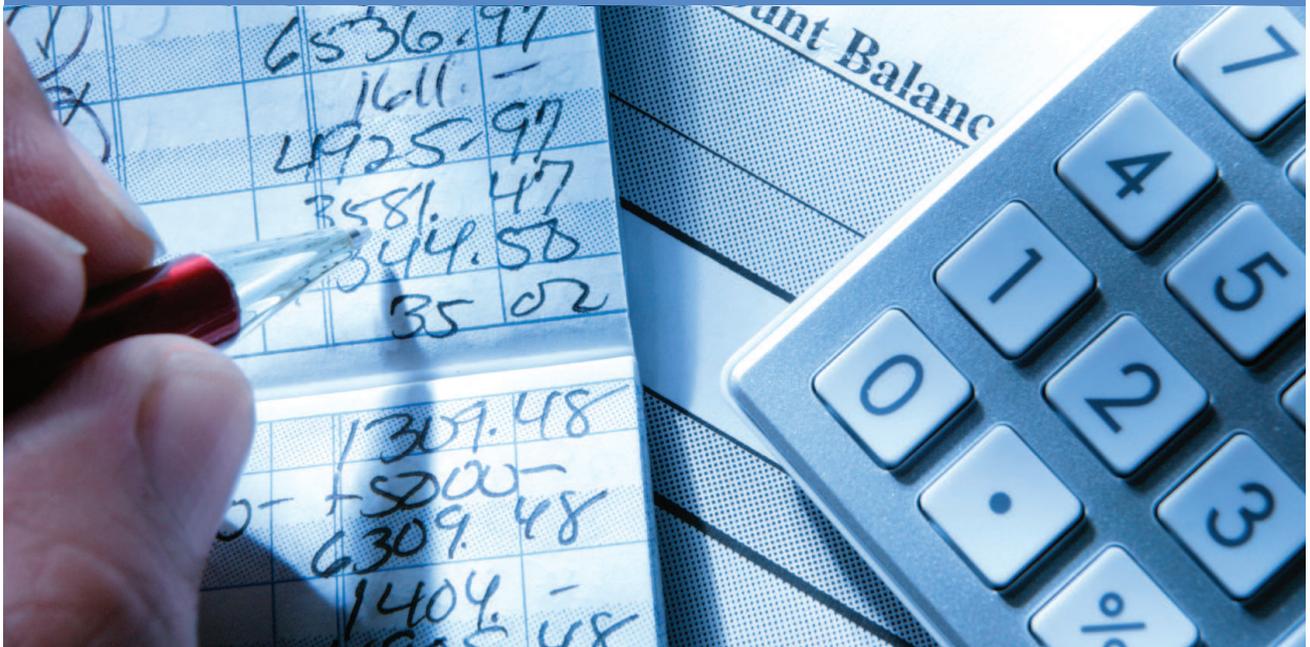


Managing Client Trust Accounts

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 in dealing with trust accounting questions. Our purpose is to provide you with the basic rules, highlight the areas that will always require your best judgment because there are no absolute rules, and dispense some practical advice provided by years of experience answering lawyers' questions. Whenever you are dealing with trust accounts and questions arise, please do not hesitate to call us at 206-443-9722 or 800-945-9722 or e-mail us at questions@wsba.org.

Introduction

The trust accounting rules currently in effect for Washington lawyers are found at RPC 1.15A and RPC 1.15B. This edition reflects amendments to those rules through March 2010. 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 that is 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 ELC 15.4 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 formal Ethics Opinions issued related to specific questions that have arisen about the trust accounting rules. RPC 1.15A and RPC 1.15B, the Comments to these rules, and the related Ethics Opinions must be taken into consideration whenever a question arises regarding the handling of client funds. 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. The client must feel confident, when entrusting money to his or her lawyer, that the funds will be maintained in a safe place, fully accounted for, and promptly remitted. The lawyer who conscientiously follows the rules is maintaining insurance against false claims of financial improprieties with client funds. This should create a "win-win" situation for both you and your clients.

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, of which three trustees are appointed by the Supreme Court, three by the Governor of Washington, and three by the WSBA Board of Governors.

The Foundation's purpose is described in its mission statement 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. In addition, its published annual report is available upon request and on its website.

Bank Reporting Requirements

IOLTA accounts must be set up using the tax ID 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 checks are due on the 15th of each month and are 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 of money to remit to the LFW, the bank looks at each IOLTA account individually. In addition, 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:

1325 Fourth Ave, Ste 1335
Seattle WA 98101-2509
206-624-2536

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. The purpose of this requirement is to protect client funds from lawyers' creditors or personal financial problems. Therefore, any lawyer who expects to be handling client funds should open a trust account. A law firm may open one account for all lawyers in the firm. If you are not in private practice or your practice is of a nature that you do not expect to receive client funds, you do not need to open a trust account.

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 deposits are considered client funds and must be deposited into the trust account because the client has the expectation 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 5-6.)

Settlements

Settlements are considered to be 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 overpayment 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 14-15, 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 are a frequent event, you may want to review your billing statement to determine if the format of the statement 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 the overpayment.

Escrow Funds

Escrow and other funds incident to closing real estate or personal property transactions must be deposited and held in a trust account. Effective January 1, 2009, RPC 1.15A(a) requires lawyers who prepare documents used in the closing of any real estate or personal property transaction to ensure that funds handled by the Closing Firm are held and maintained as set forth in RPC 1.15A or LPORPC 1.12A.

RPC 1.15A Comment [17] clarifies that the lawyer's duty to ensure all funds are properly handled by the Closing Firm can be met by obtaining certification or other reasonable assurance from the Closing Firm that the funds are being handled in compliance with RPC 1.15A or LPORPC 1.12A; the rule does not require the lawyer to personally inspect the books and records of the Closing Firm.

RPC 1.15A Comment [17] further states that a lawyer may be relieved from the duties of RPC 1.15A as it pertains to funds held by the Closing Firm if the lawyer is representing either the buyer or seller and the documents prepared by the lawyer are only incidental to the closing and not for the actual closing itself. Specific examples are included in Comment [17].

Funds Held in Other Fiduciary Capacities

If you are holding funds in connection with a representation in which you are acting as a trustee, agent, escrow agent, guardian, personal representative, or executor, those funds must be deposited and held in a trust account. The key is whether you are holding the funds in connection with a representation. If you are simply acting as the executor of an estate, trustee of a trust, etc., but are providing no legal service, RPC 1.15A does not apply.

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, then 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.

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. This phrase was meant to leave open the possibility that there may be circumstances where the lawyer and the client agree in writing that the funds for a retainer will be placed in the client trust account and withdrawn as earned. An example might be 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 may be paid wholly or partially up front. 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 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 37- 39 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 client a lump sum fee in advance for the first so many hours, but then hourly billing begins once the number of hours is met, is really an advance fee deposit instead of a flat fee and should 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 should 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. If a client is also a related party, be aware that the conflict of interest rules may also apply (for example, if a firm is handling a real estate transaction for one of its lawyers).

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 are going to be handling client money for a short period of time or the funds are nominal in amount. Only an attorney can be an authorized signatory on an IOLTA account.

2. Individual Interest-Bearing Client Trust Account

You need to use one of these bank accounts if it would be beneficial to the client and the client wants the interest. The account is set up using the client's tax ID 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 the account would earn exceeds the cost of establishing and maintaining the account. The cost of establishing the account may include a charge for your time involved 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 ($5,000 \times .04 / 12 \times 1 = \16.67). Once this amount is determined, you must then determine what it costs to establish and maintain the account in order to compute the net return. If it costs \$50 in firm time to open the account and the bank charges \$7.50 a month to maintain the account, then there is no positive net return ($\$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 whenever 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 whenever 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 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 these types of 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.

The advantage of these types of accounts is all of the account information is accumulated in one place and the tax reporting is simplified by having a Form 1099 for each account prepared by the financial institution. A pooled trust account with a sub-accounting eliminates the setup time because several clients' accounts may be combined into one account, but the sub-accounting and tax reporting may be time-consuming depending on the activity in the account.

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) 15.4 and 15.7 of the Rules for Enforcement of Lawyer Conduct require 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. Also, 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 if 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 at which they do their other banking. Some deliberately use a different bank so that there can be no question of inadvertently mixing 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**. The WSBA has a sample form "Request to Establish an IOLTA Account" available on request and on its website if your financial institution does not have a preprinted form.

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 the checks a different color than the checks used for your general business account. Both of these details may prevent the incorrect 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. Your other option is to have this cost 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 an IOLTA account 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. An example of how the interest remittance works is as follows: 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.

Examples of fees the lawyer remains responsible for include check printing, NSF, and stop payment fees. So what is the proper way to handle paying 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 allowed to keep a reasonable amount of personal or business funds in the IOLTA account to cover any bank fees you might incur. In determining a reasonable amount of funds to cover any bank charges, 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 the tax identification number of you or your law firm. Using your own ID 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 being charged a fee.

You may not need to order checks or deposit slips if the activity on the account 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 and write checks from there. When you transfer the money into your IOLTA, it 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 to the trust account?

Any deposit containing client funds must be deposited directly into the trust account. No funds belonging to the lawyer may be deposited into the trust account with three exceptions: (1) funds 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.

This simple 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 a cost advance, the check must be deposited to your trust account. Once the funds have cleared the banking system and been collected, you 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."

How do I keep proper deposit records?

Part of keeping proper records is identifying the client clearly, by name or file number, on the deposit slip. Each line of the deposit slip should show the client identity of the deposit items (see example on the next page). Keep a copy of the deposit slip for your records. In addition, it is a good idea to make copies of the deposited items to back up your

banking system, unless you have a written arrangement with your financial institution guaranteeing the payment of the disbursement, without recourse against 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. The only items that are recognized as collected when deposited are cash and wire transfers. 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 length of time you need to wait before making a disbursement.¹

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 on your 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 client. This is

¹ See the May 2010 *Bar News* article (page 38), "Check Fraud Scams" for a discussion of check fraud schemes.

prohibited by RPC 1.15A(h)(8), and violation may subject you to disciplinary action.

Note: RPC 1.15A(h)(5) requires 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, wire transfer, or bank transfer.

Identify checks by client

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.

Sample check from trust account on behalf of client

My Law Firm IOLTA Account 101 Main St Seattle, WA 98155	18566
	Date <u>November 18, 200X</u>
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 received

From your copy of the deposit slip you should promptly record the deposit in your check register. The entry should show the date of the deposit, the payor, and the amount belonging to each client.

List checks in the check register chronologically as issued

Record checks in the check register promptly as they are issued. Record the check date, check number, payee, description, client reference, and amount.

Record all other transactions chronologically as they occur

Sometimes funds are received or disbursed from the trust account by wire transfer, bank transfer, or credit card payment. 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/OX	18560	My Law Firm	Olson, M	attorney fees		866.66	38,050.05
11/5/OX	18561	My Law Firm	Felty	attorney fees		1,745.62	36,304.43
11/7/OX	18562	My Law Firm	Smith, D	attorney fees		8,450.50	27,853.93
11/8/OX	Deposit	Jones	Kane	award	15,000.00		42,853.93
11/10/OX	18563	Dr. Grey	Weatherholt	medical		238.00	42,615.93
11/11/OX	18564	Dr. Radtke	Tyner	medical		169.50	42,446.43
11/17/OX	18565	WSP	Zelinski	records		67.89	42,378.54
11/18/OX	Deposit	Johnson	Johnson	attorney fees	5,000.00		47,378.54
		Tuck	Tuck	attorney fees	3,500.00		50,878.54
11/18/OX	18566	Superior Ct Clerk	Zelinski	filing fee		210.00	50,668.54
11/24/OX	18567	No-Pain Chiro	Olson, E	medical		156.38	50,512.16
11/25/OX	18568	Pinkerton Inv.	Dexter	investigation		2,450.25	48,061.91
11/31/OX	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 both 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 balance on hand in the trust account. Client ledgers may be produced manually by the attorney or automatically by an accounting software program.

Each entry in the check register must be posted to a client ledger. This should be done simultaneously with posting items to the check register. The client ledger should include the same information as is contained in the check register. 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
10/15/0X	Deposit	A. Zelinski	Adv. Fee dep	3,500.00		3,500.00
10/23/0X	18545	My Law Firm	Attorney fees		423.14	3,076.86
11/17/0X	18565	WSP	records		67.89	3,008.97
11/18/0X	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 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

Once a month you will receive your bank statement. 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 total to the reconciled check register balance. The easiest way to do this is to make a list of the clients and the balance that shows for each. When the list is complete, total the balances and compare it 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 summaries 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 20.

C. Review reconciled client balances

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 you have an employee or other person maintain the trust account records, you should review his/her monthly reconciliations. This ensures they are being done 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 or secretary in your office was maintaining the records will not excuse you from responsibility if they are not handled properly.

Sample Bank Reconciliation and Client Ledger Reconciliation

Bank Reconciliation		August 0X
Ending Bank Balance		50,736.43
Add: Deposits in Transit		
None		
	Total	-
Less: Outstanding checks (or other withdrawals)		
#18565	8/17/0X	67.89
#18567	8/24/0X	156.38
#18568	8/25/0X	2,450.25
#18569	8/31/0X	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		August 0X
<u>Client</u>	<u>Last Activity</u>	<u>Balance</u>
Dexter, N	12/10/0X	1,500.00
Felty, J	12/5/0X	3,425.11
Johnson, L	11/18/0X	5,000.00
Olson, E	3/29/0X	416.33
Olson, M	7/24/0X	950.00
Smith, D	8/21/0X	11,322.78
Tuck, T	6/24/0X	3,500.00
Tyner, M	7/31/0X	278.22
Weatherholt, R	4/28/0X	3,870.50
Zelinski, A	11/18/0X	2,798.97
		<u>33,061.91</u>

Reporting to Clients

You are required to report to your client whenever 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 money 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.

You may have an occasion when you are holding client money for a long period of time with no 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 Properties

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

The Rules for Enforcement of Lawyer Conduct 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. Title 15 identifies three types of examinations:

(a) Random Examination. An examination of the books and records of any lawyer or law firm selected at random.

(b) Particular examination ("for cause audit"). An examination of the books and records of a lawyer or law firm based on information received by the WSBA that the lawyer or law firm may not be in compliance with RPC 1.15A.

(c) Audit. A re-examination of the books and records of a lawyer or law firm, if the results of the random examination or the particular examination warrant expanding procedures to include verification of information provided by the lawyer or law firm.

The most frequent type of examination performed by the WSBA is the random trust account examination. Lawyers are chosen at random for the examination. A letter is sent a few weeks in advance of the date scheduled for the examination giving notice of the examination and indicating the books and records that will be needed by the auditor. If the attorney selected is a member of a firm of lawyers, the examination will cover the entire firm.

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

The focus of random examinations is to obtain assurance that the lawyer is managing client funds properly and to make recommendations for improvement where the lawyer's procedures may create an incidence of non-compliance. All random examination reports are reviewed by the Chair of the Disciplinary Board. If the auditor has made recommendations to assure compliance with the RPCs, those recommendations may be incorporated into an order from the Chair of the Disciplinary Board requiring the lawyer or firm to carry out those recommendations. If the examination report states the lawyer or law firm is in compliance with the RPCs, an order will usually be issued showing no further action is necessary.

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 either when a 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 the overdraft is reimbursed. 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. Frequent overdraft notifications may trigger a "for cause" 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, you would 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 funds.

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 informal 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 what requirement your financial institution has regarding collected funds.

Funds may be deposited in many different forms: checks, warrants, drafts, money orders, cashier's checks, 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. Remember that only cash and electronic transfers can be disbursed immediately. You must wait for all other deposited items to be collected, including cashier's checks and money orders.

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, you should 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 advance fee/cost deposits and earned fees or you can decide to 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. Trust account payments 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, the funds are not immediately deposited into your trust or operating account. 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 may distribute them.

What should I do about credit card fees?

Credit card companies charge a fee for credit card payments. The fees for trust account payments should 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.

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 stay in the trust account to be used for future work or returned to your client.

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. Others require slightly more. You can check with your bank to discover the minimum amount the bank requires. 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 says 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. Additionally, for all transactions in which a lawyer has selected, prepared, or completed legal documents for use in the closing of any real estate or personal property transaction, the lawyer must ensure that all funds received or held by the Closing Firm incidental to the closing of the transaction, including advances for costs and expenses, are held and maintained as set forth in this rule or LPORPC 1.12A. The lawyer's duty to ensure that all funds received or held by the Closing Firm incidental to the closing of the transaction are held and maintained as set forth in this rule or LPORPC 1.12A shall not apply to a lawyer when that lawyer's participation in the matter is incidental to the closing and (i) the lawyer or lawyer's law firm has a preexisting client-lawyer relationship with a buyer and seller in the transaction, and (ii) neither the lawyer nor the lawyer's law firm has an existing client-lawyer relationship with the Closing Firm or an LPO participating in the closing.

(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 bank 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 into 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 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.

The provisions of paragraph (i) do not relieve a lawyer or law firm from any obligation imposed by these Rules.

RPC 1.15A 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 applies to property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, personal representative, executor, or otherwise.

[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, retainers meeting the requirements of Rule 1.5(f)(1), and 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 (a), that the lawyer must ensure that all funds received or held by the Closing Firm incidental to the closing of the transaction including advances for costs and expenses, 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 (a) is intended to relieve a lawyer from the duties of paragraph (a) 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. The exception stated in the last sentence of paragraph (a) 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.

[Amended effective September 1, 2012]

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 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.

RPC 1.15B 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]

RPC 1.5(f)(1) and (f)(2): 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 reasonable 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].

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