Be Wary of Delegating Bank and Bookkeeping Responsibilities

*By Presiding Justice A. Gail Prudenti**

With the ever increasing demands placed upon attorneys, it is inevitable that a greater number of tasks will routinely be delegated to others, including bank and bookkeeping responsibilities. Some firms assign this responsibility to a partner, an associate, a trusted non-lawyer employee, or possibly an independent bookkeeper or accounting service. Whether the bank and bookkeeping tasks have been delegated within the firm or outsourced, every signatory on the account ultimately has a fiduciary responsibility to oversee and review the account. Unfortunately, the trust and reliance vested in others may provide a false sense of security if those individuals do not fully appreciate the importance of preserving the integrity of client funds. As supervision decreases or disappears, the risk to the funds on deposit and to the ethical liability of those in control escalates.

The purpose of this article is to provide a review of the basics of attorney bank and bookkeeping responsibilities and the dangers inherent in their delegation which, though permissible, should never mean total relinquishment of supervision or control.

The Basics of Fiduciary Accounting

Whenever an attorney comes into possession of funds or property belonging to a client or third party, where such possession is incident to the practice of law, he or she becomes a fiduciary.[1] Acting as a fiduciary of client funds or funds that belong to another is one of the most solemn duties an attorney can perform and if not performed properly poses a great risk to an attorney's license to practice law.[2] As a fiduciary, the attorney must notify a client or third-party whenever funds are received on his or her behalf, and ensure the funds are promptly deposited into an attorney escrow, attorney trust, or attorney special account, in a banking institution which agrees to provide dishonored check reports to the New York Lawyers Fund for Client Protection.[3] Only lawyers admitted to practice in New York may be authorized signatories on attorney escrow, trust, or special accounts.[4] Attorneys commonly maintain a multi-client IOLA account, where interest generated upon the account is provided to the New York Interest on Lawyers' Account Fund; however, the parties in a transaction may request that the funds be placed in an

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individual interest bearing account and they may determine who is to receive the benefit of the interest.[5] Disbursements should be made promptly from available funds, and each check must be made payable to named payees and never to cash.[6] The attorney is required to maintain accurate and contemporaneous records of all transactions; provide clients and third parties with timely accountings and preserve all required records for seven years.[7]

Chief among the fiduciary's obligations is the requirement not to misappropriate client funds or funds that belong to another.[8] Compliance with this mandate is easily discernable when dealing with an account that has been opened for a specific matter. In this instance, an attorney can simply look at the account balance and transaction history and readily ascertain what funds are being held. Safekeeping and preservation become more complicated in a multi-client account because the aggregate balance may encompass multiple matters. The fiduciary is obligated to ensure that there is an adequate balance maintained on behalf of each individual matter. Accordingly, before a check is issued from a multi-client account, it is paramount that the attorney confirm it is being drawn against funds that were previously deposited for that specific matter and that the funds have cleared and are available.

The failure to confirm properly the availability of correlating funds before each disbursement exposes the attorney to a dangerous game of "availability roulette" which may have unpredictable consequences. If there is an *insufficient* balance in the account as a whole when the check is drawn and tendered, it will be dishonored and the failure to confirm the availability will become apparent. As a result, the fiduciary will likely face a grievance investigation and audit of the IOLA account,[9] and any discovered impropriety may become the subject of committee inquiry, and ultimately, disciplinary action. However, if there is a *sufficient* balance in the account as a whole when the check is drawn and tendered, but there are inadequate funds on deposit with respect to the specific transaction from which the check is drawn, the failure to confirm adequate correlating funds may go undetected since the check will clear against other unrelated funds on deposit. The signatory's misuse of unrelated funds may be discovered later should the signatory ever become the subject of a separate grievance inquiry from an unrelated complaint concerning his or her handling of funds in the IOLA account.

Further guidance concerning fiduciary responsibilities may be accessed from a broad range of materials offered by the New York Lawyers Fund for Client Protection at www.nylawfund.org.

Delegation of Bank and Bookkeeping Responsibilities

With the time constraints placed upon practitioners, it is perfectly permissible and often inevitable that tasks will be delegated to non-lawyers. In such cases, the delegating attorney is charged with the responsibility to insure that those persons are adequately trained and supervised, because he or she may be held accountable for the unethical acts of non-lawyer employees, associates, and even partners.[10] "The degree of supervision required is that which is reasonable under the circumstanc-

es, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter."[11] Several cases decided by the Appellate Division, Second Department serve to illustrate how adequate supervision is never more important than when dealing with the delegation of bank and bookkeeping obligations.

A classic example of an attorney's total relinquishment of control is found in *Matter of Duboff*.[12] Attorney Duboff agreed to act as a mortgage loan settlement agent for Island Mortgage Network (IMN). In furtherance of this arrangement, he created David Duboff, PC (DDPC), whose sole client was IMN. In late 1996, an attorney trust account was opened at the First National Bank of Long Island (First National), known as *David Duboff, PC Attorney Trust Account*. First National was authorized to accept a facsimile stamp for Duboff's signature on all checks.[13] Beginning in 1996, for a period of three and one-half years, IMN funded and closed thousands of mortgage loans through the First National DDPC attorney trust account. Although DDPC was listed as the attorney of record and settlement agent on each of the loans, in fact, Duboff had virtually no input or participation in the transactions. He permitted the Comptroller of IMN, who was not an employee of DDPC, to have exclusive control of his signature stamp and to issue all checks from the DDPC accounts using the stamp with little or no supervision from him. While IMN was running the Long Island operations of DDPC, Duboff continued to practice from his law office in Westchester, NY.

In 1999, a second trust account was opened by an employee of IMN at the State Bank of Long Island (State Bank) entitled *David Duboff PC Attorney Escrow Account*. Although Duboff had executed the necessary bank documents with the understanding they were to be used to open a new payroll and/or operating account for DDPC, an *escrow account* was established. Using the Duboff signature stamp, IMN then issued thousands of checks through the State Bank escrow account. Duboff did not discover the existence of the State Bank escrow account until the very end of June 2000, just days before Federal authorities raided IMN's offices and closed down its operations.

While IMN controlled both the First National and State Bank accounts, there were periods when the accounts had an insufficient balance to meet DDPC's obligations, and more than one individual failed to receive loan closing funds disbursed from the account. Duboff's fatal error occurred when he relinquished full control of DDPC and any bank accounts affiliated therewith to third-party non-lawyers. He failed to give the non-lawyers any meaningful instruction concerning the requirements for maintaining an attorney trust account and he failed to supervise the non-lawyers or oversee the bank accounts, in any meaningful way. Duboff's total abdication of his fiduciary responsibility, led to the multiple instances of negative balances in both accounts which remained undetected by him until well after IMN was shut down by federal authorities. Duboff received a five year suspension from the practice of law.

Many practitioners may easily dismiss the *Duboff* case as an extreme example

of the dangers of completely delegating all bank and bookkeeping responsibilities to an independent individual or entity; however, *Matter of Iaguinta-Snigur*[14] illustrates that the same dangers lurk even if these duties are delegated to a trusted in-house employee. Snigur maintained a multi-client IOLA account at the Bank of New York and knowingly delegated responsibility for the bookkeeping and reconciliation duties to her non-lawyer employees. These duties included the task of confirming the availability of correlating funds in the IOLA account prior to effectuating a disbursement. On September 13, 2001, Snigur acted as a settlement agent for ABN/AMRO Mortgage Group, Inc (AMRO) for a loan transaction involving a client named Dixon in which Snigur received a wire deposit of $187,137.62 to her IOLA account. One week later, on September 20, 2001, AMRO mistakenly wired an additional $185,162.62 into Snigur's IOLA account for the same Dixon loan. Despite AMRO's immediate and repeated requests for the return of the Dixon overpayment, Snigur did not account for or effectuate the refund until July 3, 2002.

In the course of the grievance committee investigation that ensued, Snigur was required to produce bank and bookkeeping records from her IOLA account. An audit of the account revealed that there were multiple instances where issued checks that cleared the account without available correlating funds on deposit. Accordingly, in each of these instances, when the disbursement check cleared, Snigur used one depositor's funds for the benefit of an unrelated matter, and in some instances, Snigur received the disbursement herself as her fee.

The continued practice of prematurely disbursing funds before their availability, and the misappropriation of unrelated funds, was directly attributable to Snigur's failure to supervise adequately the bank and bookkeeping responsibilities of her non-lawyer staff and examine the account records. Snigur's delegation was not improper, but her failure to review the work being carried on by her employees and her failure to promptly review the account once a discrepancy had been called to her attention ultimately led to her failing in her fiduciary responsibilities and her suspension from the practice of law for a period of three years.

The *Duboff* and *Snigur* cases should not be interpreted to suggest that the risks inherent in delegating bank and bookkeeping obligations to *non-lawyers* may simply be avoided by choosing instead to entrust these responsibilities to a lawyer in the firm. The Appellate Division, Second Department has long held all co-signatories culpable for the misdeeds committed by another co-signatory in connection with the handling of fiduciary accounts.[15] Two cases especially highlight the dangers inherent in this kind of blind trust existing among partners.

Twin brothers, Michael and Charles Linn were co-signatories on the firm's two escrow accounts. From 1987 through 1991, Michael Linn converted client funds to his own use and benefit from the firm's escrow accounts and was later convicted of grand larceny in the second degree, a felony, and disbarred from the practice of law.[16] Charles Linn also faced disciplinary charges for his failure to oversee or review the escrow records for the firm's escrow accounts, which the court found contributed to the conversion by his law partner. In light of his unblemished record,

and the absence of any evidence of his participation in his brother's conversion of client funds, Charles Linn received a censure.[17]

In *Matter of Felman*,[18] junior partner Michael Felman practiced law with the senior partner, Irwin Berson, in the two-person firm of Felman & Berson. Both partners were signatories on the multi-client IOLA account. Cognizant of his fiduciary obligations, Felman nevertheless permitted Berson, his senior partner, to oversee the operation of the firm's IOLA account from 1993 until the demise of the firm in August 1995. During this period, with Felman's knowledge and tacit approval, Berson delegated significant bank and bookkeeping responsibilities, to the firm's secretary, including the authority to sign Berson's name to escrow checks.

While Berson and his secretary were in control of the bank and bookkeeping responsibilities, there were numerous defalcations, including 20 different client matters wherein funds were disbursed without sufficient funds on deposit. In some instances, funds on deposit for one client were invaded and converted for the benefit of another client. Felman faced disciplinary proceedings for his failure to comply with his fiduciary responsibilities as a signatory in connection with the firm's IOLA account, as well as causing or permitting the conversion of funds from an IOLA account he opened as a sole practitioner after Berson was disbarred.[19] Although Felman maintained that his errors were errors of omission by failing to supervise or monitor the escrow account maintained by his former firm, the court found that he also failed to keep his new account in accord with the disciplinary rules and consequently, he was disbarred from the practice of law.

The lessons of the *Duboff*, *Snigur*, *Linn* and *Felman* cases plainly illustrate that attorney fiduciaries cannot evade their bank and bookkeeping responsibilities by simply delegating them to others. They must remain mindful that proper delegation never means total abdication, but instead requires appropriate supervision and control, even over trusted partners and employees.

ENDNOTES

[1] 22 NYCRR 1200.46.

[2] See *Matter of Pinello*, 100 AD2d 64, 473 NYS2d 7 [1st Dept. 1984]; *Matter of Marks*, 72 AD2d 399, 424 NYS2d 229 [1st Dept. 1980]; *Matter of Iverson*, 51 AD2d 422, 381 NYS2d 174 [4th Dept. 1976].

[3] 22 NYCRR '1200.46 (B)(1),(2), (C).

[4] 22 NYCRR '1200.46 (E).

[5] *See* NY State Bar Assn Comm on Prof Ethics Op 582 [1987], Op 554 [1983], Op 532 [1981].

[6] 22 NYCRR '1200.46 (C)(4), (E).

[7] 22 NYCRR '1200.46 (D).

[8] 22 NYCRR '1200.46 (A).

[9] *See* Dishonored Check Reporting Rules for Attorney Special, Trust and Escrow Accounts, 22 NYCRR 1300.1.

[10] 22 NYCRR '1200.5.

[11] 22 NYCRR '1200.5 (C).

[12] 21 AD3d 206, 799 NYS2d 92 [2nd Dept 2005].
[13] *See* NY State Bar Assn Comm on Prof Ethics Op 693 [1997] ("A lawyer may allow a paralegal to use a signature stamp to execute escrow checks from a client trust account so long as the lawyer supervises the delegated work closely as provided in this Opinion and exercies complete professional responsibility for the acts of the paralegal.")
[14] 30 AD3d 67, 813 NYS2d 170 [2nd Dept 2006].
[15] See *Matter of Falanga*, 180 AD2d 83, 583 NYS2d 472 [2nd Dept. 1992]; *Matter of Cardoso*, 152 AD2d 157, 548 NYS2d [2nd Dept. 1989]; *Matter of Sykes*, 150 AD2d 126, 546 NYS2d 376 [2nd Dept. 1989]; *Matter of Dahowski*, 103 AD2d 354, 479 NYS2d 755 [2nd Dept. 1984].
[16] *Matter of Michael S. Linn*, 183 AD2d 399, 592 NYS2d 597 [2nd Dept. 1992].
[17] *Matter of Charles B. Linn*, 200 AD2d 4, 612 NYS2d 670 [2nd Dept. 1994]. Charles Linn was subsequently suspended from the practice of law for one year based upon his conviction of a serious crime. *See Matter of Charles B. Linn*, 280 AD2d 230, 720 NYS2d 529 [2nd Dept 2001].
[18] 299 AD2d 15, 747 NYS2d 113 [2nd Dept. 2002].
[19] *See Matter of Berson*, 217 AD2d 72, 636 NYS2d 630 [2nd Dept. 1995].