



## Know What's in Your Trust Account

A recent Court of Appeals case highlights the importance of knowing which fees to place in your trust account and of keeping track of what is there once those fees are earned.<sup>1</sup> In that case, a law firm had received a retainer to handle the appeal of a judgment debtor. It placed this retainer in its trust account. While the appeal was pending, the judgment creditor served a writ of garnishment on the law firm for the retainer paid by its client, minus any earned fees that the law firm already had withdrawn from the trust account.

The sums involved were substantial, and battle lines were promptly drawn. The law firm argued that the retainer was not subject to garnishment but that, if it was, the firm should be able to subtract fees earned but not yet removed from the trust account. The trial court disagreed and held that all fees still in the trust account were subject to garnishment.

On appeal, the court affirmed that part of the trial court's ruling that allowed the retainer to be garnished, but vacated that part of the decision that disallowed the law firm from subtracting the fees it had earned but had not withdrawn at the time the writ was served. The court held that fees earned are separate property that can be withheld from garnishment funds. The fees became the law firm's property once they were earned, the court held, and remanded the case with directions that the law firm be allowed to withhold its earned fees from the garnished trust funds.

The case points out the importance of determining exactly what it is that is being paid to the lawyer. If what is being paid is deemed to be earned upon receipt, it belongs to the lawyer and should not be in the lawyer's trust account. If what is being received is deemed to belong, in whole or in part, to the client, that part which is still the client's must be held in the lawyer's trust account until it is earned.

We are fortunate in Arizona to have an excellent ethics opinion, recently supplemented, to which we can refer whenever we are presented with these questions.<sup>2</sup> But before we go there, we need to review ER 1.5(d)(3),<sup>3</sup> which tells us that a fee can be deemed or denominated "earned upon receipt" or "non-refundable" if the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer and be entitled to a refund for that part of the fee that exceeds "the value of the representation" as determined by the parameters set forth in ER 1.5(a). Turning to Opinion 99-02, we learn that an advance fee payment or "retainer," against which the lawyer draws as he or she earns the fee, must be deposited in the lawyer's trust account.<sup>4</sup> The lawyer can then withdraw amounts when and to the extent the fee is earned by the criteria specified in the fee agreement. In the case of a "hybrid" fee, defined as in part non-refundable and in part to be earned, the funds advanced to secure the hourly fee would go into the trust account, but the funds earned upon receipt should go into the lawyer's operating account.

These rules also apply to what is known as a "flat fee." A flat fee describes an agreement in which the lawyer renders a specific legal service for an amount that is fixed at the beginning of the representation. A flat fee may or may not be paid in advance

and may or may not be non-refundable. This will be a matter of agreement in the lawyer's engagement letter. These flat fees can be deemed earned after certain tasks are performed, or when all tasks are performed, or when initially paid.<sup>5</sup>

Whether the fee is non-refundable, hybrid, flat, a "minimum fee" or a retainer, the opinions conclude that it is the lawyer's responsibility to ensure that the fee agreement describes clearly how prepaid fees will be treated.

We learn from all of this that not only must we consider unearned fees as the property of the client, but that the courts will treat those funds in our trust accounts as the client's as well, and subject to the claims of creditors. One lesson that the Court of Appeals decision teaches us is that earned fees and costs should be withdrawn from the advance fee payments we hold in our trust accounts on a timely basis and in strict accordance with our fee agreements. Remember that the first place everyone will look in the event of a disagreement on this issue will be the engagement letter/fee agreement. It is a good idea to make sure it accurately and clearly states what is to be deemed earned, when, and after which tasks are completed. 

The newest Ethics Opinions are on p. 49. Ethics Opinions and the Rules of Professional Conduct are available at [www.myazbar.org/Ethics](http://www.myazbar.org/Ethics)



David D. Dodge is Of Counsel with the Phoenix law firm Lorona Steiner Ducar Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

### endnotes

1. *Sports Imaging of Arizona LLC v. Meyer Hendricks & Bivens, PA*, 2008 WL 4516397 (Ariz. App. Div. 1, 2008) (not legal precedent per Rule 111, ARIZ.R.S.Ct.).
2. Arizona Ethics Op. No. 99-02 (April 1999) (Fees: Retainer Fees; Fee Agreements; Retainer Agreements). There is a recent update in Ariz. Ethics Op. No. 10-03 (June 2010).
3. Rule 42, ARIZ.R.S.Ct.
4. ER 1.15(c).
5. See Ariz. Ethics Op. 10-03 (describing the arrangement inquired of there as a "minimum fee," but authorizing deposit in lawyer's operating account if agreed to by the client as "earned upon receipt" and "non-refundable"); and see *In re Mance*, No. 06-BG-890 (D.C. Cir. Sept. 24, 2009) (an unearned flat fee may be treated as the lawyer's property if the client gives informed consent to such an arrangement); *In re Sather*, 3 P.3d 403 (Colo. 2000) (same).