C. Is right.
- D. Paid attention in Professional Responsibility class.



**ANSWER:** 

C (and probably D).

A lawyer is permitted to deposit personal funds in a client trust account for the sole purpose of paying bank service charges for that account, but only in an amount "reasonably sufficient" for that purpose. KRPC 1.15(d)(1)(i).



#### **QUESTION:**

Attorney Carol represented Bob in civil litigation. Bob paid a retainer for fees and expenses, which Carol deposited into her attorney trust account. After the litigation was over and all of the final expenses tallied, \$250 of Bob's funds remained in the trust account. Carol issued a trust account check to Bob for \$250 and mailed it to him. Two years have passed and the check has never been cashed. Carol has tried to located Bob, but has not been successful. In her search, Carol found Bob's adult son, but he does not know where his father is and hasn't heard from him in years. Carol:

- A. Must initiate an interpleader action and deposit the money into court.
- B. May consider the money earned fees and transfer it to her operating account.
- C. May disburse the money to Bob's son.
- D. Must hold the funds in trust for five years and then comply with the Kansas Uniform Unclaimed Property Act, K.S.A. 58-3934 et seq.



**ANSWER:** 

D.

Under KRPC 1.15, Carol has a duty to keep Bob's funds segregated in her trust account. KRPC 1.15(a). Carol may not disburse them to herself. Carol may not disburse the funds to anyone other than Bob without Bob's consent or unless permitted to do so by law. KRPC 1.15(b). Interpleader may be an appropriate way for a lawyer to get out of the middle of a dispute between a client and a third party over trust account monies, but that does not apply in this scenario.

In KBA Legal Ethics Opinion No. 00-4, the KBA Professional Ethics Advisory Committee addressed this scenario. The Committee opined that unclaimed client funds in an attorney's trust account are subject to the Kansas Uniform Unclaimed Property Act, "so long as the attorney has made a reasonable effort to locate the client and has been unable to do so and five years has passed since the obligation to pay or distribute the funds has accrued." Consequently, once the unclaimed funds meet the criteria for abandoned property under the statute, Carol must follow the statute's procedures for delivering the funds to the state.



#### **QUESTION:**

Jane is a Kansas-licensed attorney. She was at a recent bar association gathering where she overheard some of the attorneys from the Kansas City area talking about a new rule concerning flat fees and trust accounts. The attorneys said under the new rule, flat fees paid in advance may be deposited directly into the attorney's operating account, rather than the client trust account, if the flat fee does not exceed \$2,000.

Jane was excited to hear this because she does a lot of municipal court work where she charges advanced flat fees under \$2,000. Jane just received a \$1,500 advanced flat fee from a client who has hired her to represent him on a traffic case in municipal court in Overland Park.

Yes or No: Is it permissible for Jane to deposit the \$1,500 advanced flat fee directly into her operating account?



#### **ANSWER:**

No.

Under KRPC 1.15, Jane's \$1,500 flat fee is an advanced payment of fees for services to be provided and therefore it must be deposited into her client trust account and cannot be withdrawn until it is earned. *In re Thurston*, 304 Kan. 146 (2016).

The attorneys at the bar association gathering were talking about the Missouri Supreme Court's recent order amending Missouri's version of Rule 1.15 on trust accounts.



#### **QUESTION:**

John and Celia are Kansas lawyers. They are opening their own firm and will serve only Kansas clients. John and Celia are looking into setting up their client trust account and are trying to decide what bank to use.

John wants to set up their trust account with "Cyber Bank," a national online bank with no physical branch locations. Celia thinks the Kansas Rules of Professional Conduct require that their trust account be with a financial institution that has a branch location in Kansas and is on the Disciplinary Administrator's list of financial institutions approved for client trust accounts. John argues that the rules require only that the bank is a state or federally licensed institution and is FDIC insured.

Who is right: John or Celia?



#### **ANSWER:**

Celia.

Under KRPC 1.15, Kansas lawyers who receive funds from Kansas clients must maintain those funds "in an insured account in a financial institution located within the State of Kansas and approved by the Disciplinary Administrator's Office as a depository for lawyer trust accounts." Kansas Bar Foundation, *Money of Others:* Accounting for Lawyer Trust Accounts, p. 1 (2017 ed.).

The requirements come from KRPC 1.15(d)(1) and (f)(1).

#### WHERE CAN WE GO FOR HELP?

