Ethics Question – Fee Advances – IOLA Accounts

Here's the situation, brought up in another group.

1. Client pays attorney's fees in advance.
2. Attorney does not deposit advance fees into IOLA account, but rather keeps the funds in his Operating Account, and refunds the excess if there is excess at the end of the case.
2b. Attorney relies on http://www.nylawfund.org/cle.pdf (pages 28 -31) to justify this practice, stating that "all the attorneys" that the attorney knows engages in the same practice.
2c. The mentioned article in 2b clearly states this is a minority opinion.
3. This is contrary to what I learned in law school, while I was being admitted, and at another NYS CLE.

Opinions, anyone? Are advance fees client funds or do they belong to the attorney, even though he hasn't earned them yet?

They are advanced if stated so in the retainer agreement and agreed so by the client. I think without spelling it out in the retainer or engagement, they should go in the escrow, however the retainer or engagement should also spell out how funds will be held, used, withdrawn and refunded if in escrow. NYSBA published a great book about NY escrow accounts.
My preference is to use the operating account.

Michael A. Huerta, New York

See NYSBA Ethics Opinion # 816.

Samuel Katz, New York

Read. Noted. Adjustment in progress. (Fortunately, I don't have to move any money.)

That is a no-no in Illinois. Until they are earned, they belong to the client and may not be mingled with earned fees.

Very truly yours,

Timothy A. Gutknecht, Illinois

Does anyone have the answer to this question for NJ and DC?

Some states it may work to specify that all funds are deemed fees paid. To me, that's wrong and risky but supportable some places.

John Page, Florida

Can't answer for the jurisdictions in question but in CA, last time I checked, flat fees paid for specific work can be deposited directly into operating account. Monies will need to be refunded if client fires you before work is finished, but no need to deposit into IOLTA. That's CA.

Joseph D. Dang, California

I am DC and Texas-barred (and principally practice in DC). See here: http://www.dcbar.org/bar-resources/practice-management-advisory-service/iolta.cfm

Are there any exceptions to the new, mandatory IOLTA account rule?

Yes, there are two limited exceptions. Trust funds are not deposited into a D.C. IOLTA when the lawyer is otherwise compliant with the contrary mandates of a tribunal. In other words, if a court order directs the lawyer to place trust funds in an account other than a D.C. IOLTA account, the lawyer must comply. The second exception occurs when the lawyer is participating in and compliant with the IOLTA program of another jurisdiction where the lawyer is licensed and principally practices. For example, if the lawyer is licensed in and principally practices in Maryland, IOLTA eligible funds from D.C. clients can be deposited into the Maryland IOLTA account and the lawyer would not need a D.C. IOLTA account.

Lawyers may seek additional guidance from the D.C. Barâ€™s legal ethics counsel, at 202-737-4700, ext. 3231, or ext. 3232, or at et ethics@dcbar.org.

Might be worth checking whether the DC Bar would deem "more lenient rules" on IOLTA (as it seems they are in NY) as being within the 2nd exception. I think yes, but just a thought.

Regards,

Murtaza Sutarwalla, Texas

Historical note: I was the principal drafter of New York State Bar Association Opinion 570 (1985), which Opinion 816 (2007) reaffirmed.

Steven Finell, California and New York
