

Managing Client Trust Accounts

Rules, Regulations, and Common Sense

WSBA

Washington State Bar Association



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This booklet has been prepared by the Washington State Bar Association as a guide for both new and experienced lawyers with trust accounting questions. Our purpose is to provide you with the basic rules and highlight areas that will always require your best judgment because there are no absolute rules. We will dispense practical advice afforded by years of experience answering lawyers' questions. Please do not hesitate to call us at 206-443-9722 or 800-945-9722 or e-mail us at questions@wsba.org.

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Introduction

The trust accounting rules currently in effect for Washington lawyers are found in rules 1.15A and 1.15B of the Rules of Professional Conduct (RPC). This edition reflects amendments to those rules through December 2013. RPC 1.15A imposes a strict fiduciary standard that all funds received by a lawyer which belong wholly or in part to a client or third person must be maintained in an interest-bearing trust account while in the lawyer's possession. The trust account must be segregated from any lawyer funds. It must also be maintained in a bank, savings bank, credit union, or savings and loan association insured by the Federal Deposit Insurance Corporation or National Credit Union Administration, is authorized by law to do business in Washington, has filed the agreement required by rule 15.4 of the Rules for Enforcement of Lawyer Conduct (ELC) and is in compliance with all the requirements set forth by ELC 15.7. A list of all financial institutions meeting these requirements is maintained by the Legal Foundation of Washington (LFW). Finally, the trust account must generate interest for the benefit of either the client or the LFW. The client trust account that generates interest for the benefit of the LFW is frequently referred to as an IOLTA (Interest on Lawyers' Trust Accounts) account. RPC 1.15B imposes a clear standard as to which records are required when maintaining a trust account.

The Supreme Court has adopted comments to RPC 1.15A and RPC 1.15B. There have also been several advisory Ethics Opinions issued regarding trust accounting rules. The rules, comments, and related Ethics Opinions must be taken into consideration when a question regarding the handling of client funds arises. The responsibility for compliance cannot be delegated to others. Violations of these rules may result in disciplinary action, including possible disbarment.

These rules have been implemented in an attempt to protect both clients and lawyers. When entrusting money to his or her lawyer, the client must feel confident that the funds will be maintained in a safe place, fully accounted for, and promptly remitted. The lawyer who conscientiously follows these rules is less likely to face false claims of financial improprieties with client funds. This creates a "win-win" situation for both parties.

The Legal Foundation of Washington

As noted in the introduction, client trust accounts must generate interest for either the client or the Legal Foundation of Washington (LFW).

The LFW is a nonprofit organization, separate and distinct from the Washington State Bar Association (WSBA). The LFW was incorporated at the direction of the Washington State Supreme Court in 1984. It is governed by a nine-member Board of Trustees, three of which are appointed by the Supreme Court, three by the Governor of Washington, and three by the WSBA Board of Governors.

The Foundation's mission statement is as follows: "The LFW is dedicated to equal justice for low-income persons. The Foundation funds programs and supports policies and initiatives which enable the poor and the most vulnerable to overcome barriers in the civil justice system."

The LFW reports its activities annually to the Supreme Court. Its annual report is published online or available upon request.

Bank Reporting Requirements

IOLTA accounts must be set up using the tax identification number of the Legal Foundation of Washington: **91-1263533**. The interest earned on IOLTA accounts must be remitted monthly by the financial institution through a remittance report. These remittance reports and earnings are due on the 15th of each month and are electronically deposited or sent to the LFW's lockbox at P.O. Box 84383, Seattle Terminal Annex, Seattle, WA 98124-5683.

The remittance reports include the name of the lawyer or law firm, the amount being remitted, the rate of interest applied, the balance used to compute the interest, and the amount of service charges.

When determining the amount to remit to the LFW, the bank looks at each IOLTA account individually. Banks may not offer earnings credits or any other benefit based on the balance of funds in a trust account.

If you have questions, contact the Legal Foundation of Washington at:

www.legalfoundation.org

Getting Started

Do I need a trust account?

The purpose of a trust account is to protect your clients' funds. RPC 1.15A(c)(1) requires a lawyer to deposit and hold in a trust account any funds belonging to a client or third person, that are in the lawyer's possession, in connection with a representation. This requirement protects client funds from lawyers' creditors or personal financial problems. Therefore, any lawyer who expects to handle client funds should open a trust account. If you are not in private practice, or if you do not expect to receive client funds, there is no need to open a trust account. A law firm may open one account for all lawyers in the firm.

What are some examples of client funds (which are therefore required to be placed in a trust account)?

Advance fee and cost deposits

Advance fee and cost deposits are funds given to you by clients to pay for future fees and costs; these are fees you have not yet earned or costs you have not yet paid. Advance fee and cost deposits are considered client funds and must be deposited into the trust account because the client expects that the funds will be safeguarded until needed. If you handle advance fee deposits, you need a trust account. Advance fee deposits should be distinguished from "retainers" and "flat fees." (See the discussion of retainers and flat fees on pages 5-7.)

Settlements

Settlements are considered client funds and must be handled in accordance with RPC 1.15A. In addition, RPC 1.5(c)(3) requires that at the conclusion of a contingent fee matter, the lawyer must provide the client with a written statement showing the settlement amount recovered, the fees and costs, and the portion being remitted to the client. (Remember that all contingent fee arrangements must be in writing and signed by the client. See RPC 1.5(c)(1).)

Overpayments of bills

Overpayments are considered to be partially earned (the part covering the outstanding balance) and partially unearned (the overpaid portion). RPC 1.15A(h)(1)(ii) states that "funds belonging in part to a client or third person and in part presently or potentially to the lawyer must be deposited and retained in a trust account, but any portion belonging to the lawyer must be withdrawn at the earliest reasonable time." Therefore, overpayments must initially be

deposited into the trust account. The earned portion must be withdrawn once the funds have been collected. (See the section on disbursing funds at pages 15-17, for more information about collected funds.) The unearned portion may be refunded to the client, or if the client so chooses, held in the trust account to apply to future services. Under no circumstances is it permissible to deposit client overpayments to the general business account.

If you would rather not deposit the overpayment into the trust account, you can send the payment back to the client and ask that the check be reissued for the proper amount.

Note: If client overpayments occur frequently, you may want to review your billing statement to determine if its format is confusing. Some billing programs do not clearly differentiate between the current billing amount and the total client balance to date; this may be the cause of overpayment.

Note: Occasionally a client may make, by means of wire or other electronic funds transfer, a deposit directly into the lawyer's operating account, which at least in part includes client or third party funds. Conversely, the client may also inadvertently make an electronic funds transfer of funds belonging in part to the lawyer into the trust account. These transfers are not considered to be violations of RPC 1.15A(c) or 1.15A(h)(1) so long as the transfers were not made at the direction of the lawyer and the lawyer promptly identifies and redirects funds to the appropriate account. (See Comment [21].)

Escrow Funds

Escrow and other funds incident to closing real estate or personal property transactions must be deposited and held in a trust account. In accordance with, RPC 1.15A(j), lawyers who prepare documents used in the closing of any real estate or personal property transaction must ensure that funds handled by the Closing Firm are held and maintained as set forth in RPC 1.15A or LPORPC 1.12A. See Comment [17] for further clarification.

Funds Held in Other Fiduciary Capacities

If you are holding funds in connection with a representation in which you are also acting as a trustee, agent, escrow agent, guardian, personal representative, or executor, those funds must be deposited and held in a trust account. If you are simply acting as the executor of an estate, trustee of a trust, etc., and not serving as a lawyer for the entity, RPC 1.15A does not apply. In those situations, funds would generally be held in accounts with the tax identification number of the estate or trust, not in the lawyer's trust account.

What does not go into a trust account?

Knowing what must *not* go into the trust account is just as important as knowing what does go into the trust account. Depositing earned fees or personal funds into a trust account can change the nature of the account and allow it to be subject to a lawyer's creditors. (See *In re Discipline of McKean*, 148 Wn.2d 849, 864 n.9, 64 P.3d 1226 (2003).) The following are some types of funds that must not be deposited into the trust account.

Fully earned fees (i.e., payments of bills)

This is money you receive from your client that is already earned. If your client is paying the exact amount shown on your invoice (or less), that payment does not go into the trust account.

Reimbursements for litigation expenses that have been advanced by a lawyer

RPC 1.8(e)(1) authorizes lawyers to advance the expenses of litigation, provided the client remains ultimately liable. Any such advances by the lawyer should be paid out of the general business account, not the trust account. These advances are usually paid by the lawyer when there are no client funds on deposit and therefore using the trust account would not be appropriate. When you bill the clients for these costs and they make a full or partial payment, you should deposit the funds into your general business account.

Sometimes the reimbursements for costs advanced will be paid from a settlement when it is received. Because part of the settlement belongs to the client, the settlement must be deposited into the trust account. The lawyer's portion to cover costs and fees is then withdrawn after the settlement check clears the bank and a settlement statement has been provided to the client (see RPC 1.5(c)(3), RPC 1.15A(h)(1)(ii).

Retainers

The term retainer has been widely misused and confused with advance fee deposits and flat fees, and some lawyers have used the term to describe nearly any type of fee paid in advance. The November 2008 amendments to RPC 1.5 clarify the definition of a retainer. Under RPC 1.5(f)(1), a retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability during a specific period of time or on a specific matter, in addition to, and apart from any legal services to be performed. A retainer is not a deposit for fees for legal services that are to be performed in the future. Any payment made that is later applied to a client's account as the lawyer renders services is not a retainer.

A retainer agreement must be in writing and signed by the client. The written retainer agreement should clearly specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt and will not deposit the fee into a trust account. If these requirements are met, retainers become the lawyer's property on receipt and do not go into a trust account.

There are situations, however, where a retainer may be placed in the trust account with the client's written consent. RPC 1.5(f)(1) provides that retainers must not be deposited into a trust account "unless otherwise agreed." The situations in which this is permissible are not explained, as the phrase was meant to leave open the possibility that circumstances may arise wherein the lawyer and client agree in writing that the funds for a retainer will be placed in the client trust account and withdrawn as earned. An example is where a client pays an annual amount up front and the lawyer withdraws the funds monthly in twelve equal installments as the terms of the written agreement regarding availability are met.

Flat Fees

Lawyers may charge flat fees for certain legal services. Flat fees constitute complete payment for the services and do not vary with the amount of time or effort expended by the lawyer to perform or complete the specified services. Flat fees may be paid wholly or partially in advance. Flat fees paid in advance must be deposited in a trust account unless the lawyer has a written fee agreement, signed by the client, that meets the requirements of RPC 1.5(f)(2).

According to RPC 1.5(f)(2), a flat fee agreement must be written in language that can easily be understood by the client, and must include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and terms of payment; (iii) a statement that the fee is the lawyer's property upon receipt and will not be placed in a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if not all the agreed-upon services have been provided. Please refer to RPC 1.5(f)(2) on pages 39-41 for sample language that lawyers may use as part of the flat fee agreement.

If the flat fee agreement is in writing, signed by the client, and otherwise meets all the requirements listed above, the flat fee paid in advance becomes the property of the lawyer on receipt and must not be deposited into the trust account.

Lawyers sometimes have fee agreements that are a combination of flat fees and hourly billing. In that case, the flat fee will be considered the lawyer's property on receipt only if the flat fee portion of the agreement meets the requirements of RPC 1.5(f)(2). Flat fees paid in advance for specified legal services must constitute complete payment for those services. Therefore, an agreement to charge a lump sum fee in advance for the first so many hours, followed by hourly billing beginning once the number of hours has been met, is really an advance fee deposit instead of a flat fee and must be placed in the trust account.

In the absence of a written fee agreement as set forth in RPC 1.5(f)(2), all advance payments for legal services are presumed to be advance fee deposits and must be deposited and held in a trust account. (See discussion of advance fee deposits on page 3.)

Lawyer's personal or business transactions

Deposits related to a lawyer's personal or business transactions must not be placed in the trust account. The trust account is designed to hold client funds, not funds relating to employees, stockholders, outside counsel, friends, businesses of the lawyer, and/or personal real estate transactions. Make sure trust account deposits are for your clients and connected with a representation before depositing the funds into the trust account.

Which trust account do I use?

You've determined that you handle client money and therefore need to open a trust account. Which type of trust account do you use?

1. IOLTA (Interest on Lawyers' Trust Accounts)

Interest on IOLTA accounts goes to the Legal Foundation of Washington (LFW). These types of accounts should be used if you will handle client money for a short period of time, or if the funds are nominal. Only an attorney can be an authorized signatory on an IOLTA account.

2. Individual Interest-Bearing Client Trust Account

You need to use an individual interest-bearing client trust account if it would be beneficial to the client and the client wants the interest. The account is set up using the client's tax identification number, but the attorney is the signer on the account. RPC 1.15A(i)(3) states that in determining whether to deposit client funds to the IOLTA account or to a trust account in which interest goes to the client, "a lawyer must consider only whether the funds will produce a positive net return to the client..."

A “positive net return” means that the interest earned would exceed the cost of establishing and maintaining the account. Establishing the account may include a charge for your time in opening the account in addition to any bank charges. The cost of maintaining the account would include any monthly bank service charges and charges for preparation of the trust account bank and client ledger reconciliations.

How do I calculate the positive net return?

Since the interest earned is a function of the amount deposited, the interest rate, and the length of time on deposit, you must include all of these factors in your computation of the positive net return. The formula for computing interest is:

Interest = Principal X Interest Rate/12 X number of months

For example, a \$5,000 deposit at 4% interest for one month would earn \$16.67 in interest ($5,000 \times .04 / 12 \times 1 = \16.67). Once this amount is determined, you must then determine what it costs to establish and maintain the account in order to compute the net return. If it costs \$50 in firm time to open the account and the bank charges \$7.50 a month to maintain the account, there is no positive net return ($\$16.67 - \$50 - \$7.50 = -\40.83). However, if these same funds are to be held for one year, they would generate a positive net return of \$60 for the client's benefit. (Interest of \$200 - \$50 firm time - (12 months X \$7.50 bank charges) = \$60).

When do I calculate the positive net return?

You must make this computation every time you accept client funds that could potentially generate a positive net return. In addition, you must review your initial decision as circumstances change. If you accepted the \$5,000 above, thinking it would be on deposit one month or less, but circumstances subsequently changed, resulting in significantly more time before the funds are distributed, you must recalculate the potential positive net return. If this new computation shows the client would benefit, you must transfer the funds to an account bearing interest for the client's benefit, if the client wants the interest.

There is no specific minimum amount of client funds that requires an individual interest-bearing trust account. This is because interest rates and fees change. As such, you must perform the cost/benefit analysis each time you accept funds that could generate a positive net return. You may want to prepare a matrix to show how much interest could be earned for different periods of time.

An example of this would be:

Deposit Amount	Interest Rate	Interest 1 Month	Interest 3 Months	Interest 6 Months	Interest One Year
\$25,000	0.75%	\$15.63	\$46.88	\$93.75	\$187.50
\$25,000	1.00%	\$20.83	\$62.50	\$125.00	\$250.00
\$50,000	1.25%	\$52.08	\$156.25	\$312.50	\$625.00
\$50,000	1.50%	\$62.50	\$187.50	\$375.00	\$750.00
\$75,000	2.00%	\$125.00	\$375.00	\$750.00	\$1,500.00
\$75,000	2.25%	\$140.63	\$421.88	\$843.75	\$1,687.50

These computations may be used as benchmarks for when a separate client account should be considered, based on your financial institution's service charges and your firm's cost in setting up and maintaining the account.

What if my client does not want to earn interest?

You may have clients who do not want to earn interest on their trust account funds. In this situation the funds must be deposited to the IOLTA account. Document the reasons the funds were not placed in an individual interest-bearing trust account and, if possible, get your client's written acknowledgment.

3. Pooled Interest-Bearing Trust Account

For pooled interest-bearing trust accounts, the interest is allocated among various clients, usually by the financial institution. RPC 1.15A(i)(2)(ii) allows for "a pooled interest-bearing trust account with sub-accounting that allows for computation of interest earned by each client or third person's funds with the interest paid to the appropriate client or third person." These accounts are very rarely used due to the complexity of allocating the interest and the extra accounting work involved. Only an attorney can be an authorized signatory on these accounts.

Who may be a signer on a trust account?

RPC 1.15A(h)(9) states that only a lawyer admitted to practice law or an LLLT may be an authorized signatory on the account. This applies to all types of trust accounts covered by RPC 1.15A. Note that the rule does not require that the lawyer be admitted to the Washington State Bar Association.

Lawyers or law firms who disburse funds by electronic transfer may not wish to perform the manual execution of those transactions themselves. In those cases, we recommend you create an authorization form noting the amount of transfer, recipient, client, routing number, and bank account number, etc., and signed by a

lawyer authorized to sign on the trust account. The executed form can then be given to a bookkeeper or assistant who will complete the transfer. The lawyer who reviews the trust account records at the end of each month should compare the authorization forms to the bank statement to ensure that all the transfers from the trust account were properly authorized.

How do I open an IOLTA account?

1. Decide which financial institution you want to use for the account.

RPC 1.15A(i) states that the account may be in “any financial institution authorized by the Legal Foundation of Washington (Legal Foundation) under ELC 15.7(c).”

ELC 15.7 requires the account to be with a financial institution that is insured by either the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Administration (NCUA), and authorized to do business in the state of Washington. Accordingly, under ELC 15.4, the financial institution must sign an agreement with the LFW to report to the WSBA if any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored.

The financial institution must also offer IOLTA accounts at interest rates comparable to the rates they offer to their non-IOLTA customers and at least 75% of the Federal Funds Targeted Rate. The LFW is responsible for determining whether a financial institution meets these requirements and will maintain a list of authorized financial institutions.

Note: Many lawyers choose to have their IOLTA account at the financial institution they use for other banking. Some deliberately use a different bank so that there can be no inadvertent mixing of their general business account transactions with the trust account.

2. Give the bank instructions that you want to open an IOLTA account.

Each financial institution has its own requirements for opening an account. You should make sure that the account is clearly identified as a client trust account and that it bears the LFW’s tax identification number, **91-1263533**. If your financial institution does not have a preprinted form, you may use the WSBA’s sample “Request to Establish an IOLTA Account” form, available on its website.

3. Order checks and deposit slips.

The checks and deposit slips for your IOLTA account should be clearly labeled "Client Trust Account" or "IOLTA Account." In addition, it is a good idea to have checks a different color from the checks used for your general business account. These details may prevent erroneous use of the trust account.

The cost of printing checks and deposit slips is your responsibility. You can make an initial deposit to the trust account in an amount sufficient to cover this cost or have these costs charged to your general business account. Under no circumstances should it be deducted from client funds in the trust account.

What about bank fees?

Many attorneys mistakenly believe that a bank cannot charge fees in an IOLTA account. Some of the fees incurred in IOLTA accounts are deducted from the interest earned on the account and the difference is remitted to the LFW. ELC 15.7(e)(2) provides that the interest accruing on all IOLTA accounts, net of reasonable account fees, must be paid to the Legal Foundation of Washington. ELC 15.7(e)(3) lists what may be included in reasonable account fees, including per deposit and check charges, a fee in lieu of minimum balance, sweep fees, FDIC insurance fees, and a reasonable IOLTA account administration fee. Any other service charges or fees are the sole responsibility of, and may be charged to, the lawyer. If the IOLTA earns \$15 in interest for one month and the account fees are \$8, the bank deducts the fees from the interest and remits \$7 to the LFW.

Some fees the lawyer remains responsible for are check printing, NSF, and stop payment fees. So what is the proper way to pay bank fees? RPC 1.15A(h)(1) states that "[n]o funds belonging to the lawyer may be deposited or retained in a trust account except as follows:

- (i) funds to pay bank charges, but only in an amount reasonably sufficient for that purpose;"

You are permitted to keep a reasonable amount of personal or business funds in the IOLTA account to cover any bank fees you might incur. In determining this amount, the lawyer needs to look at an average of a few months' fees. Some law firms will be charged significantly more fees than others. While it is acceptable to have some law firm money in a trust account to cover bank fees, it is not acceptable to keep money in the trust account as a "cushion" to prevent overdrafts. Also note, that if asked, some banks will charge any trust account fees to the general business account, thereby avoiding the fee issue altogether.

How do I open an individual interest-bearing trust account?

1. Decide which financial institution you want to use for the account.

The requirements for individual interest-bearing accounts are the same as for IOLTAs. The financial institution must be on the LFW's list of approved financial institutions as described above. If you have any questions as to whether the financial institution you have chosen is on the list, call the LFW at 206-624-2536 or check the list on the LFW website. (www.legalfoundation.org).

2. Give the bank instructions that you want to open an individual interest-bearing trust account.

You will need your client's tax identification number. This is either a Social Security number or an EIN (Employer Identification Number). You should not use your tax identification number or your law firm's. Using your own identification number will not safeguard your client's funds.

The account should be labeled with the name of your client in care of you or your law firm. The bank statements should come to you, although the bank may send a duplicate statement to your client if you want. Remember that only an attorney can be a signer on this account.

In most banks, these accounts are very similar to savings accounts. As such, you are often limited to the number of checks and deposits you can make in a month before fees are charged.

You may not need checks or deposit slips if account activity is minimal. Many lawyers have their individual interest-bearing trust accounts and IOLTA accounts at the same bank. They electronically transfer client funds from the individual interest-bearing account to their IOLTA account, from where they write checks. Money transferred into your IOLTA should be disbursed in a timely manner.

Day-to-Day Operations and Recordkeeping

Because you cannot write a trust account check until you have made a deposit and the deposited items have cleared the banking system, the best place to start this discussion is with deposits.

Deposits, disbursements and related recordkeeping

What do I deposit into the trust account?

Any deposit containing client funds must be deposited directly into the trust account. Funds belonging to the lawyer may not be deposited into the trust unless they are: (1) used to pay bank fees, (2) receipts belonging in part to a client and in part to the lawyer, and (3) funds to restore appropriate balances.

While seemingly simple, the concept that client funds must be deposited to a trust account and lawyer funds must never be deposited to a trust account gets complicated when put into practice. Your firm will receive funds from many different sources and for many different purposes. To decide if these funds must be deposited to a trust account, you need to determine if the client still has an ownership interest in any portion of the funds when you receive them.

For example:

- a. If you have sent the client a billing statement for legal services performed and the client gives you a check in the amount of the billing statement, these are clearly earned fees and must be deposited to your general business account.
- b. If your client gives you a cost advance to be disbursed on his/her behalf as costs related to litigation are incurred, these funds must be deposited to your trust account.
- c. If your client sends a check that contains both earned fees and an advance fee deposit and/or cost advance, the check must be deposited to your trust account. Once the funds have cleared the banking system and been collected, transfer the earned fees to your general business account. You cannot deposit one check into two accounts (commonly called a split deposit). RPC 1.15A(h)(4) states that "Receipts must be deposited intact." Also see Comment [10] of the Rule.

What about credit cards?

Lawyers are allowed to accept credit card payments from clients for advance fees and cost deposits, as well as earned fees. Please see the discussion of credit cards in the Frequently Asked Questions section on page 27.

How do I disburse funds from a client trust account?

Funds may only be disbursed in accordance with the understanding between you and your client. Although this may be a verbal agreement, it is preferable (mandatory, in contingent fee cases) to have a written agreement acknowledging receipt of the funds and designating their purpose.

After establishing entitlement to the funds, disburse trust account funds promptly. Note however, that such disbursements should be made only after the deposit behind the funds has cleared the banking system, unless you and your bank have a written agreement by which the lawyer personally guarantees all deposits to the account without recourse to the trust account (See RPC 1.15A(h)(7) and Comment 11).

When a deposited item has cleared the banking system it becomes collected funds. Do not confuse collected funds with available funds. Often banks make funds available for withdrawal before those funds have been collected due to the requirements under Federal Reserve Regulation CC.

It is not easy to determine when deposited funds have been collected. Even banks have a difficult time telling when funds have cleared. In the past, cash and electronic deposits, such as wire transfers, have been considered collected when deposited. However, in view of fraudulent activity against lawyers which can result in wire deposits being recalled and removed from lawyers' trust accounts by the remitting bank, great care must be exercised when disbursing wire deposits. A lawyer should not assume that a wire deposit is always collected when deposited. All other deposit items including cashier's checks, money orders, and certified checks, will have varying times for collection; check with your bank to determine the appropriate wait time before making a disbursement.

Word of caution:

Lawyers fall victim to fraudsters who pose as clients but actually intend to commit check fraud, sometimes requesting that a lawyer collect on a debt. The lawyer receives a cashier's check from the company paying on the "client's" debt, deposits the funds, and quickly transfers funds to the "client" in the form of an electronic transfer because the "client" pressures the lawyer to make the transfer before the check is even collected. Disbursing before the funds have cleared the banking process is not only a violation of the Rule, but can also put the lawyer in the position of having to personally pay back all of the other client funds that were in the trust account but were lost as a result of the scam. The amount may be substantial if the deposit proves to be counterfeit. There are many schemes perpetrated on lawyers, mostly likely because it is common for lawyers to be involved with large financial transactions in the course of practicing law.

Sometimes these scams involve an additional step where the fraudsters ask the lawyer/recipient of the fraudulent cashier's check to wire funds to a second lawyer and then the second lawyer is instructed to wire funds to the scammers. Once the fraudulent cashier's check is exposed, the bank that remitted the wire may recall that wire and remove funds from the second lawyer's trust account. If the second lawyer has already disbursed those wired funds, the recall of the wire could result in a large deficit in the second lawyer's trust account. Be cautious.

Have written evidence supporting issuance of each check

You may never remove funds from a trust account without being able to document undisputed entitlement to those funds. If the client funds in the trust account are understood to be an advance fee deposit, such fees must be promptly removed from the trust account after the client has had an opportunity to review the billing to which they relate. RPC 1.15A(h)(3) states that "the lawyer may withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document." It is not appropriate to send your client a bill and pay yourself your fees on the same day. The amount of time you need to wait before withdrawing the earned fees will depend, in part, on where your clients are located. You should allow enough time for your client to receive the invoice and review it. Should a client dispute the billing, the disputed portion of the fee must remain in the trust account until the dispute is resolved. Similarly, if a client disputes a proposed settlement distribution, you are required to promptly disburse the undisputed funds and retain the disputed funds in the trust account until the dispute is resolved. You are further required to take reasonable action to resolve these disputes, including, when appropriate, interpleading the disputed funds.

RPC 1.15A(h)(3) also states that "a lawyer may withdraw funds when necessary to pay client costs." Therefore, you are not required to give notice to your client before paying a cost on your client's behalf. However, you do need to provide an accounting to your client, such as by monthly invoices.

Disbursements made on behalf of a client may never exceed the amount that the client has on deposit in the trust account; if they do, you are using one client's funds on behalf of another. This is prohibited by RPC 1.15A(h)(8), and violation may subject you to disciplinary action.

Note: RPC 1.15A(h)(5) requires that all checks drawn on the trust account be written to a named payee. You cannot make a check payable to "cash." In addition, you cannot make cash or ATM

withdrawals from the trust account. All withdrawals must be made by check or electronic transfer.

Identify the client on the face of each check. If the check covers more than one client, show the breakdown by client and amount. Attach a breakdown to your copy of the check. If you make an electronic transfer, keep a copy of the transfer acknowledgement document.

Sample check from trust account on behalf of client:

My Law Firm IOLTA Account 101 Main St Seattle, WA 98155	Date <u>November 18, 20XX</u>	18566
Pay to the order of <u>Superior Court Clerk</u>	\$	210.00
<u>Two Hundred Ten and 00/100</u>		Dollars
Any Bank USA Seattle, WA		
for <u>Zelinski filing fee</u>		<u>My Lawyer</u>

Required trust account records

RPC 1.15B(a) states that “a lawyer must maintain current trust account records. They may be in electronic or manual form and must be retained for at least seven years after the events they record.” At a minimum, the records must include the following nine items:

1. **Checkbook register or equivalent for each trust account**

Record deposits in the check register chronologically as of the day they are deposited

From your copy of the deposit slip or electronic transfer receipt, promptly record the deposit in your check register. The entry should show the client matter, date of the deposit, the payor, and the amount for each client.

List checks and electronic transfers (out of the trust account) in the check register chronologically as issued

Record checks and electronic transfers in the check register promptly as they are issued/made. Record the issue date, check number or transfer reference, payee, description, client reference, and amount.

Record all other transactions chronologically as they occur

As noted above, sometimes funds are received or disbursed from the trust account by electronic transfer or credit card deposit. These transactions must be recorded in the check register as well. List the date of the transaction, payee or payor, client reference, description, and amount.

Keep a running balance in the check register

After every transaction, calculate the new trust account balance so that you will always know the balance in the trust account.

Sample IOLTA check register

My Law Firm Check Register							
Date	Ref	Payor/Payee	Client	Memo	Deposit	Check	Balance
Balance forward							38,916.71
11/1/XX	18560	My Law Firm	Olson, M	attorney fees		866.66	38,050.05
11/5/XX	18561	My Law Firm	Felty	attorney fees		1,745.62	36,304.43
11/7/XX	18562	My Law Firm	Smith, D	attorney fees		8,450.50	27,853.93
11/8/XX	Deposit	Jones	Kane	award	15,000.00		42,853.93
11/10/XX	18563	Dr. Grey	Weatherholt	medical		238.00	42,615.93
11/11/XX	18564	Dr. Radtke	Tyner	medical		169.50	42,446.43
11/17/XX	18565	WSP	Zelinski	records		67.89	42,378.54
11/18/XX	Deposit	Johnson	Johnson	attorney fees	5,000.00		47,378.54
		Tuck	Tuck	attorney fees	3,500.00		50,878.54
11/18/XX	18566	Superior Ct Clerk	Zelinski	filing fee		210.00	50,668.54
11/24/XX	18567	No-Pain Chiro	Olson, E	medical		156.38	50,512.16
11/25/XX	18568	Pinkerton Inv.	Dexter	investigation		2,450.25	48,061.91
11/30/XX	18569	Karen Kane	Kane	settlement		15,000.00	33,061.91

2. **Individual client ledgers containing either a separate page for each client, or an equivalent electronic record, showing all receipts, disbursements, or transfers for that client**

Post deposits and disbursements promptly to client ledgers

Client ledgers are individual client transaction summaries. They contain all deposits and disbursements for a particular client, as well as the current client ledger balance. Client ledgers may be produced manually by the attorney or electronically with an accounting software program.

Each entry in the check register must be posted to a client ledger. These should be done simultaneously. The client ledger should include the same information as is contained in the check register plus the purpose of each transaction. A running balance must also be maintained on each client ledger.

Maintain one ledger for each client

There should be one ledger for each client with trust account activity. If you have deposited a nominal amount of your own money to the trust account per RPC 1.15A(h)(1) to pay bank charges, you should also maintain a ledger for your own funds. It may also be necessary to maintain a ledger for the interest accrued and remitted to the Legal Foundation of Washington.

Here is an example of a client ledger:

Client Ledger						
Client:	A. Zelinski					
Date	Ref	Payor/Payee	Memo	Deposit	Check	Balance
10/15/XX	Deposit	A. Zelinski	Adv. Fee dep	3,500.00		3,500.00
10/23/XX	18545	My Law Firm	Attorney fees		423.14	3,076.86
11/17/XX	18565	WSP	Records		67.89	3,008.97
11/18/XX	18566	Superior Ct Clerk	Filing fee		210.00	2,798.97

- 3. Copies of any agreements pertaining to fees and costs**
- 4. Copies of any statements or accountings to clients or third parties showing the disbursement of funds to them or on their behalf**
- 5. Copies of bills for legal fees and expenses rendered to clients**
- 6. Copies of invoices, bills, or other documents supporting all disbursements or transfers from the trust account**
- 7. Bank statements, copies of deposit slips, and cancelled checks or their equivalent**
- 8. Copies of all trust account bank and client ledger reconciliations**
- 9. Copies of the portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them**

Monthly Activities

A. Bank reconciliation

You will receive your bank statement monthly. The account balance on the bank statement must be reconciled to the account balance shown in your check register. There is usually a form for performing the reconciliation on the back of the bank statement, or you can devise your own format. Differences between the bank statement balance and the check register balance should be investigated immediately and corrected either in your records or by the bank.

B. Reconcile your individual client ledgers

As soon as you have completed the bank reconciliation you should make sure the individual client balances are equal to the reconciled check register balance. The easiest way to do this is to make a list of your clients and the balance shown for each. Add the balances together and compare the total to the balance in your check register. If every item has been posted correctly and the math is correct, these two numbers will agree. If they do not agree, it means: (1) you have left a client off the list, (2) the activity during the month was not posted to the client ledgers correctly, or (3) you added or subtracted incorrectly. Find the error and correct it immediately.

See an example of a bank reconciliation and a client ledger reconciliation on page 21.

C. Review reconciled client balances

You are required to keep both the bank reconciliation and the client ledger reconciliation with your client trust records. If more than one lawyer uses the trust account, each lawyer with client funds in the account should review the balances for his or her clients. This review should be used to determine if the balance on deposit should be applied to billings for services, refunded to the client, or transferred to an individual interest-bearing account.

Note: If an employee or other person maintains the trust account records, you should review his/her monthly reconciliations. This ensures they are being completed and that the client records are accurate. It also emphasizes the importance of maintaining these records accurately and on a timely basis. The fact that a bookkeeper, paralegal or administrative assistant in your office was maintaining the records will not excuse you from responsibility if the trust account is not handled properly.

Sample Bank Reconciliation and Client Ledger Reconciliation

Bank Reconciliation		November XX
Ending Bank Balance		50,736.43
Add: Deposits in Transit		
None		
	Total	-
Less: Outstanding checks (or other withdrawals)		
#18565	11/17/XX	67.89
#18567	11/24/XX	156.38
#18568	11/25/XX	2,450.25
#18569	11/30/XX	15,000.00
	Total	<u>(17,674.52)</u>
Adjusted Bank Balance		33,061.91
Check Register Balance		<u>33,061.91</u>
Difference		0

Client Ledger Reconciliation		November XX
<u>Client</u>	<u>Last Activity</u>	<u>Balance</u>
Dexter, N	12/10/XX	1,500.00
Felty, J	12/5/XX	3,425.11
Johnson, L	11/18/XX	5,000.00
Olson, E	3/29/XX	416.33
Olson, M	7/24/XX	950.00
Smith, D	8/21/XX	11,322.78
Tuck, T	6/24/XX	3,500.00
Tyner, M	7/31/XX	278.22
Weatherholt, R	4/28/XX	3,870.50
Zelinski, A	11/18/XX	2,798.97
		<u>33,061.91</u>

Reporting to Clients

You are required to notify your client when money is received or disbursed on your client's behalf. Specifically, RPC 1.15A(d) states that a "lawyer must promptly notify a client or third person of receipt of the client or third person's property." In addition, RPC 1.15A(e) states that a "lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request." The reporting of this activity is not optional; it is required.

The reporting of trust account activity can be done in many different ways. The most common method is to show the activity on your client's monthly billing statement. The information listed on the statement should include:

- The amount of your client's money held in the trust account at the beginning of the month
- New deposits (including the source of the deposit) or other additions
- Costs paid on the client's behalf and other disbursements (including the payee)
- The balance of your client's funds in the trust account at the end of the month

If the amount owed on the bill is going to be paid from the trust account unless the client objects, a statement noting this should appear on the bill.

If you are disbursing settlement proceeds to a client, a settlement statement must be prepared (see RPC 1.5(c)(3)). The statement must show the amount of the settlement, attorney fees and costs, third party disbursements, and client distribution. If any funds remain in the trust account after the distribution, the balance remaining and the purpose for its retention should be noted on the settlement statement.

There may be occasion to hold client money for a long period of time without transactions occurring. These types of situations rarely generate billing statements or regular reporting to clients. Under RPC 1.15A(e), you are required to send at least an annual accounting to your client that should show how much money is being held. This reminds your client that you are holding funds and allows you to stay in contact. If there is not a specific reason to hold these funds in the trust account, they should be refunded to the client.

Client Securities and Property

Although most of the discussion of RPC 1.15A and RPC 1.15B involves handling client funds and managing the client trust account, RPC 1.15A also imposes a fiduciary responsibility on the lawyer when holding client property other than funds.

RPC 1.15A(c)(3) states that a "lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property."

Trust Account Audits

ELC Title 15 provides for the Washington State Bar Association to examine the books and records of any lawyer for the purpose of ascertaining compliance with RPC 1.15A and RPC 1.15B. ELC 15.1 identifies two types of examinations:

- 1 -- Random Examination. An examination "of the books and records of any lawyer or law firm selected at random."
- 2 -- Audit. During the course of an investigation under ELC 5.3 (concerning grievances) or after a random examination, "the Association may conduct an appropriate audit of the lawyer's or firm's books and records, including verification of the information in those records from available sources."

ELC 15.2 requires a lawyer or law firm to cooperate with the audit process; this usually involves assembling the requested records and being available to answer any questions the auditor may have.

ELC 15.4 requires every bank, credit union, savings bank, or savings and loan association approved as a depository for lawyer trust accounts to notify the WSBA's Office of Disciplinary Counsel when an IOLTA account has been overdrawn or when a check in an amount that exceeds the account balance has been presented for payment regardless of whether or not the item presented was honored. In addition, every lawyer who receives a notice of insufficient funds in the client trust account must notify the Office of Disciplinary Counsel and give a full explanation of the cause of the overdraft. In most cases, the Office of Disciplinary Counsel will open an investigation under ELC 5.3 upon notification of an overdraft, which will involve an audit.

Frequently Asked Questions

What do I do with unclaimed trust account funds?

Unclaimed funds result from either a balance left in the trust account for a client you can no longer locate, or from outstanding checks which you are unable to reissue. Any unclaimed trust funds must be dealt with pursuant to the Uniform Unclaimed Property Act, Chapter 63.29 RCW. The Act requires the funds to be remitted to the Department of Revenue Unclaimed Property Division within three years of when the funds were issued or had a last activity date.

What do I do when I issue a check that never gets cashed?

As part of your monthly bank reconciliation, you should have a list of checks that have not cleared your account. A good practice is to send letters to the payees of any checks older than six months. The letter should indicate that you issued a check that remains outstanding. Ask the payee to cash the check or to contact you for a replacement if necessary. If a letter is returned unclaimed, handle the funds in accordance with the Unclaimed Property Act as noted above.

What do I do with an unidentified balance in the trust account?

Occasionally a lawyer ends up with a balance in the trust account that is not identified as belonging to a particular client. You must make a reasonable effort to identify these funds. If your best effort to identify the excess funds in the trust account fails, they must be handled as unclaimed property.

Must I notify WSBA if I want to open or close a trust account, or move my client funds to another bank?

You are not required to notify WSBA if you decide to open or close a trust account, or want to move your trust account to another bank. You will simply report whatever trust accounts you have open on your Trust Account Declaration during the next licensing period.

If you are closing a trust account, or moving your funds to a new trust account, be sure you leave enough funds in the old account to cover any outstanding checks.

If I am licensed to practice in more than one state, where should I maintain my trust account?

The Rules of Professional Conduct Committee has issued an advisory opinion (#959) that if trust account funds accrue as a result of a lawyer's practice under the lawyer's Washington license, then those funds should be handled as required by the Washington rules. The key consideration is whether the representation of the client was undertaken using your Washington license.

What should I do if I cannot obtain my client's taxpayer identification number in order to set up a separate trust account for the client's benefit?

Your client's funds should remain in the IOLTA trust account until you have the correct taxpayer identification number for a separate interest-bearing account. You should document your efforts to obtain the identification number by keeping a record of telephone calls, copies of letters, etc. You should not, however, use your own or your firm's taxpayer identification number on the separate client account pending the receipt of the client's identification number.

What is the required waiting period between deposit and disbursement?

The time period depends on what was deposited and your financial institution's requirements regarding collected funds.

Funds may be deposited in many different forms: checks, warrants, drafts, money orders, cashier's checks, electronic transfers, etc. Each financial institution has its own schedule, based on regulatory requirements and internal banking procedures, for recognizing collected funds. Discuss this with the financial institution handling your IOLTA trust account. They should be able to provide you with a schedule for the routine items you deposit. See the discussion on disbursements and collected funds on page 15.

What should I do if I receive an overdraft notice on my client trust account from my bank?

You should immediately contact your bank and take whatever steps are necessary to correct the deficiency in your client trust account. If necessary, deposit your own funds to make up any shortfall until the cause of the overdraft is determined.

ELC 15.4 requires you to notify the WSBA Office of Disciplinary Counsel with a complete explanation of the overdraft and the steps you have taken to correct it.

What should I do when a client wants to pay by credit card?

You can accept credit card payments. You must decide which type of credit card payments you will accept. There are two kinds: advance fee/cost deposits and earned fees. You can accept payments for both types, or accept only one type of payment. If you decide to accept credit card payments for both earned fees and advance fees/costs, you must have two merchant accounts. Advance fees and costs cannot be deposited into a non-trust account with earned fees and then transferred to a trust account.

Please note that when you accept payments by credit card, it sometimes takes several days for the merchant services provider to process the card payment and have the funds deposited into your account. As with any other items deposited into your trust account, you have to wait for those funds to clear that process before you disburse them.

What should I do about credit card fees?

Credit card companies charge a fee for credit card payments. You may be able to arrange for credit card fees related to the trust account to be charged to the general business account. However, if the fees are charged to the trust account, you should deposit your own funds in the trust account to cover these fees.

Some lawyers may choose to charge credit card fees to their clients. This is not prohibited under the RPC; however, the lawyer should ensure that the client is aware of the fees, that the fee charged reasonably reflects the actual cost incurred by the lawyer, and that there is nothing in their merchant services agreement prohibiting them from doing so. For further discussion, please see Advisory Ethics Opinion #2214 (2012).

Can I deposit one check into two accounts at the same time (commonly called a split deposit)?

A split deposit is not allowed. RPC 1.15A(h)(4) states: "Receipts must be deposited intact." If you receive a payment from a client that contains earned fees and unearned fees, the payment must first be deposited into the trust account. After the funds have been collected by the bank, withdraw the earned fee portion. The remaining funds can be returned to your client, or remain in the trust account to be used for future work.

I have very little activity in my trust account. My bank closes the account when the balance is \$0. What can I do?

First you must decide if you need a trust account. If you do, you can deposit a small amount of your money in the account to keep it open. Some banks will allow you to do this with as little as \$1; check with your bank to determine the minimum amount required. You should keep as little of your money in the account as necessary.

How long must I retain my trust account records?

RPC 1.15B(a) states the trust account records must be "retained for at least seven years after the events they record."

RPC 1.15A: SAFEGUARDING PROPERTY

(a) This Rule applies to (1) property of clients or third persons in a lawyer's possession in connection with a representation and (2) escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction.

(b) A lawyer must not use, convert, borrow or pledge client or third person property for the lawyer's own use.

(c) A lawyer must hold property of clients and third persons separate from the lawyer's own property.

(1) A lawyer must deposit and hold in a trust account funds subject to this Rule pursuant to paragraph (h) of this Rule.

(2) Except as provided in Rule 1.5(f), and subject to the requirements of paragraph (h) of this Rule, a lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

(d) A lawyer must promptly notify a client or third person of receipt of the client or third person's property.

(e) A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds.

(f) Except as stated in this Rule, a lawyer must promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive.

(g) If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

(h) A lawyer must comply with the following for all trust accounts:

(1) No funds belonging to the lawyer may be deposited or retained in a trust account except as follows:

(i) funds to pay bank charges, but only in an amount reasonably sufficient for that purpose;

(ii) funds belonging in part to a client or third person and in part presently or potentially to the lawyer must be deposited and retained in a trust account, but any portion belonging to the lawyer must be withdrawn at the earliest reasonable time; or

(iii) funds necessary to restore appropriate balances.

(2) A lawyer must keep complete records as required by Rule 1.15B.

(3) A lawyer may withdraw funds when necessary to pay client costs. The lawyer may withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document.

(4) Receipts must be deposited intact.

(5) All withdrawals must be made only to a named payee and not to cash. Withdrawals must be made by check or by electronic transfer.

(6) Trust account records must be reconciled as often as bank statements are generated or at least quarterly. The lawyer must reconcile the check register balance to the bank statement balance and reconcile the check register balance to the combined total of all client ledger records required by Rule 1.15B(a)(2).

(7) A lawyer must not disburse funds from a trust account until deposits have cleared the banking process and been collected, unless the lawyer and the bank have a written agreement by which the lawyer personally guarantees all deposits to the account without recourse to the trust account.

(8) Disbursements on behalf of a client or third person may not exceed the funds of that person on deposit. The funds of a client or third person must not be used on behalf of anyone else.

(9) Only a lawyer admitted to practice law or an LLLT may be an authorized signatory on the account.

(i) Trust accounts must be interest-bearing and allow withdrawals or transfers without any delay other than notice periods that are required by law or regulation and meet the requirements of ELC 15.7(d) and ELC 15.7(e). In the exercise of ordinary prudence, a lawyer may select any financial institution authorized by the Legal Foundation of Washington (Legal Foundation) under ELC 15.7(c). In selecting the type of trust account for the purpose of depositing and holding funds subject to this Rule, a lawyer shall apply the following criteria:

(1) When client or third-person funds will not produce a positive net return to the client or third person because the funds are nominal in amount or expected to be held for a short period of time the funds must be placed in a pooled interest-bearing trust account known as an Interest on Lawyer's Trust Account or IOLTA. The interest earned on IOLTA accounts shall be paid to, and the IOLTA program shall be administered by, the Legal Foundation of Washington in accordance with ELC 15.4 and ELC 15.7(e).

(2) Client or third-person funds that will produce a positive net return to the client or third person must be placed in one of the following two types of non-IOLTA trust accounts, unless the client or third person requests that the funds be deposited in an IOLTA account:

(i) a separate interest-bearing trust account for the particular client or third person with earned interest paid to the client or third person; or

(ii) a pooled interest-bearing trust account with sub-accounting that allows for computation of interest earned by each client or third person's funds with the interest paid to the appropriate client or third person.

(3) In determining whether to use the account specified in paragraph (i)(1) or an account specified in paragraph (i)(2), a lawyer must consider only whether the funds will produce a positive net return to the client or third person, as determined by the following factors:

(i) the amount of interest the funds would earn based on the current rate of interest and the expected period of deposit;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client or third person's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients or third persons if the account in paragraph (i)(2)(ii) is used.

(4) The provisions of paragraph (i) do not relieve a lawyer or law firm from any obligation imposed by these Rules or the Rules for Enforcement of Lawyer Conduct.

(j) In any transaction in which a lawyer has selected, prepared, or completed legal documents for use in the closing of any real estate or personal property transaction, where funds received or held in connection with the closing of the transaction, including advances for costs and expenses, are not being held in that lawyer's trust account, the lawyer must ensure that such funds, including funds being held by a closing firm, are held and maintained as set forth in this rule or LPORPC 1.12A. The duty shall not apply to a lawyer whose participation in the matter is incidental to the closing if (i) the lawyer or lawyer's law firm has a preexisting lawyer-client relationship with a buyer or seller in the transaction, and (ii) neither the lawyer nor the lawyer's law firm has an existing client-lawyer relationship with a closing firm or LPO participating in the closing.

Washington Comments

[1] A lawyer must also comply with the recordkeeping rule for trust accounts, Rule 1.15B.

[2] Client funds include, but are not limited to, the following: legal fees and costs that have been paid in advance other than retainers and flat fees complying with the requirements of Rule 1.5(f)), funds received on behalf of a client, funds to be paid by a client to a third party through the lawyer, other funds subject to attorney and other liens, and payments received in excess of amounts billed for fees.

[3] This Rule does not apply to property held by a lawyer acting solely in a fiduciary capacity such as attorney in fact, trustee, guardian, personal representative, executor, administrator, or in any similar capacity where the lawyer's investment duties as a fiduciary are controlled by statute or other law. If a lawyer is acting as both a fiduciary and as the lawyer for the fiduciary, the character of the funds controls whether funds should be deposited in a fiduciary account or the lawyer's trust account. In some cases, it may be permissible to put

funds received in either the lawyer's trust account or the fiduciary account. That determination depends in part on the substantive law of fiduciary obligations, which is beyond the scope of these rules. The conflict of interest rules determine whether it is appropriate for a lawyer who is the fiduciary to also serve as the attorney for the fiduciary. See generally RPC 1.7 and RPC 1.8(a) and comment [8] to RPC 1.8 and *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849.866n.12, 64 P.3d 1226, 1234n.12 (2003).

[4] The inclusion of ethical obligations to third persons in the handling of trust funds and property is not intended to expand or otherwise affect existing law regarding a Washington lawyer's liability to third parties other than clients. See, e.g., *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999).

[5] Property covered by this Rule includes original documents affecting legal rights such as wills or deeds.

[6] A lawyer has a duty to take reasonable steps to locate a client or third person for whom the lawyer is holding funds or property. If after taking reasonable steps, the lawyer is still unable to locate the client or third person, the lawyer should treat the funds as unclaimed property under the Uniform Unclaimed Property Act, RCW 63.29.

[7] A lawyer may not use as a trust account an account in which funds are periodically transferred by the financial institution between a trust account and an uninsured account or other account that would not qualify as a trust account under this Rule or ELC 15.7.

[8] If a lawyer accepts payment of an advanced fee deposit by credit card, the payment must be deposited directly into the trust account. It cannot be deposited into a general account and then transferred to the trust account. Similarly, credit card payments of earned fees, of retainers meeting the requirements of Rule 1.5(f)(1), and of flat fees meeting the requirements of Rule 1.5(f)(2) cannot be deposited into the trust account and then transferred to another account.

[9] Under paragraph (g), the extent of the efforts that a lawyer is obligated to take to resolve a dispute depend on the amount in dispute, the availability of methods for alternative dispute resolution, and the likelihood of informal resolution.

[10] The requirement in paragraph (h)(4) that receipts must be deposited intact means that a lawyer cannot deposit one check or

negotiable instrument into two or more accounts at the same time, commonly known as a split deposit.

[11] Paragraph (h)(7) permits Washington lawyers to enter into written agreements with the trust account financial institution to provide for disbursement of trust deposits prior to formal notice of dishonor or collection. In essence the trust account bank is agreeing to or has guaranteed a loan to the lawyer and the client for the amount of the trust deposit pending collection of that deposit from the institution upon which the instrument was written. A Washington lawyer may only enter into such an arrangement if 1) there is a formal written agreement between the attorney and the trust account institution, and 2) the trust account financial institution provides the lawyer with written assurance that in the event of dishonor of the deposited instrument or other difficulty in collecting the deposited funds, the financial institution will not have recourse to the trust account to obtain the funds to reimburse the financial institution. A lawyer must never use one client's money to pay for withdrawals from the trust account on behalf of another client who is paid subject to the lawyer's guarantee. The trust account financial institution must agree that the institution will not seek to fund the guaranteed withdrawal from the trust account, but will instead look to the lawyer for payment of uncollectible funds. Any such agreement must ensure that the trust account funds or deposits of any other client's or third person's money into the trust account would not be affected by the guarantee.

[12] The Legal Foundation of Washington was established by Order of the Supreme Court of Washington.

[13] A lawyer may, but is not required to, notify the client of the intended use of funds paid to the Foundation.

[14] If the client or third person requests that funds that would be deposited in a non-IOLTA trust account under paragraph (i)(2) instead be held in the IOLTA account, the lawyer should document this request in the lawyer's trust account records and preferably should confirm the request in writing to the client or third person.

[15] A lawyer may not receive from financial institutions earnings credits or any other benefit from the financial institution based on the balance maintained in a trust account.

[16] The term "closing firm" as used in this rule has the same definition as in ELPOC 1.3(g).

[17] The lawyer may satisfy the requirement of paragraph (j), that the lawyer must ensure that all funds received or held by a closing

firm in connection with the closing of the transaction are held and maintained as set forth in this rule or LPORPC 1.12A, by obtaining a certification or other reasonable assurance from the closing firm that the funds are being held in accordance with RPC 1.15A and/or LPORPC 1.12A. The lawyer is not required to personally inspect the books and records of the closing firm.

The last sentence of Paragraph (j) is intended to relieve a lawyer from the duties of the paragraph only if the lawyer or the lawyer's law firm has a previous client-lawyer relationship with one of the parties to the transaction and that party is a buyer or seller. Lawyers may be called on by clients to review deeds prepared during the escrow process, or may be asked to prepare special deeds such as personal representative's deeds for use in the closing. A lawyer may also be asked by a client to review documents such as settlement statements or tax affidavits that have been prepared for the closing. Such activities are limited in scope and are only incidental to the closing. This exception does not apply if the lawyer or the lawyer's law firm has an existing client-lawyer relationship with the closing firm or with a limited practice officer who is participating in the closing.

[18] When selecting a financial institution for purposes of depositing and holding funds in a trust account, a lawyer is obligated to exercise ordinary prudence under paragraph (i). All trust accounts must be insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration up to the limit established by law for those types of accounts or be backed by United States Government Securities. Trust account funds must not be placed in stocks, bonds, mutual funds that invest in stock or bonds, or similar uninsured investments. See ELC 15.7(d).

[19] Only those financial institutions authorized by the Legal Foundation of Washington (Legal Foundation) are eligible to offer trust accounts to Washington lawyers. To become authorized, the financial institution must satisfy the Legal Foundation that it qualifies as an authorized financial institution under ELC 15.7(c) and must have on file with the Legal Foundation a current Overdraft Notification Agreement under ELC 15.4. A list of all authorized financial institutions is maintained and published by the Legal Foundation and is available to any person on request.

[20] Upon receipt of a notification of a trust account overdraft, a lawyer must comply with the duties set forth in ELC 15.4(d) (lawyer must promptly notify the Office of Disciplinary Counsel of the Washington State Bar Association and include a full explanation of the cause of the overdraft).

[21] A unilateral deposit of funds belonging in part to a client or third party into a lawyer's non-trust account does not constitute a violation of paragraph (c) of this Rule if the lawyer promptly identifies the portion of the funds belonging to the client or third party, deposits those funds into a trust account, and notifies the client or third party of the deposit. A unilateral deposit of funds belonging in part to a lawyer into a trust account does not constitute a violation of paragraph (h) of this Rule if the lawyer promptly identifies the lawyer-owned funds and withdraws them from the trust account. For purposes of this provision, a unilateral deposit refers to funds deposited directly by a client or third party by means of electronic funds transfer where the lawyer has not directed, invited, or encouraged a deposit that would constitute a violation of this Rule and has taken reasonable precautions to prevent such a deposit.

[22] An LLLT who is signatory to a trust account under paragraph (h)(9) is subject to independent professional-ethical obligations that correspond to a lawyer's obligations under this Rule. See LLLT RPC 1.15A. Partners and lawyers who individually or together with other lawyers possess comparable managerial authority in a law firm that employ LLLTs, or in which LLLTs are members, should also be aware of their obligations under Rule 5.10. These obligations extend to making reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that an LLLT's conduct in relation to the firm's trust account(s) is compatible with these Rules of Professional Conduct. A lawyer with managerial or supervisory authority over an LLLT who is signatory to a trust account under paragraph (h)(9) is also ethically obligated to make reasonable efforts to ensure that the LLLT's conduct is compatible with the LLLT's professional-ethical obligations. When a lawyer is a joint signatory on a trust account with an LLLT, a lawyer should exercise direct supervisory authority over the activities of the LLLT with respect to the account.

[Comment [3] amended effective September 1, 2018.]

[Comment [22] amended effective April 14, 2015.]

[Comments adopted effective September 1, 2006]

RPC 1.15B: REQUIRED TRUST ACCOUNT RECORDS

(a) A lawyer must maintain current trust account records. They may be in electronic or manual form and must be retained for at least seven years after the events they record. At minimum, the records must include the following:

(1) Checkbook register or equivalent for each trust account, including entries for all receipts, disbursements, and transfers, and containing at least:

(i) identification of the client matter for which trust funds were received, disbursed, or transferred;

(ii) the date on which trust funds were received, disbursed, or transferred;

(iii) the check number for each disbursement;

(iv) the payor or payee for or from which trust funds were received, disbursed, or transferred; and

(v) the new trust account balance after each receipt, disbursement, or transfer;

(2) Individual client ledger records containing either a separate page for each client or an equivalent electronic record showing all individual receipts, disbursements, or transfers, and also containing:

(i) identification of the purpose for which trust funds were received, disbursed, or transferred;

(ii) the date on which trust funds were received, disbursed or transferred;

(iii) the check number for each disbursement;

(iv) the payor or payee for or from which trust funds were received, disbursed, or transferred; and

(v) the new client fund balance after each receipt, disbursement, or transfer;

(3) Copies of any agreements pertaining to fees and costs;

(4) Copies of any statements or accountings to clients or third parties showing the disbursement of funds to them or on their behalf;

(5) Copies of bills for legal fees and expenses rendered to clients;

(6) Copies of invoices, bills or other documents supporting all disbursements or transfers from the trust account;

(7) Bank statements, copies of deposit slips, and cancelled checks or their equivalent;

(8) Copies of all trust account bank and client ledger reconciliations; and

(9) Copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them.

(b) Upon any change in the lawyer's practice affecting the trust account, including dissolution or sale of a law firm or suspension or other change in membership status, the lawyer must make appropriate arrangements for the maintenance of the records specified in this Rule.

Washington Comments

[1] Paragraph (a)(3) is not intended to require that fee agreements be in writing. That issue is governed by Rule 1.5.

[2] If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential.

[3] Paragraph (a)(9) does not require a lawyer to retain the entire client file for a period of seven years, although many lawyers will choose to do so for other reasons. Rather, under this paragraph, the lawyer must retain only those portions of the file necessary for a complete understanding of the financial transactions. For example, if a lawyer received proceeds of a settlement on a client's behalf, the lawyer would need to retain a copy of the settlement agreement. In many cases, there will be nothing in the client file that needs to be retained other than the specific documents listed in paragraphs (a)(2)-(8).

[Amended effective September 1, 2006; December 10, 2013]

RPC 1.5(f)(1), (f)(2), and (f)(3): FEES

(f) Fees and expenses paid in advance of performance of services shall comply with Rule 1.15A, subject to the following exceptions:

(1) A lawyer may charge a retainer, which is a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer's property on receipt and shall not be placed in the lawyer's trust account.

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. A statement in substantially the following form satisfies this requirement:

[Lawyer/law firm] agrees to provide, for a flat fee of \$ _____, the following services:

_____. The flat fee shall be paid as follows: _____. Upon [lawyer's/law firm's] receipt of all or any portion of the flat fee, the funds are the property of [lawyer/law firm] and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have a right to a refund of a portion of the fee.

(3) In the event of a dispute relating to a fee under paragraph (f)(1) or (f)(2) of this Rule, the lawyer shall take reasonable and prompt action to resolve the dispute.

RPC 1.5 Washington Comments [10] through [16]

[10] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (f)(1) or (f)(2), is subject to Rule 1.5(a) and may not be unreasonable.

[11] Under paragraph (a)(9), one factor in determining whether a fee is reasonable is whether the fee agreement or confirming writing demonstrates that the client received a reasonable and fair disclosure of material elements of the fee agreement. Lawyers are encouraged to use written fee agreements that fully and fairly disclose all material terms in a manner easily understood by the client.

[12] In the absence of a written agreement between the lawyer and the client to the contrary that complies with paragraph (f)(1) or (f)(2), all advance payments are presumed to be deposits against future services or costs and must, until the fee is earned or the cost incurred, be held in a trust account pursuant to Rule 1.15A. See Rule 1.15A(c)(2). This fee structure is known as an "advance fee deposit." Such a fee may only be withdrawn when earned. See Rule 1.15A(h)(3). For example, when an advance fee deposit is placed in trust, a lawyer may withdraw amounts based on the actual hours worked. In the case of a flat fee that constitutes an advance fee deposit because it does not meet the requirements of paragraph (f)(2), the lawyer and client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific "milestones" reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.

[13] Paragraphs (f)(1) and (f)(2) provide exceptions to the general rule that fees received in advance must be placed in trust. Paragraph (f)(1) describes a fee structure sometimes known as an "availability retainer," "engagement retainer," "true retainer," "general retainer," or "classic retainer." Under these rules, this arrangement is called a "retainer." A retainer secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a retainer under paragraph (f)(1). A written retainer agreement should clearly specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt and will not deposit the fee into a trust account.

[14] Paragraph (f)(2) describes a “flat fee,” sometimes also known as a “fixed fee.” A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort expended by the lawyer to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be deposited initially in the lawyer’s trust account. See Washington Comment [12].

[15] If a lawyer and a client agree to a retainer under paragraph (f)(1) or a flat fee under paragraph (f)(2) and the lawyer complies with the applicable requirements, including obtaining agreement in a writing signed by the client, the fee is considered the lawyer’s property on receipt and must not be deposited into a trust account containing client or third-party funds. See Rule 1.15A(c) (lawyer must hold property of clients separate from lawyer’s own property). For definitions of the terms “writing” and “signed,” see Rule 1.0(n).

[16] In fee arrangements involving more than one type of fee, the requirements of paragraphs (f)(1) and (f)(2) apply only to the parts of the arrangement that are retainers or flat fees. For example, a client might agree to make an advance payment to a lawyer, a portion of which is a flat fee for specified legal services with the remainder to be applied on an hourly basis as services are rendered. The latter portion is an advance fee deposit that must be placed in trust under Rule 1.15A(c)(2). If the requirements of paragraph (f)(2) are met regarding the flat fee portion, those funds are the lawyer’s property on receipt and must not be kept in a trust account. If the payment is in one check or negotiable instrument, it must be deposited intact in the trust account, and the flat fee portion belonging to the lawyer must be withdrawn at the earliest reasonable time. See Rule 1.15A(h)(1)(ii) & (h)(4). See also Comment [10] to Rule 1.15A (explaining prohibition on split deposits). Although a signed writing is required under paragraphs (f)(1) and (f)(2) only for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer’s property on receipt), the lawyer should consider putting the entire arrangement in writing to facilitate communication with the client and prevent future misunderstanding. See Washington Comment [11].

[Amended effective September 1, 2006; November 18, 2008.]

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