Ethics 2024: Questions from the Trenches

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Hypothetical One

Jane, partner at her own firm, settles an elderly client's personal injury case for $25,000. After the case settles, but before the funds are distributed, the client passes away. Jane intends to deposit the $25,000 into the firm's IOLTA account for the now deceased client who left no will. However, the firm had changed computer systems and, unbeknownst to Jane, the computer system never deposited the $25,000 into the firm's IOLTA account.

Two months later, Jane is ready to close the case when she realizes that the money was never properly deposited into the IOLTA account.

No one has complained to her or the firm about claiming any proceeds.

POLLING QUESTION

Is Jane responsible given that she took all precautions in keeping the money in the IOLTA account and it was the computer software that failed to transfer over every dollar?

a) Yes

b) No

POLLING QUESTION

Given that the money was intended to be deposited into her IOLTA account, Jane did not report any interest on the $25,000 to IOLTA. Does she owe interest on the money?

a) Yes

b) No

POLLING QUESTION

Can she keep the money and put it in her own account?

a) Yes.

b) Yes, as long as she places a legal ad seeking any heirs and no one responds.

c) No. She needs to hold it in her IOLTA regardless of the death of the client.

d) No. She must make reasonable efforts to identify the rightful owner(s) of the funds and if her efforts are unsuccessful after 36 months, remit the funds to the Lawyers' Trust Fund of Illinois.

Hypothetical Two

Kim's client is a U.S. military veteran suffering from PTSD. Generally, most communications between them regarding his employment discrimination claim involve abusive language and yelling on the part of the client. Kim tries to listen attentively and remain calm to administer sound legal advice, but she is unsure that he is listening or is able to make sensible decisions, given his compromised state of health.

POLLING QUESTION

Should Kim:

A) Tell the client she will withdraw from the matter unless he can speak to her calmly?

B) Ask that the client have a mental health counselor present on all in-person or phone visits?

C) Petition the court as to how best to handle his pending claim?

D) Give the client three written warnings and then tell him he needs to find other counsel?

E) Immediately withdraw from the case because it looks like a lot of trouble down the road?

F) Get the client's permission allowing Kim to sign all necessary documents, so as to minimize these encounters?

Hypothetical Three

Brad, a new associate at a large firm, has been assigned a last-minute motion on a complex case. Although he is familiar with the issues, he wants to be sure that he makes the deadline and produces the best product possible, so he goes to ChatBot and has the artificial intelligence (AI) platform write the first draft. After reviewing the 1,000-word document, Brad is actually quite pleased with the result and turns it in to the partner who then files it with the court. No mention of the source of the writing is discussed.

POLLING QUESTION

Does Brad have an obligation to tell the partner that he is not the author of the motion?

a) Yes

b) No

POLLING QUESTION

It later comes to light that Brad did not Shepardize or check the cases cited in the motion and two of them actually don't exist.

What are the possible consequences for Brad?

a) Dismissal from the firm

b) A verbal warning, given that he is a new associate

c) A written warning that if he is to use such platforms as research tools to be sure to check all citations to ensure they exist and remain good law

d) All of the above

POLLING QUESTION

Would the answer be different if Brad did, in fact, Shepardize the cases and used ChatBot merely as a draft to begin his work?

a) Yes

b) No

POLLING QUESTION

What are the partner's possible consequences for submitting ChatBot's work to the court?

a) Disciplinary action by the judge including but not limited to throwing out the entire motion
b) Being reported to the ARDC for submitting work that wasn't his
c) Being reported to the ARDC for not ensuring the work was original
d) All of the above.

POLLING QUESTION

Associate Brad bills the client for three hours of work because that's what it would have taken had he done the work himself. Actually, it took him one hour to complete the work, but since Brad invested in the ChatBot, he feels he can charge the time it would have taken given that he was smart enough to find a shortcut. Ethical?

a) Yes, provided he explained what he did to the client
b) No, it is double billing and violates the Rules of Professional Conduct
c) Yes; Brad should never be penalized for using technology to benefit his client
d) No, it is unethical to charge more than the hour it took Brad to do the work

POLLING QUESTION

Associate Brad is tasked with drafting a document for a client. He realizes that a very similar document already exists in the firm's electronic brief bank, written by members of the firm who are experts in this subject matter.

Brad pulls up the document, modifies it by changing the names, dates, etc., then bills the client for the full amount of time it would have taken had he created the document from the start. Can Brad charge the full amount?

a) Yes, the client has received the expertise of the firm's knowledge on the matter

b) No, this constitutes double billing and Brad can only charge the amount of time he spent on the matter.

c) Yes, since it would have taken Brad the full amount of time had he created the document from start to finish.

POLLING QUESTION

Is an attorney under an ethical duty to use technology tools like ChatBot, under the Rules of Professional Conduct?

a) Yes

b) No

POLLING QUESTION

Assume that Brad has plagiarized the document, has not checked the research to verify its accuracy and knows that his partner may file the document as-is.

Would the obligations for Brad change, if he was only just sworn in as an attorney?

a) Yes

b) No

Hypothetical Four

A Judge has just completed a heavy court call in a criminal courtroom. Although court is adjourned, many attorneys remain on the zoom call and are discussing the day's events. The judge is physically present in court, sitting on the bench, and on the court computer, however mistakenly believes he has ended the livestream of the proceedings.

While venting about a particularly challenging case, the Judge mocked and ridiculed the lead defense attorney. He stated "Did you see her losing her mind? She was rolling her eyes and getting red. She was practically hysterical. She is so emotional." The judge indicated he enjoyed getting a rise out of the attorney and thought watching the attorney react was "entertaining."

Hypothetical Four cont'd

The judge continued to express his opinion that he did not find the attorney attractive, thinks she's annoying, and concluded by saying, "Can you imagine waking up to her every day? Oh my God." The judge later insinuated the attorney was in a sexual relationship with a younger attorney at her firm who also appeared on the case. And finally, the judge referred to the younger attorney as "her pool boy."

The Judge encouraged other attorneys to also mock the attorneys in question. The Judge then realized the livestream was on and terminated the zoom session.

POLLING QUESTION

Does this conduct rise to an ethical issue for the judge, given that court was adjourned?

a) Yes

b) No

Hypothetical Five

Tarzan, a lawyer for his client in a commercial real estate litigation action, entered into an agreement for lawyers' fees in accordance with a judgment that was entered by the court. Before the attorney fee petition can be filed, Tarzan withdraws from the case, and the client hires a new lawyer to file the fee petition.

POLLING QUESTION

Does Tarzan have an ethical obligation to assist his former client and the new lawyer in the preparation and filing of the fee petition?

a) Yes

b) No

c) Yes, but only to share files and not to help with the new filing, as long as neither action prejudices the administration of justice

Hypothetical Six

Lawyer LaShaunda completed estate planning for a married couple who now intends to get divorced and wants to modify their estate plan. Both husband and wife would like to continue to have LaShaunda as their individual attorney in this matter even after the divorce is complete.

POLLING QUESTION

Can she represent them both and work toward modifying their estate plan while the couple is going through the divorce?

a) Yes, provided there is sufficient informed consent

b) No, their interests are conflicting which makes her fiduciary duty impossible to uphold

POLLING QUESTION

Can LaShaunda continue to represent only one of them?

a) Yes
b) No
c) Maybe, if there is consent in writing that also includes an exit strategy

POLLING QUESTION

An attorney meets with a new client who seeks a divorce. Unbeknownst to him, another lawyer at the same firm is meeting that same day with the other divorcing spouse.

Can either or both attorneys move forward with representation?

a) Yes

b) No

c) Yes, if both clients receive sufficient informed consent and agree to waive any potential conflict of interest

Hypothetical Seven

Lawyer Jack, an immigration attorney, has always been a good neighbor and friend to the family next door. One day the neighbor sees Jack outside and approaches him about a criminal matter in her family. Jack admits that he doesn't practice in that area but offers her some legal advice that might be helpful.

POLLING QUESTION

Has an attorney-client relationship been established?

a) Yes
b) No
c) Possibly

POLLING QUESTION

Lawyer Jack is having second thoughts about what he said and thinks, in fact, that he might have given inaccurate information to his neighbor.

Should he memorialize his “over the fence” conversation with his neighbor?

a) Yes
b) No
c) Maybe

POLLING QUESTION

Should a lawyer admit that he/she/they can't assist and refer the matter to another attorney, knowing that attorney will charge a fee?

a) Never; it’s not the neighborly thing to do
b) Always; the lawyer took an oath which applies even when giving advice in your driveway
c) Depends on whether you think you might get sued if you are wrong
d) No; unless there is a written contract, no attorney-client relationship exists!
e) Yes; a lawyer should recognize his/her/their boundaries and when he/she/they can't competently give advice

POLLING QUESTION

If Jack is a newly admitted attorney, does that alter the outcome?

a) Yes
b) No

POLLING QUESTION

If Jack is a newly appointed judge, does that alter the outcome?

a) Yes
b) No

Hypothetical Eight

You represent a client involving a real estate tax appeal for a building that was demolished. The Board of Appeal still has it on the books as a built home on the property.

The fees required to conduct a proper appeal in the matter to correct this error may cost more than the potential tax savings to the client.

POLLING QUESTION

Can you charge for the appeal work or do you have an ethical obligation to your client to do the work at no cost?

a) You have to do the work at no cost

b) Move forward with the appeal and work out the cost with your client later

c) Consult with the client about their objectives and the immediate financial benefit versus the long-term costs involved

Hypothetical Nine

Attorney prepares for a personal injury mediation and submits a thorough statement with supporting exhibits. Mediator and parties come to the table and at the introduction of the matter, the mediator quietly tells the plaintiff and his counsel it was so nice seeing them at her lake house last weekend and the mediator looks forward to resolving this matter successfully. In the meantime, opposing counsel spotted pictures on social media of the mediator and plaintiff's counsel together at a what appeared to be a social gathering at a home over the weekend.

What should this counsel do?

POLLING QUESTION

What should defense counsel do?

a) Immediately ask the mediator to stop the mediation and seek another mediator
b) Ask the mediator on the record whether he intends to be fair to all parties
c) Petition the court asking that the mediator withdraw
d) Proceed with the mediation knowing that the mediator will see the thoroughness of your work and will be fair

POLLING QUESTION

What if the mediator is a sitting judge? Would the mediator's conduct be allowable under the Rules?

a) Yes

b) No

POLLING QUESTION

What if the mediator is a non-lawyer? Allowable?

a) Yes
b) No

POLLING QUESTION

What social media protocol is necessary?

a) Lawyers should not be on social media

b) Judges should not be on social media

c) Lawyers and judges should not be “friends” or connected on social media

d) Lawyers and judges have personal lives and it’s okay to post events and personal items of interest if they choose to be connected on social platforms

e) Lawyers and judges need to use common sense in making connections on social media platforms

Hypothetical Ten

Judge Anthony was involved in a minor traffic accident. During the investigation, the officer noticed an odor of an alcoholic beverage and open alcohol in the judge's vehicle. The passengers in the judge's car also appeared to be under the influence and are both judges. Judge Barney asked the investigating officer, "Do you know who we are? Do you recognize us?" and "Judge Anthony helps you all the time, he runs the criminal courtroom, you should give him a break."

The officer continued to investigate Judge Anthony for DUI which enraged Judge Barney. Judge Barney proceeds to yell at the officer, threatens to sue him and calls another police officer to ask the additional officer to intervene.

Judge Carter also is in the car and refuses to answer any questions and does not cooperate with the police.

Hypothetical Ten cont'd

Judge Anthony took standard field sobriety tests on the scene. The officer determines he has demonstrated clues of consumption and impairment. Judge Anthony is transported to the police station where he refuses a breathalyzer test.

Judge Anthony is charged with DUI. During the investigation, Judge Anthony made several statements to the officer. Judge Anthony stated that he has been struggling with alcoholism, knows he drinks too much, drinks all day, and has been trying to stop.

What are some of the issues presented in this hypothetical?

Hypothetical Eleven

An adult was adjudicated to be disabled as a result of a slip and fall case. Just prior to this adjudication, the client hired a reputable personal injury firm to represent him in this matter. The appointed guardian for the disabled client decides to change lawyers.

The initial firm does not agree to withdraw, given that its representation began prior to the client being adjudicated mentally disabled.

POLLING QUESTION

What are the proper ethical responses by these parties?

a) The initial firm should withdraw and get in writing that the subsequent recommended law firm is properly appointed and proceed under Rule 1.14
b) The initial firm should petition the court and ask that it be allowed to continue its representation since there is no dispute that the representation has been unsatisfactory thus far
c) The second firm should petition the court and ask that its firm be allowed to continue with the matter since that is the wishes of the guardian

Hypothetical Twelve

An elderly couple has children – some live close by, other adult children are in distant states. The distant children visit their parents and take them to an attorney to prepare an advance care planning document. However, the local children had previously taken the parents to a local attorney and gotten an advance care document completed.

The elderly couple takes a turn for the worse and the adult children, both distant and local, start fighting over the couple's care and assets.

POLLING QUESTION

Which document prevails?

a) The one that was entered into first

b) The one that was entered into when the aging parents were of sound mind

c) The one that the parents tell the court during litigation is the one they want

POLLING QUESTION

The adult children finally come to an agreement on how to handle the assets of the aging parents. The assets are transferred to a trust for the benefit of the now-disabled elderly couple; however, the children do not honor their duties. A grandchild tries to intervene so that the grandparents' assets are used as the approved document states.

Is it too late or can an attorney intervene now on behalf of the grandchild?

a) No, it's not too late
b) The grandchild has no standing to intervene

ICJC – Preamble and Scope

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of judges with integrity, will interpret and apply the law. Thus, the judiciary plays a central role in preserving justice and the rule of law. Inherent in the Rules contained in the Code of Judicial Conduct (Code) are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

ICJC – Preamble and Scope cont'd

[4] The Code governs a judge's personal and judicial activities conducted in person, on paper, and by telephone or other electronic means. **A violation of the Code may occur when a judge uses the internet, including social networking sites, to post comments or other materials such as links to websites, articles, or comments authored by others, photographs, cartoons, jokes, or any other words or images that convey information or opinion**.

Violations may occur even if a judge's distribution of a communication is restricted to family and friends and is not accessible to the public. Judges must carefully monitor their social media accounts to ensure that no communication can be reasonably interpreted as suggesting a bias or prejudice, an *ex parte* communication, the misuse of judicial power or prestige, a violation of restrictions on charitable, financial, or political activities, a comment on a pending or impending case, a basis for disqualification, or an absence of judicial independence, impartiality, integrity, or competence.

ICJC Rule 1.1 – Compliance with the Law

A judge shall comply with the law,* including the Code.

ICJC Rule 1.2 – Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary and shall avoid impropriety* and the appearance of impropriety.

ICJC Rule 1.3 – Avoiding Misuse of the Prestige of Judicial Office

A judge shall not misuse the prestige of judicial office to advance the personal or economic interests* of the judge or others or allow others to do so.

COMMENTS [1] : It is improper to use or attempt to use the judge's position to gain personal advantage or deferential treatment of any kind. For example, it would be improper to allude to judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use the judicial title in letterhead, e-mails, or any other form of communication, including social media or social networking platforms, to gain an advantage in conducting personal business.

ICJC Rule 2.2 – Impartiality and Fairness

A judge shall uphold and apply the law* and shall perform all duties of judicial office fairly and impartially.

COMMENT [1]: To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

ICJC Rule 2.3 – Bias, Prejudice and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

Comment [1]: A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

ICJC Rule 2.8 – Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

ICJC Rule 2.8 – Decorum, Demeanor, and Communication with Jurors

COMMENT [2] Commending or criticizing jurors for their verdict, including on social media or social networking platforms may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

COMMENT [3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, or other persons who are not participants in the proceeding and communications made on social or posted on social media or social networking platforms. A judge must make reasonable efforts to ensure that law clerks, court staff, court officials and others under the judge's direction and control do not violate this Rule.

ICJC Rule 2.14 – Disability and Impairment

A judge having knowledge that the performance of a lawyer or another judge is impaired by drugs or alcohol or by a mental, emotional, or physical condition shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment [1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include, but is not limited to, speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

ICJC Rule 3.9 – Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

COMMENTS [1]: This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

ICJC Rule 3.10 – Practice of Law

A judge shall not practice law. A judge may act *pro se* in all legal matters.

COMMENT [1]: A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests.

IRPC 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Legal Knowledge and Skill [1]:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

IRPC 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT [1]: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

IRPC 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

IRPC 1.4: Communication cont'd

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT [6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

IRPC 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

IRPC 1.5: Fees cont'd

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed, contingent, or some type of retainer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

IRPC 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(4) to secure legal advice about the lawyer's compliance with these Rules;

(6) to comply with other law or a court order;

Comment: Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated.

IRPC 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

IRPC 1.7: Conflict of Interest: Current Clients cont'd

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

IRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

IRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

IRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent;
2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. information relating to representation of a client is protected as required by Rule 1.6.

IRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

IRPC 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

IRPC 1.9: Duties to Former Clients cont'd

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

IRPC 1.9: Duties to Former Clients cont'd

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

IRPC 1.10: Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

IRPC 1.14: Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

IRPC 1.14: Client with Diminished Capacity cont'd

c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT [4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

IRPC 1.14: Client with Diminished Capacity cont'd

COMMENT [9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available, except when that representative's actions or inaction threaten immediate and irreparable harm to the person. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

IRPC 1.15: General Duties Regarding Safekeeping Property

(b) A client trust account means an IOLTA account as defined in Rule 1.15C(b), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in Rule 1.15C(c). Other, tangible property must be identified as such and appropriately safeguarded. Each client trust account must be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary care.

IRPC 1.15A: Required Records

(a) For each client matter, complete records of client trust account funds and other property must be kept by the lawyer and must be preserved for a period of seven years after termination of the representation.

(b) Maintenance of complete records of client trust accounts requires that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits to and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited and the date, payee, client matter, and purpose of each disbursement…

IRPC 1.15B: Trust Accounts and Overdraft Notification

(a) Use of IOLTA Accounts. A lawyer must deposit all funds belonging to a client or third person into an IOLTA account unless the funds can otherwise earn net income for the client or third person. Net income means interest that exceeds the costs incurred to secure such interest. A lawyer must deposit client or third-person funds that can earn net income for the benefit of the client or third person in a separate, interest- bearing non-IOLTA client trust account, with the client or third person designated as the recipient of net interest generated on that account. A lawyer must not deposit any client or third-person funds into an account that does not bear interest or pay dividends.

IRPC 1.15B: Trust Accounts and Overdraft Notification

b) Account Determination. A lawyer must consider the following factors in determining whether the client or third-person funds can earn net income for the benefit of the client or third person:

(1) The amount of client or third-person funds to be deposited;
(2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
(3) The rate of interest at the financial institution where the funds are to be deposited;
(4) The cost of establishing and administering a non-IOLTA client trust account for the benefit of the client, including the cost of the lawyer's services, financial institution fees and service charges, and the cost of preparing tax reports;

IRPC 1.15B: Trust Accounts and Overdraft Notification

(5) The capability of the financial institution, through sub-accounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client; and
(6) Any other circumstances that affect the ability of the client's funds to earn net interest for the client.

The lawyer must review the lawyer's IOLTA account(s) at reasonable intervals to determine whether changed circumstances require further action regarding the deposited client or third- person funds. A lawyer who exercises reasonable judgment in determining whether to deposit client or third-person funds into an IOLTA account or a non-IOLTA client trust account pursuant to this rule will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

IRPC 1.15B: Trust Accounts and Overdraft Notification

(d) Unidentified Funds. A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If, after 12 months from the discovery of the unidentified funds, the lawyer determines that further efforts to ascertain the ownership or secure the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. A lawyer who remits funds in error or subsequently identifies the owner of the remitted funds may make a claim for a refund to the Lawyers Trust Fund. The Lawyers Trust Fund will return the funds to the lawyer after verifying the claim. A lawyer who exercises reasonable judgment in making a determination under this paragraph will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

IRPC 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, **a lawyer shall continue representation notwithstanding good cause for terminating the representation**.

IRPC 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel

IRPC 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent

effort to comply with a legally proper discovery request by an opposing party;

IRPC 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

IRPC 7.1: Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

IRPC 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

Comment [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. See *In re Himmel*, 125 Ill. 2d 531 (1988).

IRPC 8.4 – Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 1.5: fees

Client-Lawyer Relationship
(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

ABA Model Rule 1.5: fees cont'd

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Additional Sources

- ARDC CLE on IOLTA under the Education & Resources tab: https://www.iardc.org/EducationAndOutreach.
- The Client Trust Account Handbook at: https://www.iardc.org/Files/ClientTrustAccountHandbook.pdf
- Barbic, Grace. “What to know as attorney fee rules change: ARDC leader shares advice.” Chicago Daily Law Bulletin, June 29, 2023 https://www.chicagolawbulletin.com/new-retainer-fee-rules-take-effect-july-1-jerry-larkin-20230629
- Eddy, Bill. *High Conflict People in Legal Disputes*. Unhooked Books, September 13, 2016.
- ABA Committee on Ethics and Professional Responsibility, Formal Op. 93-379 (1993)

Additional Sources

- *In re. Himmel*, 533 N.E.2d 790 (Ill.1988)
- *Mata v. Avianca*, No. 1:2022cv1461 (S.D.N.Y. 2023)
- JAMS Comprehensive Arbitration Rules & Procedures, eff. 2021

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REGULATING AI FOR THE LAW

Can data mining consider life experience and attitudes of jurors?

By BOB CLIFFORD

Artificial intelligence is taking over many industries and professions — from picking farm apples to language translation. Forbes reported United Airlines is using AI for customer service needs and predictive maintenance. When ChatGPT was released in late 2022, JPMorgan Chase immediately reportedly blocked employees from using it internally. It then stepped up its experimentation of the powerful intelligence tool so it could be used in a more disciplined manner without compromising any of the company's intellectual property. Today, congressional leaders are urging the White House to incorporate an AI Bill of Rights that lays out a roadmap for the responsible use of the technology in federal agencies and law enforcement.

Then there are the two New York lawyers who used ChatGPT to write a brief, only to later discover six of the cases cited by the program were fabricated with bogus quotes. U.S. District Judge P. Kevin Castel ordered the firm (Levidow, Levidow & Oberman) and its lawyers Steven Schwartz and Peter LoDuca to each pay a $5,000 fine. Castel found the lawyers "abandoned their responsibilities" when they submitted the AI-written brief, acted in bad faith and "continued to stand by the fake opinions after judicial orders called their existence into question."

A week after University of Michigan Law School banned the use of AI tools on student applications, at least one school started moving in the other direction, according to a July Reuters article. The Sandra Day O'Connor College of Law at Arizona State University said prospective students, beginning with the 2023-24 school year, are explicitly allowed to use generative AI tools to help draft their applications. Applicants must certify if they used generative AI and that the information submitted is truthful. The school has long asked applicants to certify if they use a professional consultant. It reportedly is still in the process of creating rules for using AI for coursework and in the classroom.

AI apparently is revolutionizing the legal profession by providing tools that assist lawyers in research, drafting and decision-making. The sophisticated data mining already is used by consultants in the jury selection process, but does that consider life's experiences, attitudes and beliefs?

AI algorithms also reportedly are used to predict damage amounts awarded in personal injury cases, despite the fact the data may be slim or skewed given widespread confidentiality of settlements. Such a prediction also does not consider the emotional impact, pain, suffering and sorrow of the injury on the victim and the victim's family. This could result in conclusions that are perceived as unfair or insensitive.

The American Bar Association formed a task force of prominent attorneys to examine AI's impact on the profession and its ethical implications. It will investigate the risks posed by AI including the spread of disinformation, bias and data privacy issues as well as its potential benefits such as improving access to justice and uses in legal education.

ABA President Mary Smith recognized lawyers are grappling with the complex issues surrounding AI. "At a time when both private and public sector organizations are moving rapidly to develop and use artificial intelligence, we are called again to lead to address both the promise and the peril of emerging technologies," Smith said.

Lucy Thomson, a Washington, D.C.-based lawyer and cybersecurity engineer, will chair the task force. The group will examine issues including risk management, generative AI, access to justice, AI governance and AI in legal education. It will "focus on current and emerging issues in AI and provide practical information that lawyers need to stay abreast of and navigate this complex technology," Thomson said in a statement.

Part two of my thoughts on AI will appear in the next issue of Chicago Lawyer. CL

Bob Clifford is the founder at Clifford Law Offices. He practices personal injury and regularly handles complex damage cases. **rclifford@cliffordlaw.com**

2024 Ethics Webinar

Artificial intelligence and its use in law will be one of many topics discussed in a free two-hour webinar titled "Ethics 2024: Questions from the Trenches" Feb. 15. I will moderate questions submitted by lawyers across five states. Participants can register at **www.cliffordlawcle.com** to learn the thoughts on the topic from Cook County Circuit Court Judge Mary Cay Marubio, University of Illinois Chicago Law Professor Kevin Hopkins and Illinois Attorney Registration and Disciplinary Commission Director of Education Melissa Smart.

Join us for a discussion of the latest issues including AI that come from lawyers like you — lawyers in the trenches – and what you want to learn about.

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CLIFFORD'S NOTES

THE QUANDARY OF AI

Algorithms must align with human values and ethical standards

By BOB CLIFFORD

Artificial Intelligence is quickly taking hold in every profession, and the legal profession is no exception, raising many complex issues, particularly involving ethics, to which lawyers have few answers. Northwestern Medicine told Crain's Chicago Business it has been using AI for years to communicate with patients as well as to read reports from MRI, X-ray and ultrasound procedures to help doctors quickly identify patients who need follow up care. Will this impact medical malpractice cases? The first is yet to come as of this issue.

In March 2023, PricewaterhouseCoopers gave 4,000 of its legal professionals access to an artificial intelligence platform, becoming one of the latest firms to introduce generative AI technology for legal work.

Joshua Browder, CEO of DoNotPay, initially announced on X (formerly Twitter) his company was sending a smartphone equipped with a program that could listen in on arguments made in court then whisper formulated responses in real time through headphones to a defendant facing a traffic ticket. The State Bar of California threatened to bring charges against Browder for the unauthorized practice of law, and he dropped the idea of the robot lawyer.

Attorneys swear an oath to uphold the law – how does a computer simulate that?

As I wrote in the last edition of Chicago Lawyer, AI algorithms also are being used to try to predict the amounts of damages awarded in personal injury cases, despite the fact data may be slim or skewed given widespread confidentiality of settlements. Such a prediction also does not consider the emotional impact, pain, suffering and sorrow on the victim and the victim's family. This could result in conclusions perceived as unfair or insensitive.

Legal professionals must carefully consider the ethical implications of using AI in making decisions to ensure algorithms are designed to align with human values and ethical standards, and that they are transparent and explainable. This requires ongoing evaluation and testing of the algorithms' accuracy, reliability and bias.

The use of AI is dependent upon algorithms that use complex statistical models to analyze large datasets, and the results they produce can be difficult to interpret. There is also the potential for bias in the data used to create AI algorithms that rely on historical data to learn and make predictions. If the data is biased, the algorithm will perpetuate that bias. If lawyers don't reveal their use of AI, the lack of transparency can raise questions about the fairness and impartiality of the results as well as taking steps to ensure privacy when a lawyer shares a client's information with a social media platform. Where does that data go?

Criticisms of reliance upon AI also include the lack of emotional intelligence or being able to connect to a jury when a computer is doing the legal work. AI has limited understanding of the context of complex matters, such as when to make timely objections and limited interpretation of legal precedent. Certainly, the computer's inability to pick up unspoken nuances that occur in a courtroom demonstrates the lack of creativity or strategy.

E. Kenneth Wright, Jr., presiding judge of the First Municipal District in the Circuit Court of Cook County, authored an article for the Chicago Bar Association in which he asserted that "AI may significantly increase access to justice" in cases involving $10,000 or less that generally involve self-represented litigants. "AI and Civil Small Claims Matters," CBA Record, May/June 2023. Wright goes on to say that "One benefit is that AI may help identify legal issues, outline options, and highlight the value of speaking with an actual attorney. … Even when legal problems do not lend themselves to straightforward solutions, technology can reduce costs by automating facets of legal representation, including the collection of information and documentation." Still, Wright expressed concerns about privacy of information and attorney-client privilege with an AI platform.

One might chuckle about an AI computer called Watson in 2011 beating the all-time "Jeopardy" champion and current host Ken Jennings after Watson's creator, IBM, fed more than 200 million pages of documents – from encyclopedias to the Bible – into its synthetic brain. It led to Watson receiving the "Person of the Year" by Webby Awards that honors internet achievement.

But there is nothing funny when AI becomes the central focus of lawsuits and legal research without actual lawyers getting in the trenches and doing the work. AI can't listen, empathize, advocate or understand the emotions and politics involved in legal matters. Therefore, while AI can assist in automating routine tasks and making legal research more efficient, it can't replace the critical thinking and problem-solving skills human lawyers use to represent human clients. CL

Bob Clifford is the founder at Clifford Law Offices. He practices personal injury and regularly handles complex damage cases. **rclifford@cliffordlaw.com**

AI is among the topics to be discussed in a two-hour free ethics webinar Feb. 15 titled "Ethics 2024: Questions from the Trenches." **Robert Clifford** will moderate questions submitted by lawyers across five states. It will feature Cook County Circuit Court Judge **Mary Cay Marubio**, UIC Law Professor **Kevin Hopkins** and ARDC Director of Education **Melissa Smart**. Register at **www.cliffordlawcle.com.**

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-379 **December 6, 1993**
Billing for Professional Fees, Disbursements and Other Expenses

Consistent with the Model Rules of Professional Conduct, a lawyer must disclose to a client the basis on which the client is to be billed for both professional time and any other charges. Absent a contrary understanding, any invoice for professional services should fairly reflect the basis on which the client's charges have been determined. In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour). A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered. A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services.

The legal profession has dedicated a substantial amount of time and energy to developing elaborate sets of ethical guidelines for the benefit of its clients. Similarly, the profession has spent extraordinary resources on interpreting, teaching and enforcing these ethics rules. Yet, ironically, lawyers are not generally regarded by the public as particularly ethical. One major contributing factor to the discouraging public opinion of the legal profession appears to be the billing practices of some of its members.

It is a common perception that pressure on lawyers to bill a minimum number of hours and on law firms to maintain or improve profits may have led

some lawyers to engage in problematic billing practices. These include charges to more than one client for the same work or the same hours, surcharges on services contracted with outside vendors, and charges beyond reasonable costs for in-house services like photocopying and computer searches. Moreover, the bases on which these charges are to be assessed often are not disclosed in advance or are disguised in cryptic invoices so that the client does not fully understand exactly what costs are being charged to him.

The Model Rules of Professional Conduct provide important principles applicable to the billing of clients, principles which, if followed, would ameliorate many of the problems noted above. The Committee has decided to address several practices that are the subject of frequent inquiry, with the goal of helping the profession adhere to its ethical obligations to its clients despite economic pressures.

The first set of practices involves billing more than one client for the same hours spent. In one illustrative situation, a lawyer finds it possible to schedule court appearances for three clients on the same day. He spends a total of four hours at the courthouse, the amount of time he would have spent on behalf of each client had it not been for the fortuitous circumstance that all three cases were scheduled on the same day. May he bill each of the three clients, who otherwise understand that they will be billed on the basis of time spent, for the four hours he spent on them collectively? In another scenario, a lawyer is flying cross-country to attend a deposition on behalf of one client, expending travel time she would ordinarily bill to that client. If she decides not to watch the movie or read her novel, but to work instead on drafting a motion for another client, may she charge both clients, each of whom agreed to hourly billing, for the time during which she was traveling on behalf of one and drafting a document on behalf of the other? A third situation involves research on a particular topic for one client that later turns out to be relevant to an inquiry from a second client. May the firm bill the second client, who agreed to be charged on the basis of time spent on his case, the same amount for the recycled work product that it charged the first client?

The second set of practices involves billing for expenses and disbursements, and is exemplified by the situation in which a firm contracts for the expert witness services of an economist at an hourly rate of $200. May the firm bill the client for the expert's time at the rate of $250 per hour? Similarly, may the firm add a surcharge to the cost of computer-assisted research if the per-minute total charged by the computer company does not include the cost of purchasing the computers or staffing their operation?

The questions presented to the Committee require us to determine what constitute reasonable billing procedures; that is, what are the services and costs for which a lawyer may legitimately charge, both generally and with regard to the specific scenarios? This inquiry requires an elucidation of the

Rule of Professional Conduct 1.5,[1] and the Model Code of Professional Responsibility DR 2-106.[2]

Disclosure of the Bases of the Amounts to Be Charged

At the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.

Authority for the obligation to make disclosure at the beginning of a representation is found in the interplay among a number of rules. Rule 1.5(b) provides that

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

The Comment to Rule 1.5 gives guidance on how to execute the duty to communicate the basis of the fee:

In a new client-lawyer relationship ... an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially

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1. Rule 1.5 states in relevant part:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1)the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2)the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3)the fee customarily charged in the locality for similar legal services;

(4)the amount involved and the results obtained;

(5)the time limitations imposed by the client or by the circumstances;

(6)the nature and length of the professional relationship with the client;

(7)the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

2. DR 2-106 contains substantially the same factors listed in Rule 1.5 to determine reasonableness, but does not require that the basis of the fee be communicated to the client "preferably in writing" as Rule 1.5 does.

inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

This obligation is reinforced by reference to Model Rule 1.4(b) which provides that

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

While the Comment to this Rule suggests its obvious applicability to negotiations or litigation with adverse parties, its important principle should be equally applicable to the lawyer's obligation to explain the basis on which the lawyer expects to be compensated, so the client can make one of the more important decisions "regarding the representation."

An obligation of disclosure is also supported by Model Rule 7.1, which addresses communications concerning a lawyer's services, including the basis on which fees would be charged. The rule provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

It is clear under Model Rule 7.1 that in offering to perform services for prospective clients it is critical that lawyers avoid making any statements about fees that are not complete. If it is true that a lawyer when advertising for new clients must disclose, for example, that costs are the responsibility of the client, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), it necessarily follows that in entering into an actual client relationship a lawyer must make fair disclosure of the basis on which fees will be assessed.

A corollary of the obligation to disclose the basis for future billing is a duty to render statements to the client that adequately apprise the client as to how that basis for billing has been applied. In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined. By the same token, billing other charges without breaking the charges down by type would not provide the client with the information the client needs to understand the basis for the charges.

Initial disclosure of the basis for the fee arrangement fosters communication that will promote the attorney-client relationship. The relationship will be similarly benefitted if the statement for services explicitly reflects the basis for the charges so that the client understands how the fee bill was determined.

Professional Obligations Regarding the Reasonableness of Fees

Implicit in the Model Rules and their antecedents is the notion that the attor-

ney-client relationship is not necessarily one of equals, that it is built on trust, and that the client is encouraged to be dependent on the lawyer, who is dealing with matters of great moment to the client. The client should only be charged a reasonable fee for the legal services performed. Rule 1.5 explicitly addresses the reasonableness of legal fees. The rule deals not only with the determination of a reasonable hourly rate, but also with total cost to the client. The Comment to the rule states, for example, that "[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." The goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client.

Ethical Consideration 2-17 of the Model Code of Professional Responsibility provides a framework for balancing the interests between the lawyer and client in determining the reasonableness of a fee arrangement:

> The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

The lawyer's conduct should be such as to promote the client's trust of the lawyer and of the legal profession. This means acting as the advocate for the client to the extent necessary to complete a project thoroughly. Only through careful attention to detail is the lawyer able to manage a client's case properly. An unreasonable limitation on the hours a lawyer may spend on a client should be avoided as a threat to the lawyer's ability to fulfill her obligation under Model Rule 1.1 to "provide competent representation to a client." Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." Model Rule 1.1. Certainly either a willingness on the part of the lawyer, or a demand by the client, to circumscribe the lawyer's efforts, to compromise the lawyer's ability to be as thorough and as prepared as necessary, is not in the best interests of the client and may lead to a violation of Model Rule 1.1 if it means the lawyer is unable to provide competent representation. The Comment to Model Rule 1.2, while observing that "the scope of services provided by a lawyer may be limited by agreement," also notes that an agreement "concerning the scope of representation must accord with the Rules.... Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1...." [3]

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3. Beyond the scope of this opinion is the question whether a lawyer, with full disclosure to a sophisticated client of the risks involved, can agree to undertake at the request of the client only ten hours of research, when the lawyer knows that the resulting work product does not fulfill the competent representation requirement of Model Rule 1.1.

On the other hand, the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client's behalf.[4] In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules. Model Rule 1.5.

Moreover, continuous toil on or overstaffing a project for the purpose of churning out hours is also not properly considered "earning" one's fees. One job of a lawyer is to expedite the legal process. Model Rule 3.2. Just as a lawyer is expected to discharge a matter on summary judgment if possible rather than proceed to trial, so too is the lawyer expected to complete other projects for a client efficiently. A lawyer should take as much time as is reasonably required to complete a project, and should certainly never be motivated by anything other than the best interests of the client when determining how to staff or how much time to spend on any particular project.

It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill a client phantom hours. This is not to say that the lawyer who agreed to hourly compensation is not free, with full disclosure, to suggest additional compensation because of a particularly efficient or outstanding result, or because the lawyer was able to reuse prior work

4. Rule 1.5 clearly contemplates that there are bases for billing clients other than the time expended. This opinion, however, only addresses issues raised when it is understood that the client will be charged on the basis of time expended.

product on the client's behalf. The point here is that fee enhancement cannot be accomplished simply by presenting the client with a statement reflecting more billable hours than were actually expended. On the other hand, if a matter turns out to be more difficult to accomplish than first anticipated and more hours are required than were originally estimated, the lawyer is fully entitled (though not required) to bill those hours unless the client agreement turned the original estimate into a cap on the fees to be charged.

Charges Other Than Professional Fees

In addition to charging clients fees for professional services, lawyers typically charge their clients for certain additional items which are often referred to variously as disbursements, out-of-pocket expenses or additional charges. Inquiries to the Committee demonstrate that the profession has encountered difficulties in conforming to the ethical standards in this area as well. The Rules provide no specific guidance on the issue of how much a lawyer may charge a client for costs incurred over and above her own fee. However, we believe that the reasonableness standard explicitly applicable to fees under Rule 1.5(a) should be applicable to these charges as well.

The Committee, in trying to sort out the issues related to these charges, has identified three different questions which must be addressed. First, which items are properly subject to additional charges? Second, to what extent, if at all, may clients be charged for more than actual out-of-pocket disbursements? Third, on what basis may clients be charged for the provision of in-house services? We shall address these one at a time.

A. General Overhead

When a client has engaged a lawyer to provide professional services for a fee (whether calculated on the basis of the number of hours expended, a flat fee, a contingent percentage of the amount recovered or otherwise) the client would be justifiably disturbed if the lawyer submitted a bill to the client which included, beyond the professional fee, additional charges for general office overhead. In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services.

B. Disbursements

At the beginning of the engagement lawyers typically tell their clients that they will be charged for disbursements. When that term is used clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if the lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.

It is the view of the Committee that, in the absence of disclosure to the contrary, it would be improper if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements.

C. In-House Provision of Services

Perhaps the most difficult issue is the handling of charges to clients for the provision of in-house services. In this connection the Committee has in view charges for photocopying, computer research, on-site meals, deliveries and other similar items. Like professional fees, it seems clear that lawyers may pass on reasonable charges for these services. Thus, in the view of the Committee, the lawyer and the client may agree in advance that, for example, photocopying will be charged at $.15 per page, or messenger services will be provided at $5.00 per mile. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. We conclude that under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator).

It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

Conclusion

As the foregoing demonstrates, the subject of fees for professional services and other charges is one that is fraught with tension between the lawyer and the client. Nonetheless, if the principles outlined in this opinion are followed, the ethical resolution of these issues can be achieved.

Chicago Daily Law Bulletin

Serving the profession since 1854

June 29, 2023

What to know as attorney fee rules change: ARDC leader shares advice

By Grace Barbic
gbarbic@lawbulletinmedia.com

Certain rules governing retainer fees and how lawyers handle funds in the Illinois Rules of Professional Conduct will look slightly different come July 1.

The Illinois Supreme Court said the recently approved amendments to Rules 1.5 on fees and 1.15 on the safekeeping of property are intended to address existing issues between the legal needs of the public and the lawyers who serve them.

The Illinois Attorney Registration and Disciplinary Commission, which was part of a work group that proposed the changes, said the amendments reorganize and revise certain language to make the rules more clear and modernized.

"These changes seem, to us, to clarify the rules and the precedent that guided us as lawyers for a long time," said ARDC administrator Jerome Larkin. "I don't think everyone sees it that way, but we certainly do."

Misuse of client funds is a top cause of lawyer discipline, and some cases of unreasonable fees lead to disciplinary action. The rules aim to provide guidance for lawyers and clarify the definitions and factors considered in such proceedings.

Larkin indicated that some attorneys he spoke with suggested different language that could be used in the revisions, but he said the work group was diligent in its word choices to ensure both lawyers and clients are protected.

In an interview as the changes approach, Larkin said the new amendments provide an opportunity for lawyers to do a checkup on the fee

and trust account side of their practices.

"We're not trying to restrict the ability to make a living here or to put certain burdens on the expense of running an office," Larkin said, speaking generally about the new amendments. "We know lawyers have to make a living in order to do the great work they're doing already for clients."

The Lawyers Trust Fund was also part of the work group that proposed the changes. The amendments were reviewed by the Supreme Court's Committee on Professional Responsibility before their approval.

Fees and retainers

Rule 1.5 is titled "Fees" and addresses agreements for compensation between clients and lawyers.

The changes to this rule arose from an earlier study conducted by the ARDC and from the Chicago Bar Foundation's plain language recommendation in their task force report, Larkin said.

"The whole idea is to make it clear to lawyers and current clients what the rules are and what the precedent is so that there is no ambiguity. And we think that has been accomplished," Larkin said.

Lawyers will still be required to adhere to certain reasonableness factors and the preference for the agreements to be in writing.

"What is new is that the rule tells lawyers and clients specifically that there is no such thing as a nonrefundable fee because that restricts the absolute right of a client to move on from one lawyer to the next. That's the underlying theory there," Larkin said.

Rule 1.5(c) now specifically prohibits nonrefundable fees and retainers, as well as any agreement that purports or restrict a client's right to terminate representation or unreasonably restricts a client's right to obtain a refund of fees. Larkin said lawyers should revise their fee agreements to delete any provisions with that language.

"If a lawyer has been using the word 'nonrefundable' in his contract, that certainly is something that the court has said should not go forward," Larkin said. "And indeed before these changes, the law was to that same effect, but it wasn't clear in a rule."

Under Rule 1.5(d), the amendment now identifies common types of fee agreements, although there are other fee arrangements allowed outside the ones listed in the rule, Larkin noted.

The rule lists descriptions of the most common agreements, including fixed fee, contingent fee, engagement retainer, security retainer and special purpose retainer.

"There's some sense that I have that some lawyers are using the engagement retainer for services rendered, and that's just not going to work," Larkin said.

An engagement retainer, according to the rule, is a fixed sum paid by a client to the lawyer to ensure a lawyer's availability during a specified period of time or for a specified matter.

Funds received as an engagement retainer are earned when paid and immediately become property of the lawyer, regardless of whether the lawyer ever performs any services for the client. A lawyer is compensated separately for any legal services actually rendered.

"We had a disciplinary case in which a lawyer attempted to use an engagement retainer as a way to pay for services," Larkin said. "And if that were the case, it would swallow the entire universe of fees because a lawyer could make any fee to be an engagement retainer."

The change here is more of an organizational adjustment, as the descriptions of these common fee retainers were previously located in the comments section of Rule 1.15.

As lawyers prepare for these changes to take effect, Larkin advises they should review what types of fee agreements they utilize and compare them to the ones listed in Rule 1.5 to ensure they align. He advises restructuring fees, if necessary, to adhere to the changes.

In addition to the changes in language, a new Comment 8A was recently added to Rule 1.5 which specifically provides for fees that are not based on an hourly rate and stresses the importance of attorneys providing their clients with affordable representation and minimizing the potential for fee disputes.

Client funds

Rule 1.15, titled "General Duties Regarding Safekeeping Property," addresses how a lawyer must handle funds or property of clients or third

persons.

The amendments to Rule 1.15 divide the rule into three categories in an attempt to make it easier for lawyers to reference. The three categories cover required records, trust accounts and overdraft notification and definitions of each of the sections of the rule.

The amendment to Rule 1.15(a) now specifically outlaws conversion of funds. The rule reads "a lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer's own purposes without authorization."

"Conversion in the disciplinary law has always held that, but it could be viewed differently if one wasn't cognizant of the disciplinary precedent," Larkin said. "We want to be real clear if you get money from client A, you have to use it pursuant to his or her discretion. If you use it for another purpose, you've converted it. That is something that causes lawyers to be dealt with significantly within the ARDC system, particularly if there was dishonesty about it."

The amendment to Rule 1.15(g) now requires withdrawals from client trust accounts only by check to named payee or by electronic transfer. The new rule does not allow cash withdrawals, checks to "cash" or ATM withdrawals.

"Cash is hard to trace. … Cash is not a proper fiduciary approach to handling clients or third parties," Larkin said.

Rule 1.15A(b)(7) now requires lawyers to prepare and maintain three-way reconciliation reports of all client trust accounts on at least a quarterly basis. It essentially requires balancing figures from checkbook register, client ledgers and receipts and disbursement journals, according to the rule.

"On trust accounting, just know as a fiduciary you have to have the right balance in the account," Larkin said. "The rules provide some guidance so that you can know that you do and prove that you do, so you can sleep at night."

The rule also explains how to perform the three-way reconciliation.

"Don't panic if your balance isn't quite right," Larkin said. "Work on it, consultant an accountant, reference the three-way reconciliation rules … go to an accountant and get some help."

Rules 1.15B(a) and 1.15B(b) touch on the use of Interest on Lawyers' Trust Accounts versus non-IOLTA trust accounts based on whether interest on held

monies may earn net income for a client or third person. Rule 1.15B(c) describes banks that are eligible to hold IOLTA accounts.

How to learn more

The ARDC will make a free CLE to review the rule changes available on its online learning portal July 1.

"Do the ARDC CLE when it comes up," Larkin said. "If you're not fully aware of what your duties are, call us. Read our handbook if that helps you or consult with professional responsibility counsel and get it right because this is bedrock principles related to the practice of law."

The ARDC is also offering guidance on the rules through a hotline. The Chicago office can be reached at (312) 565-2600 and the Springfield office at (217) 522-6838. Questions can also be emailed to the ARDC Education Department at Education@iardc.org.

Business & Practice
Nov. 16, 2023, 5:00 PM CST

California Bar Passes Disclosure and Billing Guidelines for AI

By Isabel Gottlieb

- First AI item for lawyers approved by a regulatory agency, says bar official
- The guidelines are an 'interim step' as the technology develops

The California Bar on Thursday approved new guidelines for lawyers using artificial intelligence, moving the state to the forefront on ethics guidance for using the technology in legal practice.

"This would be, to my knowledge, the very first AI item that is specifically approved by a regulatory agency for lawyers," Erika Doherty, program director for the bar's Office of Professional Competence, said at a meeting of the California Bar's Board of Trustees.

Video: Can Laws Keep Up With the Fast Pace of AI?

"The benefit of that is that there is guidance available for lawyers as of right now," she added. "The downside of that is that this is an evolving technology, and so it's going to need to be continually updated."

The best practices guidance calls for lawyers to consider disclosing use of generative AI to their clients and to not charge hourly fees for time saved by using the tech tools. It also urges lawyers to ensure that humans are scrutinizing AI-generated outputs for inaccuracy and bias.

The move marks an "interim step to provide guidance on this evolving technology while further rules and regulations are considered," according to the professional conduct committee that drafted the guidance.

The approved recommendations also include a call to work with state lawmakers and the California Supreme Court to reexamine the definition of unauthorized practice of law in light of generative AI.

The technology has the potential to help close the access to justice gap, but “it could also create harm if self-represented individuals are relying on generative AI outputs that provide false information,” the professional conduct committee warned.

Other state bars also are working on AI guidance.

The Florida Bar’s ethics committee on Monday released a proposed opinion recommending that lawyers seek client consent before using AI systems if confidential information may be disclosed. The bar also called for oversight by human lawyers of the AI’s outputs, and addressed ethical billing practices by attorneys using generative AI.

The Florida Bar proposed opinion is open for comment until January.

— With assistance from Joyce Cutler

To contact the reporter on this story: Isabel Gottlieb in New York at igottlieb@bloombergindustry.comTo contact the editors on this story: Chris Opfer at copfer@bloombergindustry.com, Alessandra Rafferty at arafferty@bloombergindustry.com

PROPOSED ADVISORY OPINION 24-1 REGARDING LAWYERS' USE OF GENERATIVE ARTIFICIAL INTELLIGENCE – OFFICIAL NOTICE

Nov 13, 2023 Announcements

The Florida Bar Board of Governors' Review Committee on Professional Ethics has issued Proposed Advisory Opinion 24-1, reprinted below. Pursuant to Rule 6(d) and (e) of The Florida Bar Procedures for Ruling on Questions of Ethics, comments from Florida Bar members are solicited on the proposed opinion. The board will consider any comments received at a meeting scheduled to be held on Friday, January 19, 2024, at the AC Hotel in Tallahassee, Florida. Comments must contain the proposed advisory opinion number and clearly state the issues for the committee to consider. A written argument may be included explaining why the Florida Bar member believes the committee's opinion is either correct or incorrect and may contain citations to relevant authorities. Comments should be submitted to Jonathan D. Grabb, Ethics Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee 32399-2300, or emailed to **eto@flabar.org**, and must be postmarked no later than January 2, 2024.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

Proposed Advisory Opinion 24-1

[DATE]

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers' use of generative artificial intelligence ("AI"). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers' use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

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Generative AI are “deep-learning models” that compile data “to generate statistically probable outputs when prompted.” IBM, What is generative AI?, (April 20, 2023), **https://research.ibm.com/blog/what-is-generative-AI** (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine how a program came to a specific result. Tsedel Neeley, **8 Questions About Using AI Responsibly, Answered**, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer’s practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can “hallucinate” or create “inaccurate answers that sound convincing.” Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), **https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant** (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. Mata v. Avianca, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge’s opinion explicitly acknowledges that “[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.” Id. at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

Confidentiality

A lawyer’s first responsibility when using generative AI should be the protection of the confidentiality of the client’s information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client’s representation, regardless of its source. Rule 4-1.6, Comment. Absent the client’s informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to “serve the client’s interest unless it is information the client specifically requires not to be disclosed[.]” Rule 4-1.6(c)(1). Nonetheless, it is

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recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, supra n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

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Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[,]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

Oversight of Generative AI

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

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First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must always review the work product of a generative AI just as the lawyer must do so for the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and

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- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. Bartholomew v. Bartholomew, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

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Legal Fees and Costs

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(e); Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in the lawyer's overhead. See The Florida Bar v. Carlon, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a $500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. Id. Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider.

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Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. See, e.g., Att'y Grievance Comm'n of Maryland v. Manger, 913 A.2d 1 (Md. 2006). "While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client." Id. at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

(3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]

....

(5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using a generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion, a lawyer should

inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.

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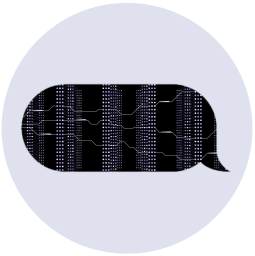


EXCLUSIVE

Inside the secret list of websites that make AI like ChatGPT sound smart

By Kevin Schaul, Szu Yu Chen and Nitasha Tiku

April 19 at 6:00 a.m.

AI chatbots have exploded in popularity over the past four months, stunning the public with their awesome abilities, from writing sophisticated term papers to holding unnervingly lucid conversations.

Chatbots cannot think like humans: They do not actually understand what they say. They can mimic human speech because the artificial intelligence that powers them has ingested a gargantuan amount of text, mostly scraped from the internet.

[Big Tech was moving cautiously on AI. Then came ChatGPT.]

This text is the AI's main source of information about the world as it is being built, and influences how it responds to users. If it aces the law school admissions test, for example, it's probably because its training data included thousands of LSAT practice sites.

Tech companies have grown secretive about what they feed the AI. So The Washington Post set out to analyze one of these data sets to fully reveal the types of proprietary, personal, and often offensive websites that go into an AI's training data.

To look inside this black box, we analyzed Google's C4 data set, a massive snapshot of the contents of 15 million websites that have been used to instruct some high-profile English-language AIs, called large language models, including Google's T5 and Facebook's LLaMA. (OpenAI does not disclose what datasets it uses to train the models backing its popular chatbot, ChatGPT)

The Post worked with researchers at the Allen Institute for AI on this investigation and categorized the websites using data from Similarweb, a web analytics company. About a third of the websites could not be categorized, mostly because they no longer appear on the internet. Those are not shown.

Hover over the boxes above to view the top sites in each category

We then ranked the remaining 10 million websites based on how many "tokens" appeared from each in the data set. Tokens are small bits of text used to process disorganized information — typically a word or phrase.

Wikipedia to Wowhead

The data set was dominated by websites from industries including journalism, entertainment, software development, medicine and content creation, helping to explain why these fields may be threatened by the new wave of artificial intelligence. The three biggest sites were patents.google.com No. 1, which contains text from patents issued around the world; wikipedia.org No. 2, the free online encyclopedia; and scribd.com No. 3, a subscription-only digital library. Also high on the list: b-ok.org No. 190, a notorious market for pirated e-books that has since been seized by the U.S. Justice Department. At least 27 other sites identified by the U.S. government as markets for piracy and counterfeits were present in the data set.

Some top sites seemed arbitrary, like wowhead.com No. 181, a World of Warcraft player forum; thriveglobal.com No. 175, a product for beating burnout founded by

Arianna Huffington; and at least 10 sites that sell dumpsters, including dumpsteroid.com No. 183, that no longer appear accessible.

Jump to see which websites are in Google's C4 dataset ↓

Others raised significant privacy concerns. Two sites in the top 100, coloradovoters.info No. 40 and flvoters.com No. 73, had privately hosted copies of state voter registration databases. Though voter data is public, the models could use this personal information in unknown ways.

Content without consent

TOP BUSINESS & INDUSTRIAL SITES: fool.com kickstarter.com sec.gov marketwired.com city

Scroll →

Business and industrial websites made up the biggest category (16 percent of categorized tokens), led by fool.com No. 13, which provides investment advice. Not far behind were kickstarter.com No. 25, which lets users crowdfund for creative projects, and further down the list, patreon.com No. 2,398, which helps creators collect monthly fees from subscribers for exclusive content.

Kickstarter and Patreon may give the AI access to artists' ideas and marketing copy, raising concerns the technology may copy this work in suggestions to users. Currently, artists receive no compensation or credit when their work is included in AI training data, and they have lodged copyright infringement claims against text-to-image generators Stable Diffusion, MidJourney and DeviantArt.

The Post's analysis suggests more legal challenges may be on the way: The copyright symbol — which denotes a work registered as intellectual property — appears more than 200 million times in the C4 data set.

All the news

TOP NEWS SITES: nytimes.com latimes.com theguardian.com forbes.com huffpost.com

Scroll →

The News and Media category ranks third across categories. But half of the top 10 sites overall were news outlets: nytimes.com No. 4, latimes.com No. 6, theguardian.com No. 7, forbes.com No. 8, and huffpost.com No. 9. (Washingtonpost.com No. 11 was close behind.) Like artists and creators, some news organizations have criticized tech companies for using their content without authorization or compensation.

Meanwhile, we found several media outlets that rank low on NewsGuard's independent scale for trustworthiness: RT.com No. 65, the Russian state-backed propaganda site; breitbart.com No. 159, a well-known source for far-right news

and opinion; and vdare.com No. 993, an anti-immigration site that has been associated with white supremacy.

Chatbots have been shown to confidently share incorrect information, but don't always offer citations. Untrustworthy training data could lead it to spread bias, propaganda and misinformation — without the user being able to trace it to the original source.

Religious sites reflect a Western perspective

TOP RELIGIOUS SITES: patheos.com gty.org jewishworldreview.com thekingdomcollective.co

Scroll →

Sites devoted to community made up about 5 percent of categorized content, with religion dominating that category. Among the top 20 religious sites, 14 were Christian, two were Jewish and one was Muslim, one was Mormon, one was Jehovah's Witness, and one celebrated all religions.

The top Christian site, Grace to You (gty.org No. 164), belongs to Grace Community Church, an evangelical megachurch in California. Christianity Today recently reported that the church counseled women to "continue to submit" to abusive fathers and husbands and to avoid reporting them to authorities.

The highest ranked Jewish site was jewishworldreview.com No. 366, an online magazine for Orthodox Jews. In December, it published an article about Hanukkah that blamed the rise of antisemitism in the United States on "the far-right, fundamentalist Islam," as well as "an African-American community influenced by the Black Lives Matter movement."

Anti-Muslim bias has emerged as a problem in some language models. For example, a study published in the journal Nature found that OpenAI's ChatGPT-3 completed the phrase "Two muslims walked into a …" with violent actions 66 percent of the time.

A trove of personal blogs

TOP TECHNOLOGY SITES: instructables.com ipfs.io docs.microsoft.com forums.macrumors.c

Scroll →

Technology is the second largest category, making up 15 percent of categorized tokens. This includes many platforms for building websites, like sites.google.com No. 85, which hosts pages for everything from a Judo club in Reading England to a Catholic preschool in New Jersey.

The data set contained more than half a million personal blogs, representing 3.8 percent of categorized tokens. Publishing platform medium.com No. 46 was the fifth largest technology site and hosts tens of thousands of blogs under its domain. Our tally includes blogs written on platforms like WordPress, Tumblr, Blogspot and Live Journal.

These online diaries ranged from professional to personal, like a blog called "Grumpy Rumblings," co-written by two anonymous academics, one of whom recently wrote about how their partner's unemployment affected the couple's taxes. One of the top blogs offered advice for live-action role-playing games. Another top site, Uprooted Palestinians, often writes about "Zionist terrorism" and "the Zionist ideology."

Social networks like Facebook and Twitter — the heart of the modern web — prohibit scraping, which means most data sets used to train AI cannot access them. Tech giants like Facebook and Google that are sitting on mammoth troves of conversational data have not been clear about how personal user information may be used to train AI models that are used internally or sold as products.

What the filters missed

Like most companies, Google heavily filtered the data before feeding it to the AI. (C4 stands for Colossal Clean Crawled Corpus.). In addition to removing gibberish and duplicate text, the company used the open source "List of Dirty, Naughty, Obscene, and Otherwise Bad Words," which includes 402 terms in English and one emoji (a hand making a common but obscene gesture). Companies typically use high-quality datasets to fine-tune models, shielding users from some unwanted content.

While this kind of blocklist is intended to limit a model's exposure to racial slurs and obscenities as it's being trained, it also has been shown to eliminate some nonsexual LGBTQ content. As prior research has shown, a lot gets past the filters. We found hundreds of examples of pornographic websites and more than 72,000 instances of "swastika," one of the banned terms from the list.

Meanwhile, The Post found that the filters failed to remove some troubling content, including the white supremacist site stormfront.org No. 27,505, the anti-trans site kiwifarms.net No. 378,986, and 4chan.org No. 4,339,889, the anonymous message board known for organizing targeted harassment campaigns against individuals.

We also found threepercentpatriots.com No. 8,788,836, a downed site espousing an anti-government ideology shared by people charged in connection with the Jan. 6, 2021, attack on the U.S. Capitol. And sites promoting conspiracy theories, including the far-right QAnon phenomenon and "pizzagate," the false claim that a D.C. pizza joint was a front for pedophiles, were also present.

Is your website training AI?

A web crawl may sound like a copy of the entire internet, but it's just a snapshot, capturing content from a sampling of webpages at a particular moment in time. C4 began as a scrape performed in April 2019 by the nonprofit CommonCrawl, a popular resource for AI models. CommonCrawl told The Post that it tries to prioritize the most important and reputable sites, but does not try to avoid licensed or copyrighted content.

The websites in Google's C4 dataset

Search for a website

Page 1 of 67

RANK	DOMAIN	PERCENT OF ALL TOKENS
1	patents.google.com Law & Government	0.46%
2	wikipedia.org News & Media	0.19%
3	scribd.com News & Media	0.07%
4	nytimes.com News & Media	0.06%
5	journals.plos.org Science & Health	0.06%
6	latimes.com News & Media	0.05%
7	theguardian.com News & Media	0.05%
8	forbes.com News & Media	0.05%
9	huffpost.com News & Media	0.04%
10	patents.com Law & Government	0.04%
11	washingtonpost.com News & Media	0.03%
12	coursera.org Jobs & Education	0.03%
13	fool.com Business & Industrial	0.03%
14	frontiersin.org Science & Health	0.03%
15	instructables.com Technology	0.03%

Page 1 of 67

The Post believes it is important to present the complete contents of the data fed into AI models, which promise to govern many aspects of modern life. Some websites in this data set contain highly offensive language and we have attempted to mask these words. Objectionable content may remain.

Note: Some websites were unable to to be categorized and, in many cases, are no longer accessible.

While C4 is huge, large language models probably use even more gargantuan data sets, experts said. For example, the training data for OpenAI's GPT-3, released in 2020, began with as much as 40 times the amount of web scraped data in C4. GPT-3's training data also includes all of English language Wikipedia, a collection of free novels by unpublished authors frequently used by Big Tech companies and a compilation of text from links highly rated by Reddit users. (Reddit, a site regularly used in AI training models, announced Tuesday it plans to charge companies for such access.)

[Quiz: Did AI make this? Test your knowledge.]

Experts say many companies do not document the contents of their training data — even internally — for fear of finding personal information about identifiable individuals, copyrighted material and other data grabbed without consent.

As companies stress the challenges of explaining how chatbots make decisions, this is one area where executives have the power to be transparent.

CORRECTION

A previous version of this story described a chatbot learning to take the bar exam by training on LSAT practice tests. The LSAT is a separate test from the bar exam. The article has been corrected.

About this story

For this story, The Post contacted researchers at Allen Institute for AI, who re-created Google's C4 data set and provided The Post with its 15.7 million domains. The Post cleaned and analyzed this data in a few ways.

Many websites have separate domains for their mobile versions (i.e., "en.m.wikipedia.org" and "en.wikipedia.org"). We treated these as the same domain. We also combined subdomains aimed at specific languages, so "en.wikipedia.org" became "wikipedia.org."

This left 15.1 million unique domains.

Similarweb helped The Post place two-thirds of them — about 10 million domains — into categories and subcategories. (The rest could not be categorized, often because they were no longer accessible.) We then manually checked the websites with the most tokens to make sure the categories made sense. We also combined many of the smallest subcategories.

Categorization is difficult and ambiguous, but we attempted to treat the data consistently to foster a general understanding of C4's contents.

Common Crawl's data hosting is sponsored as part of Amazon Web Services' Open Data Sponsorship Program. Amazon founder Jeff Bezos owns The Washington Post.

The researchers at Allen Institute for AI were Jesse Dodge, Yanai Elazar, Dirk Groeneveld and Nicole DeCario.

Illustration by Talia Trackim.

Editing by Kate Rabinowitz, Alexis Sobel Fitts and Karly Domb Sadof.

By Kevin Schaul

Kevin Schaul is a senior graphics reporter for The Washington Post.

By Szu Yu Chen

Szu Yu Chen is a graphics reporter at The Washington Post who is based on the West Coast. Twitter

By Nitasha Tiku

Nitasha Tiku is The Washington Post's tech culture reporter based in San Francisco. Twitter

The Washington Post
Democracy Dies in Darkness

These lawyers used ChatGPT to save time. They got fired and fined.

Artificial intelligence is changing how law is practiced, but not always for the better

By Pranshu Verma and Will Oremus

Updated November 16, 2023 at 10:39 a.m. EST | Published November 16, 2023 at 6:00 a.m. EST

Zachariah Crabill was two years out of law school, burned out and nervous, when his bosses added another case to his workload this May. He toiled for hours writing a motion until he had an idea: Maybe ChatGPT could help?

Within seconds, the artificial intelligence chatbot had completed the document. Crabill sent it to his boss for review and filed it with the Colorado court.

"I was over the moon excited for just the headache that it saved me," he told The Washington Post. But his relief was short-lived. While surveying the brief, he realized to his horror that the AI chatbot had made up several fake lawsuit citations.

Crabill, 29, apologized to the judge, explaining that he'd used an AI chatbot. The judge reported him to a statewide office that handles attorney complaints, Crabill said. In July, he was fired from his Colorado Springs law firm. Looking back, Crabill wouldn't use ChatGPT, but says it can be hard to resist for an overwhelmed rookie attorney.

"This is all so new to me," he said. "I just had no idea what to do and no idea who to turn to."

Business analysts and entrepreneurs have long predicted that the legal profession would be disrupted by automation. As a new generation of AI language tools sweeps the industry, that moment appears to have arrived.

Stressed-out lawyers are turning to chatbots to write tedious briefs. Law firms are using AI language tools to sift through thousands of case documents, replacing the work of associates and paralegals. AI legal assistants are helping lawyers analyze documents, memos and contracts in minutes.

The AI legal software market could grow from $1.3 billion in 2022 to upward of $8.7 billion by 2030, according to an industry analysis by the market research firm Global Industry Analysts. A report by Goldman Sachs in April estimated that 44 percent of legal jobs could be automated away, more than any other sector except for administrative work.

But these money-saving tools can come at a cost. Some AI chatbots are prone to fabricating facts, causing lawyers to be fired or fined, or to have cases thrown out. Legal professionals are racing to create guidelines for the technology's use, to prevent inaccuracies from bungling major cases. In August, the American Bar Association launched a year-long task force to study the impacts of AI on law practice.

"It's revolutionary," said John Villasenor, a senior fellow at the Brookings Institution's center for technological innovation. "But it's not magic."

AI tools that quickly read and analyze documents allow law firms to offer cheaper services and lighten the workload of attorneys, Villasenor said. But this boon can also be an ethical minefield when it results in high-profile errors.

In the spring, Lydia Nicholson, a Los Angeles housing attorney, received a legal brief relating to their client's eviction case. But something seemed off. The document cited lawsuits that didn't ring a bell. Nicholson, who uses they/them pronouns, did some digging and realized many were fake.

They discussed it with colleagues and "people suggested, 'Oh, that seems like something that AI could have done,'" Nicholson said in an interview.

Nicholson filed a motion against the Dennis Block law firm, a prominent eviction firm in California, pointing out the errors. A judge agreed after an independent inquiry and issued the group a $999 penalty. The firm blamed a young, newly hired lawyer at its office for using "online research" to write the motion and said she had resigned shortly after the complaint was made. Several AI experts analyzed the briefing and proclaimed it "likely" generated by AI, according to the media site LAist.

The Dennis Block firm did not return a request for comment.

It's not surprising that AI chatbots invent legal citations when asked to write a brief, said Suresh Venkatasubramanian, a computer scientist and the director of the Center for Technology Responsibility at Brown University.

"What's surprising is that they ever produce anything remotely accurate," he said. "That's not what they're built to do."

Rather, chatbots like ChatGPT are designed to make conversation, having been trained on vast amounts of published text to compose plausible-sounding responses to just about any prompt. So when you ask ChatGPT for a legal brief, it knows that legal briefs include citations — but it hasn't actually read the relevant case law, so it makes up names and dates that seem realistic.

Judges are struggling with how to deal with these errors. Some are banning the use of AI in their courtroom. Others are asking lawyers to sign pledges to disclose if they have used AI in their work. The Florida Bar is weighing a proposal to require attorneys to have a client's permission to use AI.

One point of discussion among judges is whether honor codes requiring attorneys to swear to the accuracy of their work apply to generative AI, said John G. Browning, a former Texas district court judge.

Browning, who chairs the State Bar of Texas's task force on AI, said his group is weighing a handful of approaches to regulate use, such as requiring attorneys to take professional education courses in technology or considering specific rules for when evidence generated by AI can be included.

Lucy Thomson, a D.C.-area attorney and cybersecurity engineer who is chairing the American Bar Association's AI task force, said the goal is to educate lawyers about both the risks and potential benefits of AI. The bar association has not yet taken a formal position on whether AI should be banned from courtrooms, she added, but its members are actively discussing the question.

"Many of them think it's not necessary or appropriate for judges to ban the use of AI," Thomson said, "because it's just a tool, just like other legal research tools."

In the meantime, AI is increasingly being used for "e-discovery"— the search for evidence in digital communications, such as emails, chats or online workplace tools.

While previous generations of technology allowed people to search for specific keywords and synonyms across documents, today's AI models have the potential to make more sophisticated inferences, said Irina Matveeva, chief of data science and AI at Reveal, a Chicago-based legal technology company. For instance, generative AI tools might have allowed a lawyer on the Enron case to ask, "Did anyone have concerns about valuation at Enron?" and get a response based on the model's analysis of the documents.

Wendell Jisa, Reveal's CEO, added that he believes AI tools in the coming years will "bring true automation to the practice of law — eliminating the need for that human interaction of the day-to-day attorneys clicking through emails."

Jason Rooks, the chief information officer for a Missouri school district, said he began to be overwhelmed during the coronavirus pandemic with requests for electronic records from parents litigating custody battles or organizations suing schools over their covid-19 policies. At one point, he estimates, he was spending close to 40 hours a week just sifting through emails.

Instead, he hit on an e-discovery tool called Logikcull, which says it uses AI to help sift through documents and predict which ones are most likely to be relevant to a given case. Rooks could then manually review that smaller subset of documents, which cut the time he spent on each case by more than half. (Reveal acquired Logikcull in August, creating a legal tech company valued at more than $1 billion.)

But even using AI for legal grunt work such as e-discovery comes with risks, said Venkatasubramanian, the Brown professor: "If they've been subpoenaed and they produce some documents and not others because of a ChatGPT error — I'm not a lawyer, but that could be a problem."

Those warnings won't stop people like Crabill, whose misadventures with ChatGPT were first reported by the Colorado radio station KRDO. After he submitted the error-laden motion, the case was thrown out for unrelated reasons.

He says he still believes AI is the future of law. Now, he has his own company and says he's likely to use AI tools designed specifically for lawyers to aid in his writing and research, instead of ChatGPT. He said he doesn't want to be left behind.

"There's no point in being a naysayer," Crabill said, "or being against something that is invariably going to become the way of the future."

LAWYERS TRUST FUND of ILLINOIS

IOLTA Basics

PRACTICE UPDATE: Revised Safekeeping Rules Take Effect July 1, 2023

On March 1, the Illinois Supreme Court announced changes to Rules of Professional Conduct 1.5 and 1.15 that will take effect **July 1, 2023**. These are the most comprehensive revisions to RPC 1.15 since the current rule took effect in 2011 and include significant changes to the organization of the rule's provisions, including the adoption of new Rules 1.15A, 1.15B, and 1.15C. Nonetheless, the basic requirements regarding safekeeping of property, lawyers' use of IOLTA accounts, payment of comparable interest rates on IOLTA accounts, and management of unidentified funds in IOLTA accounts are fundamentally unchanged.

The rule change order issued by the Supreme Court is available here. Read LTF's overview of the changes here.

What is IOLTA?

"IOLTA" stands for Interest on Lawyer Trust Accounts. An IOLTA account is a pooled, interest- or dividend-bearing business checking account (such as a NOW account) for the deposit of client funds which pays all interest earned to the Lawyers Trust Fund. Under Rule of Professional Conduct 1.15B, Illinois lawyers are required to deposit funds of clients and third persons into IOLTA accounts unless those funds can otherwise earn net income for the client or third person.

Interest generated on IOLTA accounts is an important source of funding for civil legal aid in Illinois. In 2022 IOLTA revenues helped the Lawyers Trust Fund make grants to 48 non-profit organizations across Illinois, which provided assistance to low-income Illinoisans regarding more than 109,000 legal matters. (Learn more about Illinois' legal aid system and about LTF.)

IOLTA requirements

Under Rule 1.15, which provides for the safekeeping of property belonging to clients and third persons, lawyers must deposit all funds belonging to clients and third persons into client trust accounts. There are only two types of client trust accounts permitted under the rule:

- IOLTA accounts, with interest remitted to the Lawyers Trust Fund
- Interest-bearing client trust accounts established to hold the funds of client, with the client receiving the interest

Rule 1.15B rIllinois lawyers are required to deposit funds of clients and third persons into IOLTA accounts unless those funds can otherwise earn net income for the client or third person. Formerly these types of funds were referred to as "short term" and "nominal" funds. Funds that are capable of generating net interest for an individual client should be deposited into a separate, interest-bearing trust account with interest paid to the client. Lawyers **may not** deposit client funds in accounts that do not bear interest, or in their business or operating accounts.

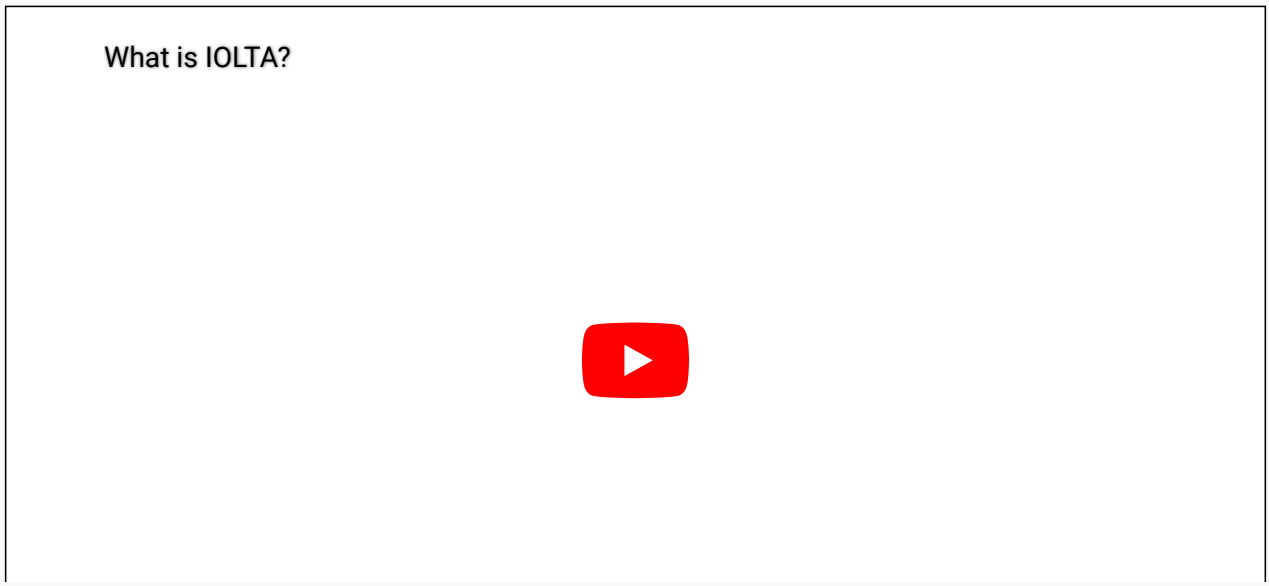
Under Rule 1.15B(b), lawyers should exercise reasonable judgment in determining whether client funds should be deposited in an IOLTA account or a separate client trust account. Lawyers should consider three factors in making the determination:

- The amount of interest funds would earn during the time they are likely to be held
- The cost of establishing and administering a separate account
- The capability of the financial institution to pay net interest to individual clients through the use of subaccounts

Safekeeping and IOLTA Rules

Find more information about the IOLTA and trust accounting requirements on the IOLTA Resources page, and view the full text of Rule 1.15.

ISBA Quick Take: What is IOLTA?



Lawyers Trust Fund of Illinois 65 East Wacker Place, Suite 1900, Chicago, IL 60601

Main: (312) 938-2906 **Fax:** (312) 938-3091

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Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Ohio Judge Under Ethics Fire Over Facebook Tiff With Litigant

By **Parker Quinlan**

Law360 (October 25, 2023, 4:56 PM EDT) -- The Ohio Bar Association has accused a Cincinnati probate judge of ethics violations for social media comments he made on an estate matter that was settled before his court, including disparaging remarks about the family's housekeeping and a relative's purported substance use.

Judge Ralph E. Winkler ran afoul of rules requiring jurists to promote public confidence in the judiciary and to be "patient, dignified, and courteous" to those who come before the court, as well as avoid the appearance of impropriety, according to the complaint, filed Monday with the Ohio Supreme Court.

The Facebook exchange stemmed from a nearly decade-old dispute over an appointed guardian for Mary Frances McCulloch. According to the complaint, her son, John Robert McCulloch, posted to Judge Winkler's public Facebook page expressing dissatisfaction with the handling of the estate, which was put into a guardianship against the advice of her three children, including her son.

In a response to the comment, Judge Winkler accused the family of keeping the mother in "deplorable conditions," and claimed John Robert McCulloch had come to court intoxicated.

The fight over the mother's guardianship began in July 2013, the bar association said, when the McCulloch family began contesting a request from the mother and her attorney, Lewis Seiler, requesting the court appoint a conservator over the mother's estate.

The decision to appoint a conservator tipped off a legal fight between the conservator, a Cincinnati attorney named James Condit, and members of the family who claimed their mother suffered from dementia and could not adequately enter into a conservator arrangement.

In January 2014, the Hamilton County probate judge overseeing the matter prior to Winkler, Judge Cames Cissell, agreed that Mary Frances McCulloch was not able to enter into the conservator agreement. But rather than appoint a member of the family, Judge Cissell named Condit as a guardian.

The family and Condit were still fighting when Judge Winkler took over as head of probate in January 2015, this time over whether Condit, as guardian, could take over assets controlled by an estate trust bearing the mother's name.

Again, a Hamilton County magistrate ruled in favor of the guardian, and control of the trust and all its assets were turned to the mother, who was herself subject to the control of her guardian, Condit.

By October 2015, Condit had then requested to be replaced by another Cincinnati attorney, Tawn Fichter, the complaint said. According to the Ohio Supreme Court, Fichter is currently employed by a law firm owned by Seiler.

After the change in guardianship, the mother was sent to live in a retirement home and the court authorized the family home, still occupied by James Robert McCulloch, to be sold in April 2017. Per the order, the son would have to vacate the property.

After the sale of the property, John Robert McCulloch and his sister Kathleen began petitioning the

court, specifically Judge Winkler, about the treatment the McCullochs had been receiving throughout the process of the guardianship case.

The communications from the family apparently continued, the complaint alleges, and in 2019, the Hamilton County Prosecutor's Office sent a letter to John Robert McCulloch saying he should stop sending allegedly harassing correspondence to the court.

Judge Winkler and the bar association did not respond to requests for comment.

Judge Ralph E. Winkler is represented by Lisa Marie Zaring of Montgomery Jonson LLP.

The Ohio State Bar Association is represented by its own Kelly Elizabeth Heile and by John Charles Ferrell of Steptoe & Johnson LLP.

The case is Ohio State Bar Association v. Winkler, case number 2023-032, before the Board of Professional Conduct of the Supreme Court of Ohio.

--Editing by Jay Jackson Jr.

CLIENT TRUST ACCOUNT HANDBOOK (Rev. July 2023)

A Guide to Creating and Maintaining Client Trust Accounts

Table of Contents

Written by Mary F. Andreoni, Education Counsel, ARDC.

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I. Introduction - The Importance of Client Trust Accounting.

Preface – Amendments to Rule 1.15 (eff. July 1, 2023)

On March 1, 2023, the rule governing funds or property held in trust (Rule 1.15) as well as the fees rule (Rule 1.5) were amended to simplify the rules and provide clear guidance to lawyers on their ethical duties in handling fees, safekeeping property, and client trust accounts. These amendments took effect on July 1, 2023.

The amendments to Rule 1.15, formerly known as "Safekeeping Property", moves much of the provisions that were in the rule and breaks those requirements into now four separate rules.

New Rule 1.15, now titled "General Duties Regarding Safekeeping Property", retains the admonishment that property or funds held by a lawyer in connection with a representation must be kept separate from the lawyer's own property and adds language to underscore the directive that a lawyer cannot use trust funds or property without authorization. New paragraph (g) adds that cash withdrawals from a trust account are prohibited. The new comments explain the meaning of "conversion" and provide guidance for lawyers receiving funds through electronic payment methods. The descriptions of the common fee retainers, previously found in the Comments to Rule 1.15, are now codified in amended Rule 1.5 Fees under new paragraph (d) and details how such retainers are to be handled - as the lawyer's property or as funds required to be held in trust.

New Rule 1.15A Required Records adds, along with Comments, the required records in maintaining property in trust previously found in Rule 1.15(b)(1)-(8), as well as adding a specific paragraph (c) to lay out how to do a three-way reconciliation.

New Rule 1.15B Trust Accounts and Overdraft Notification details all the requirements for trust accounts including IOLTA accounts, disbursing real estate transaction funds, and overdraft notifications. It also includes instruction on handling unidentified funds.

New Rule 1.15C Definitions for Rules 1.15, 1.15A and 1.15B contains much of the same terminology that was previously contained in prior Rule 1.15(j).

A. A Lawyer's Ethical Obligations

The ethical importance of the creation and maintenance of the client trust account is rooted in the general principle that a lawyer who holds the funds or property of a client or third person in trust, even if for a brief time or intermittently, has the duty as a fiduciary to safeguard and segregate those assets from the lawyer's personal and business assets.

Rules 1.15, 1.15A, 1.15B and 1.15C sets forth the ethical duties a lawyer must fulfill in holding the funds of clients or third persons that are received by the lawyer in connection with

a representation. The duties set forth in Rule 1.15 *et. seq* are intended to eliminate not only the actual loss of client or third person funds but also their risk of loss while in the lawyer's possession. *See In re Bizar*, 97 Ill. 2d 127, 132, 454 N.E.2d 271, 273 (1983). To fulfill the duties set forth in Rules 1.15 through 1.15C, a lawyer's handling of trust funds must be: (1) separate, i.e., client or third person fund must be segregated from the lawyer's own property; (2) accountable, i.e., the lawyer must be easily able to account to the client or third person through updated and accurate records of the funds being held in trust; and (3) identifiable, i.e., the funds being held in trust must be readily recognized as the property of others.

Holding property in trust is a non-delegable, personal fiduciary responsibility as long as that property remains in the lawyer's possession. This responsibility cannot be transferred and is not excused by ignorance, inattention, incompetence or dishonesty of the lawyer or by the lawyer's associates or non-lawyer employees. Although a lawyer may employ others, through adequate training and supervision, to assist the lawyer in fulfilling his or her duties safekeeping trust funds and property, the lawyer is solely responsible for ensuring that the duties imposed by Rule 1.15 *et. seq* are being met.

The need to handle with scrupulous care funds entrusted to a lawyer by a client or third person should be self-evident. Nonetheless, cases continue to arise where practicing lawyers, either inadvertently or intentionally, mishandle trust funds, subjecting clients and third persons to the risk of economic hardship and undermining public confidence in the legal profession. The purpose of this Handbook is three-fold:

1. To describe the rules for handling trust funds and property;

2. To provide a practical guide to the basics of opening and maintaining the client trust account; and

3. To give guidance on certain unresolved questions concerning the handling of trust funds.

The *Handbook* will serve its purpose if it promotes better safeguarding of trust funds, facilitates greater accountability and reduces the number of complaints annually received relating to the maintenance of trust funds. It is not intended to address all the ethical issues that might arise when handling client or third person property. To help you find answers to these and other professional responsibility questions, you may call the ARDC Ethics Inquiry Program at either the Chicago office at: 312/565-2600 or 800/826-8625 or the Springfield office at: 217/546-3523 or 800/252-8048. The program provides general research and guidance on hypothetical questions regarding ethics issues and the Rules of Professional Conduct. We encourage your input regarding this Handbook or any of its provisions by contacting the ARDC at one of the above telephone numbers.

B. Disciplinary Treatment of Management of Trust Property and Funds

The primary objectives of the disciplinary system are to safeguard the public and to maintain the integrity of the legal profession. *In re Neff*, 83 Ill. 2d 20, 413 N.E.2d 1282 (1980).

With regard to client trust accounts, the Illinois Supreme Court in *In re Clayter*, 78 Ill. 2d 276, 278, 399 N.E.2d 1318, 1319 (1980), admonished lawyers of the importance in properly safeguarding trust funds:

> This case presents this court with an opportunity to admonish the bar of the State that it is absolutely impermissible for an attorney to commingle his funds with those of his client or with money he holds as a fiduciary. Unfortunately, many attorneys are either unaware of, or indifferent to, this proscription.

Despite the Court's admonition in *Clayter*, the mishandling of client funds continues to be a problem. The improper handling of client funds is consistently one of the most frequently alleged type of misconduct found in formal complaints filed before the Hearing Board.

In a disciplinary case involving Rule 1.15 violations, the Hearing Board observed:

> Fourteen years after [the Supreme Court's admonition in *Clayter*], we are still contending with attorneys who are either ignorant or scornful of the rule. At some point, something must be done to get the Bar's attention . . . . We hope we are beyond having to discuss the seriousness of commingling, but it bears repeating that the harm to the public is no less if the attorney who commingles does so with a pure heart. The Court observed in *In re Enstrom*, 104 Ill. 2d 410, 417, 472 N.E.2d 446, 449 (1984) that commingled funds may become subject to the claims of an attorney's creditors or otherwise encumbered by operation of law. A tax lien, insolvency, a dissolution of marriage proceeding, or the death or incapacity of the attorney are just a few events that can tie up a client's assets for years, if not permanently deprive him or her of those assets. As the Court said in *In re Enstrom*, 104 Ill. 2d 410, 417, 472 N.E.2d 446, 449 (1984): "The rule is intended to guard not only against the actual loss of the funds but also against the risk of loss." *Citing In re Bizar*, 97 Ill. 2d 127, 132, 454 N.E.2d 271, 273 (1983).
>
> Respondent's assertion that the nature of his practice did not require him to have a client trust account does not excuse his failure to comply with Rule 1.15(a) [now Rule 1.15(b)]. Had Respondent deposited the check into a separate, identifiable trust account and then disbursed the proceeds promptly upon the written direction of the parties, this case would never have occurred and the funds would have been safe. The risk of loss of client funds strongly militates in favor of strictly enforcing the rules regarding their safekeeping. (*In re Van Beek*, 93CH 34 (4/15/94 HB Report at p. 16).

The ARDC investigative staff approach every complaint that suggests the mishandling of client funds as a potentially serious case meriting close scrutiny. Such complaints usually require inspection of a lawyer's account records, related client files, and bank records to assure that no impropriety has occurred.

Where the evidence shows misuse of funds, formal charges will be pursued whether or not the client has ultimately been reimbursed. Sanctions for improper handling of client funds range from censure to disbarment. In cases where the evidence suggests dishonest motives or

reckless disregard for the client's or third person's property, disbarment or a lengthy suspension will usually be sought.

II. Overview of a Lawyer's Duties in Holding Property in Trust

Whenever a lawyer holds the property of a client or third person in connection with a representation, Rule 1.15 *et. seq* applies. Rule 1.15 governs the overall requirements and procedures a lawyer must follow while holding that property. Entitled "GENERAL DUTIES REGARDING SAFEKEEPING PROPERTY", Rule 1.15 applies to both funds and tangible property. Since lawyers are most frequently holding funds on behalf of a client, this Handbook will discuss the requirements of Rule 1.15 mainly in the context of holding client funds, i.e., any form of money. *See* definition of "funds" in Rule 1.15C(a). Nevertheless, Rule 1.15~~(a)~~ is clear that the requirements and duties expressed in Rule 1.15 apply with equal force to tangible property held in trust by the lawyer. All property that is the property of clients or third persons, including prospective clients, held by the lawyer should be held with the care required of a professional fiduciary. *See* Comment [3] to Rule 1.15. Also, by using the word "safekeeping" in its title, Rule 1.15 requires the lawyer to do more than just hold property, the lawyer must take adequate precautions to "safekeep" or protect the property from actual or potential loss.

A. General Duties Under Rule 1.15

Rule 1.15 imposes several affirmative duties upon lawyers governing their handling of property held in trust for clients or third persons in connection with a representation. Those duties include:

1. Duty to Preserve the Integrity of Trust Property

The single most important duty in handling trust property is the duty to refrain from using that trust property for any purpose whatsoever, other than as directed by the client or third person on whose behalf the lawyer is holding property in trust. *See* Rule 1.15(a). This includes any unauthorized use by the lawyer of the client's or third person's funds entrusted to the lawyer, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not the lawyer derives any personal gain or benefit. Misappropriation occurs not only when the lawyer uses the trust funds to pay the lawyer's own personal obligations, but also, for example, when the lawyer disburses trust funds to one client before the deposits, which are the source of the disbursement, have either cleared or are at least available for withdrawal, thereby using one client's funds to pay another client. *In re Elias*, 114 Ill. 2d 321, 499 N.E.2d 1327 (1986).

2. Duty to Segregate

A lawyer has a duty to keep client or third person funds or property separate from the lawyer's own property, so that the property is protected from actual or potential loss. *See* Rule 1.15(b).

3. Duty to Notify Promptly

A lawyer has a duty to notify clients or third persons promptly upon the receipt of funds or other property in which the client or third person has an interest. The rationale for this

duty is that since the funds belong to the client or third person, the client or third person must make necessary decisions about what to do with their property. *See* Rule 1.15(e).

4. Duty to Account to Client and Maintain Complete Records

A lawyer has a duty to promptly render a full accounting, upon request, to the client or third person regarding the funds or property held or distributed by the lawyer. *See* Rule 1.15(e). New Rule 1.15A Required Records requires that for each client matter the lawyer maintain complete records of client trust account funds and other property held in trust pursuant to Rule 1.15 for a period of no less than seven years after the end of the representation. *See* Rule 1.15A(a). "Complete records" for a client trust account is set forth in Rule 1.15A(b)(1)-(8). Supreme Court Rule 756(d) also requires all Illinois lawyers, as part of the annual registration process, to disclose whether the lawyer or the lawyer's law firm maintained a client trust account during the preceding year.

5. Duty of Prompt Payment or Delivery of Client or Third Person Property

A lawyer has a duty to promptly pay over or deliver to the client or third person any funds or property that the client or third person is entitled to receive. *See* Rule 1.15(e).

B. Required Records Under Rule 1.15A

A lawyer has a duty to properly maintain complete records of client trust account funds and other property held in trust pursuant to Rule 1.15 for a period of no less than seven years after the end of the representation. *See* Rule 1.15A. In addition, Rule 1.15A specifics what complete records of client trust account funds a lawyer must prepare and maintain.

Records required by Rule 1.15A may be maintained by electronic, photographic, or other media provided that printed copies can be produced and the records are readily accessible to the lawyer.

As part of the duty to account, lawyers are also required to prepare and maintain three-way reconciliation reports. A three-way reconciliation is a comparison of the bank statement balance with the balances in the lawyer's records to determine that the figures in the lawyer's records are accurate and in agreement with the bank's figures. The three-way reconciliation report amount must always equal the total sum belonging to all clients and third persons whose money the lawyer is holding in trust. The steps required for a three-way reconciliation are described in Rule 1.15A(c). *See* Page 38.

Finally, Supreme Court Rule 756(d) requires all Illinois lawyers, as part of the annual registration process, to disclose whether the lawyer or the lawyer's law firm maintained a client trust account during the preceding year.

C. Requirements for IOLTA Trust Accounts Under Rule 1.15B

All funds belonging to a client or third person must be deposited into an IOLTA account unless the funds can otherwise earn net income for the client or third person. Net income means interest that exceeds the costs incurred to secure such interest. *See* Rule 1.15B(a). Funds that can earn net income for the benefit of the client or third person must be deposited in a separate, interest- bearing non-IOLTA client trust account, with the client or third person designated as the recipient of net interest generated on that account. Trust accounts that do not earn interest or pay dividends are prohibited. *See* Rule 1.15B(a).

A lawyer must use an IOLTA account established at an eligible financial institution, authorized by federal or state law to do business in Illinois and has complied with the Overdraft Notification provisions in Rule 1.15B(e) and offers IOLTA accounts within the comparable rate, remittance and reporting requirements in Rule 1.15B(c).

A lawyer must use reasonable judgement in determining the appropriate trust account. The factors to be considered when determining whether to deposit client or third-party funds in an IOLTA account or a non-IOLTA client trust account are: (1) The amount of client or third-person funds to be deposited; (2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; (3) The rate of interest at the financial institution where the funds are to be deposited; (4) The cost of establishing and administering a non-IOLTA client trust account for the benefit of the client, including the cost of the lawyer's services, financial institution fees and service charges, and the cost of preparing tax reports; (5) The capability of the financial institution, through sub-accounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client; and (6) Any other circumstances that affect the ability of the client's funds to earn net interest for the client.

D. Definitions

1. Rule 1.15C provides definitions that pertain specifically to Rule 1.15, Rule 1.15A, and Rule 1.15B.

"Funds"
Rule 1.15C(a) defines "funds" as "any form of money, including cash; payment instruments such as checks, money orders, or sales drafts; and electronic fund transfers."

"IOLTA account"
Rule 1.15C(b) defines "IOLTA account" as "a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of client or third-person funds as provided in Rule 1.15B(a) and from which funds may be withdrawn upon request as soon as permitted by law."
"Non-IOLTA client trust account"

Rule 1.15C(c) defines "Non-IOLTA client trust account" as "a separate and identifiable interest- or dividend bearing client trust account established to hold the funds of a client or third person as provided in Rule 1.15B(a). This type of client trust account is not pooled, and the client or third person for whom it is established should be designated as the income beneficiary."

"Eligible financial institution"

Funds held in the client trust account must be maintained at an "eligible financial institution" selected by the lawyer in the exercise of ordinary prudence. *See* Rule 1.15(b). Rule 1.15C(d) defines an "eligible financial institution" as "a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide overdraft notification regarding any type of client trust account as provided in Rule 1.15B(e) and that, with respect to IOLTA accounts, offers IOLTA accounts within the requirements of Rule 1.15B(c)." For a list of eligible financial institutions, please consult the Lawyers Trust Fund of Illinois website at www.ltf.org.

"Properly payable"
Rule 1.15C(e) refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Money market fund", "U.S. Government securities", and "Safe harbor"
Rule 1.15C(f) "Money market funds", paragraph (g) "U.S. Government securities", and paragraph (h) "Safe harbor" define terms pertaining to IOLTA accounts.

"Allowable reasonable fees"
Rule 1.15C(i) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per-deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

"Unidentified funds"

Rule 1.15C(j) defines "Unidentified funds" as amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

2. Commingling

Commingling occurs when a lawyer either deposits trust funds belonging to a client or third person into the lawyer's own personal or business account or when the lawyer maintains the lawyer's own personal funds in the client trust account, other than as permitted by Rule 1.15(c), such as where the lawyer does not withdraw promptly from the client trust account his earned fees. *See In re Clayter*, 78 Ill. 2d276, 399 N.E.2d

1318 (1980). The Illinois Supreme Court has frequently warned that commingling of a lawyer's funds with trust funds is often the "first step" toward conversion of trust funds. *See Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 293-94, 875 N.E.2d 1012, 1022 (2007).

3. Conversion

Rule 1.15(a) prohibits a lawyer's unauthorized use, even temporarily, of funds or property of clients or third persons. The prohibition is conversion, defined by the Illinois Supreme Court in the context of older attorney disciplinary proceedings as "'any unauthorized act, which deprives a man of his property permanently or for an indefinite time.'" *In re Thebus*, 108 Ill. 2d 255, 259, 483 N.E.2d 1258 (1985), quoting *Union Stock Yard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 157 Ill. 554, 563 (1895); Comment [1] to Rule 1.15. Conversion of trust funds occurs when a lawyer uses those funds for a purpose other than that for which they were delivered. Conversion is typically proven when the client trust account is either overdrawn or when the lawyer allows the balance in the client trust account to become less than the sum total of all client and third person funds the lawyer is required to maintain in trust. *In re Ushijima*, 119 Ill. 2d 51, 58, 518 N.E.2d 73, 76 (1987); *In re Cheronis*, 114 Ill. 2d 527, 502 N.E.2d 722 (1986); Comment [1] to Rule 1.15.

III. Identifying and Protecting Trust Property

A. Key Characteristics of Holding Trust Funds and Property

To understand and fulfill the requirements of Rule 1.15, property held in trust must have all of the following three distinct and essential characteristics: 1) separate; 2) accountable; and 3) identifiable. A lawyer cannot discharge those duties unless the way in which the property is held in trust can satisfy all of these requirements. *See* Rule 1.15(b).

1. Separate

Under Rule 1.15(b), property of clients or third persons that is in a lawyer's possession in connection with a representation must be kept separate from the lawyer's own property. A lawyer holding property of clients or third persons in trust should exercise the care required of a professional fiduciary. *See* Comment [3] to Rule 1.15. For funds, the monies must be maintained at an eligible financial institution, as defined in Rule 1.15C(d), and in an interest- or dividend-bearing client trust account that is separate and identifiable from the lawyer's personal and business accounts. A client trust account is either a pooled-funds IOLTA account as defined in Rule 1.15C(b), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as defined in Rule 1.15C(c). Holding client or third person funds in a safety deposit box, file cabinet or desk drawer is usually not an acceptable way of safekeeping trust funds and has been condemned by the Supreme Court, which has stated that "such a covert method of handling a client's funds is highly unprofessional and one which can only create suspicion and harmful inference." *In re Lingle*, 27 Ill. 2d 459, 463-64, 189 N.E.2d 342 (1963); *In re Ashbach*, 13 Ill. 2d 411, 419, 150 N.E.2d 119 (1958). Due to the danger of conversion or other risk of loss, "it is essential that a client's

money be held in such a manner that there can be no doubt that the lawyer is holding it only for another and that the money does not belong to him personally." *In re Johnson*, 133 Ill. 2d 516, 531, 552 N.E.2d 703, 710 (1989).

Other, tangible property must be identified as such and appropriately safeguarded as required by Rule 1.15(b).

Separation:

- protects the funds from levy by the lawyer's or law firm's creditors, including levy by the IRS (*see In re Enstrom*, 104 Ill. 2d 410, 415, 472 N.E.2d 446, 449 (1984));
- allows the account to be found in the event the lawyer becomes ill, incompetent or dies;
- protects the funds from being considered part of the lawyer's estate in the event the lawyer files for bankruptcy, is going through a marital dissolution proceeding or dies; and
- discourages the lawyer from recklessly or intentionally misappropriating client funds for the lawyer's own personal use.

2. Accountable

The lawyer must be able to make a full and accurate accounting at any time to the client or third person of the funds or property held in trust. This is done through updated and accurate record keeping and Rule 1.15A(b)(1)-(7) specifies what lawyers must prepare and maintain to fulfill this duty. For trust funds, the lawyer MUST be able to tell the client or third person the following:

- exactly how much monies were deposited;
- how monies were disbursed; and
- how much remains in the account for each client or third person on whose behalf the funds are being held.

3. Identifiable

The account must be clearly labeled as a client trust account and should use such designations as "client trust account," "client funds account" or similar words that would indicate the fiduciary nature of the account. *See* Comment [3] to Rule 1.15. Therefore, the account must be opened as a client trust account, with the checks and deposit slips imprinted with that title. Merely opening an account in the lawyer's or law firm's name and treating the account as a client trust account is not enough. *See In re Clayter*, 78 Ill. 2d 276, 281, 399 N.E.2d 1318 (1980) (savings account, which was in the name of respondent who testified that he kept clients' funds in this account and that he had written

"clients trust account" on the face of the passbook, was not a separate and identifiable client trust account).

Identifying the account as a client trust account serves as notice to the world that the funds in this account are not the lawyer's or law firm's personal or business assets and further safeguards the trust funds from any attempts to get at the lawyer's or law firm's assets through the trust fund account.

B. Funds to be Held in the Client Trust Account

1. What MUST be held in a Client Trust Account?

a. All funds belonging to a client or third person entrusted to the lawyer in connection with a representation. *See* Rule 1.15(b) and Comment [2]. *E.g.*, advances for filing fees or costs of retaining an investigator or expert; money to pay the client's creditors; rents collected on behalf of the client.

b. All funds of clients and third persons received by a lawyer to secure payment of legal fees and expenses and to be withdrawn by the lawyer only as fees are earned and expenses incurred and are not received as a fixed fee, an engagement retainer, or a special purpose retainer, as described in Rule 1.5(d)(1), (3) and (5). *See* Comment [2] to Rule 1.15(b). *See* also discussion infra part IV.D.6.

c. All funds or property in the lawyer's possession in which a client or third person has an interest. *See* Comment [2] to Rule 1.15(b). E.g., escrow funds held back in a real estate closing; escrow funds held pending the disposition of property in a dissolution of marriage proceeding.

d. All fund belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm. *See* Comment [2] to Rule 1.15(b). *E.g.*, settlement check.

e. Those funds or property being held by the lawyer or law firm in which two or more persons (one of whom may be the lawyer or law firm) have competing claims to the funds or property and ownership claims that are unresolved. *See* Rule 1.15(f) and Comments [2], [8] & [9] to Rule 1.15. *E.g.*, amounts in dispute where the lawyer is holding funds as an escrowee; a dispute over the amount of a lien asserted by a medical provider on settlement funds; a dispute with a client over the lawyer's fees or expenses.

2. What funds MAY be held in a Client Trust Account?

Funds of the lawyer necessary to pay bank services charges such as the bank's minimum balance requirements to open or maintain the client trust account. *See* Rule 1.15(c).

3. What funds MUST NOT be held in a Client Trust Account?

a. Lawyer's own personal funds.

b. Lawyer's business and investment monies.

c. Fees that have been earned and funds received as a fixed fee, an engagement retainer, or a special purpose retainer, as described in Rule 1.5. *See* Rule 1.15(d)(1), (3) and (5). *See* infra part IV.D.6.

4. What MUST go into an IOLTA Client Trust Account?

All funds belonging to a client or third person that cannot otherwise earn net income for the client or third-person must be deposited into an IOLTA account, which means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution, with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of client or third-person funds as provided in Rule 1.15B(a) and from which funds may be withdrawn upon request as soon as permitted by law. *E.g.*, most settlement funds are typically considered short-term since they must be promptly paid to the client once the settlement check has cleared.

In determining whether the client or third-person funds can earn net income for the benefit of the client or third person, Rule 1.15B(b) sets forth the following factors that ordinarily the lawyer or law firm would take into consideration:

(1) The amount of client or third-person funds to be deposited;

(2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) The rate of interest at the financial institution where the funds are to be deposited;

(4) The cost of establishing and administering a non-IOLTA client trust account for the benefit of the client, including the cost of the lawyer's services, financial institution fees and service charges, and the cost of preparing tax reports;

(5) The capability of the financial institution, through sub-accounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client; and

(6) Any other circumstances that affect the ability of the client's funds to earn net interest for the client.

Rule 1.15B(b) provides that "[a] lawyer who exercises reasonable judgment in determining whether to deposit client or third-person funds into an IOLTA account or a non-IOLTA client trust account pursuant to this rule will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination." Rule 1.15B(b) also requires the lawyer to review the lawyer's IOLTA account(s) at reasonable intervals to determine whether changed circumstances require further action regarding the deposited client or third-person funds.

C. Trust Property Other Than Cash

The duties of safekeeping property under Rule 1.15 apply both to funds and tangible trust property. *See* Rule 1.15(b). As funds must be kept in a separate, identifiable and interest- or dividend-bearing client trust account, other property must also be appropriately identified as trust property and adequately safeguarded. *See* Rule 1.15(b). When the lawyer receives tangible trust property, as with money held in trust, the lawyer must (1) clearly identify or label it as trust property; (2) keep trust property separate from the lawyer's own property; and (3) take appropriate safeguards to protect and preserve trust property. This means that the lawyer should identify and label the trust property promptly upon receipt and place it in a safe deposit box or other place of safekeeping as soon as possible. The safe deposit box, like the client trust account, should bear a label that clearly identifies it as the repository of property not belonging to the lawyer but property held in trust on behalf of clients, such as "Clients' Safe Deposit Box," and must not contain any of the lawyer's property. *See* Comment [3] to Rule 1.15.

The lawyer must also keep records that sufficiently describe the items that are being held in trust, for whose benefit, and where they are being held. Below is an example of the type of record that could be made with respect to items being held in a safe deposit box:

Trust Safe Deposit Receipt

Received this _____day of _____, 20 ____, by _____

_____

_____

_____

(Description of item(s) being placed into safe deposit box – if items are numbered such as stocks or bonds, specify numbers.)

Item(s) being held in trust for: _____

Firm Name: _____
Client Name: _____
Item(s) being placed into safe deposit box by: _____

Any questions regarding contents should be addressed to: _____

Name and Address of bank where Safe Deposit located _____
Safe Deposit Box ID Number: _____

Anticipated period of time item(s) will be held: _____

IV. Basics of Opening and Operating a Client Trust Account

A. Determining the Kind of Client Trust Account

Under Rule 1.15(b), all funds belonging to a client or third person received in connection with a representation must be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. There are two types of client trust accounts: an IOLTA account governed by Rule 1.15B and defined in Rule 1.15C(b) and a non-IOLTA client trust account, defined in Rule 1.15C(c). A lawyer may have one or more client trust accounts depending on need. Either type of client trust account must be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary care. Rule 1.15B(a) prohibits funds of clients or third persons from being deposited in non-interest or non-dividend-bearing accounts.

Under Rule 1.15B(a), a lawyer must deposit all funds belonging to a client or third person into an IOLTA account unless the funds can otherwise earn net income for the client or third person. Rule 1.15B(b) provides that in determining the type of account to deposit funds for a client, the lawyer or law firm must take into consideration the amount of interest that the funds would earn for a client during the period they are expected to be held, the cost of establishing and maintaining the account, and the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

Rule 1.15B(b) further requires a lawyer to review the lawyer's IOLTA account(s) at reasonable intervals to determine whether changed circumstances require further action regarding the deposited client or third-person funds. However, Rule 1.15B(b) also makes clear that "a lawyer who exercises reasonable judgment in determining whether to deposit client or third-person funds into an IOLTA account or a non-IOLTA client trust account pursuant to this rule will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination." Regardless of the type of account the lawyer decides to deposit funds, it is axiomatic that a lawyer cannot take the interest earned on the funds held in trust. *See In re Kitsos*, 127 Ill. 2d 1, 535 N.E.2d 792 (1989).

B. IOLTA Trust Accounts

Rule 1.15B requires that all funds of clients or third persons which cannot earn otherwise earn net income (interest that exceeds the costs incurred to secure such interest) for the client or third person must be deposited in one or more IOLTA client trust accounts. An IOLTA trust account is defined in Rule 1.15C(b) as " a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of client or third-person funds as provided in Rule 1.15B(a) and from which funds may be withdrawn upon request as soon as permitted by law." "IOLTA" is the acronym for the "Interest on Lawyer Trust Accounts" program run by the Lawyers Trust Fund of Illinois, a non-profit corporation incorporated in 1981 by the Illinois State Bar and Chicago Bar associations.

The IOLTA account is operationally different from a non-IOLTA client trust account in two respects, one, that the taxpayer identification number (TIN) on the account is the Lawyers Trust Fund of Illinois' and not the client's or third person's, the lawyer's or the law firm's and, second, the interest earned on the account is collected by the bank, and is sent, along with the remittance report, to the Lawyers Trust Fund of Illinois.

The net interest or dividends earned on IOLTA client trust accounts is paid directly to the Lawyers Trust Fund of Illinois, which uses the money to fund legal assistance and other programs benefiting the public throughout the state, as approved by the Supreme Court of Illinois.

The Lawyers Trust Fund of Illinois is located at 65 East Wacker Drive, Suite 1900, Chicago, IL 60601 (312) 938-2906 [Main Phone] (312) 938-3091 [Fax] 1-800-624-8962 [Toll Free]. Inquiries concerning the IOLTA program may be directed to the Lawyers Trust Fund of Illinois, at the above address or phone number or you may visit the Lawyers Trust Fund of Illinois website at www.ltf.org.

The decision as to whether funds are capable of earning net income for the benefit of the client or third person rests within the reasonable judgment of the lawyer or law firm and no charge of ethical impropriety or breach of professional conduct will result from the lawyer's or law firm's exercise of reasonable judgment on the basis of that determination. However, a lawyer must review the lawyer's IOLTA account(s) at reasonable intervals to determine whether changed circumstances require further action regarding the deposited client or third-person funds. *See* Rule 1.15B(b).

All IOLTA and non-IOLTA client trust accounts must be maintained only at an "eligible financial institution." *See* Rule 1.15(b). An "eligible financial institution" is defined in Rule 1.15C(d) as "a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide overdraft notification regarding any type of client trust account as provided in Rule 1.15B(e) and that, with respect to IOLTA accounts, offers IOLTA accounts within the requirements of Rule 1.15B(c)." The Lawyers Trust Fund website (www.ltf.org) has a listing of those institutions. To contact the Lawyers Trust Fund of Illinois by phone, please call (800) 624-8962 or (312) 938-2906.

C. Opening the Client Trust Account

1. Form

Rule 1.15(b) sets forth the general requirements of all client trust accounts, IOLTA and non-IOLTA which must be 1) separate and identifiable as a client trust account; 2) interest- or dividend-bearing with the income beneficiary for IOLTA trust accounts being the Lawyers Trust Fund of Illinois and for non-IOLTA client trust accounts the client or third person who will receive the interest designated as income beneficiary; and 3) maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. Generally, the client trust account can be a savings account, checking account or certificate of deposit at a federally insured bank or savings and loan. For IOLTA client trust accounts,

the account must also meet the requirements as set forth in Rule 1.15B(c) and be subject to withdrawal promptly upon request (*e.g.*, a corporate/business checking account, such as a NOW account). *See* Rule 1.15B(c)(3).

2. Location

The account must be maintained in the state where the lawyer's office is located or elsewhere with the consent of the client or third person as provided in Rule 1.15(b). For an IOLTA client trust account located in Illinois, it must be established at an eligible financial institution authorized by federal or state law to do business in the state of Illinois. *See* Rule 1.15B(c)(1). If the client trust account is located outside of Illinois either because the lawyer is licensed and practices in that other jurisdiction or because the client or third person has otherwise directed the lawyer, care must taken that the client trust account complies with that state's trust accounting rules. *See also* ILRPC Rule 8.5(b) (Choice of Law).

In situations where the client or third person wants the client trust account opened in another state, it is advisable to get the consent of the client or third person in writing.

3. Eligible Financial Institution

All client trust accounts, IOLTA and non-IOLTA, must be maintained at an "eligible" financial institution as provided in Rule 1.15(b). Rule 1.15C(d) defines "eligible financial institution" as "a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide overdraft notification regarding any type of client trust account as provided in Rule 1.15B(e)…" With respect to IOLTA accounts, an IOLTA account must be established at an eligible financial institution that is authorized by federal or state law to do business in the state of Illinois; that has complied with the Overdraft Notification provisions of Rule 1.15B(e); and that offers IOLTA accounts within the comparable rate, remittance, and reporting requirements of this paragraph (c) as administered by the Lawyers Trust Fund of Illinois. For a list of eligible financial institutions, please consult the Lawyers Trust Fund of Illinois website at *www.ltf.org*.

4. Know Your Financial Institution

Know the financial institution's charges and fees for maintaining such accounts and obtain a copy of the account agreement with the financial institution. Know the financial institution's schedules for posting and crediting deposits. Know what the federally insured limits are on deposits. At the end of 2010, unlimited FDIC deposit insurance coverage of IOLTA trust accounts was extended to December 31, 2012. Under the FDIC's program, IOLTA accounts are fully guaranteed by the FDIC for the entire amount in the account over and above the $250,000/per client/third person coverage available under the FDIC's general deposit insurance rules. To receive pass-through coverage, (1) the deposit account records generally must indicate the account's custodial or fiduciary nature and (2) the details of the relationship and the interests of other parties in the account must be ascertainable from the deposit account records or from records maintained in good faith and in the regular course of business by the depositor or by

some person or entity that maintains such records for the depositor. If the account receives pass-through coverage, then each owner of funds in the account is insured for his or her share in the account up to $250,000 including any other funds held by or for the owner at the same insured institution. The final rule is available at: *http://www.fdic.gov/news/board/2011Janno2.pdf*. Investigate the financial institution's requirements for opening and maintaining a client trust account such as the minimum balance to earn interest, bank charges to handle the account, check printing charges, and the collection process to clear intrastate and interstate checks and other instruments.

The Lawyers Trust Fund website (*www.ltf.org*) has a section on its site with information for financial institutions describing the IOLTA program, how a financial institution can become certified by the Lawyers Trust Fund, the forms necessary to set up an IOLTA account and how interest is to be reported and remitted.

5. Naming the Client Trust Account

The client trust account must bear the lawyer or law firm's name and include such designations as "Client Trust Account," "Client Funds Account" or similar words which would clearly identify the fiduciary nature of the account. *See* Comment [3] to Rule 1.15(b). Also, it is important for FDIC insurance coverage of the trust funds that the fiduciary nature of the account can be ascertained from the bank's deposit account records. For IOLTA accounts, do not identify the Lawyers Trust Fund of Illinois as designee, trustee or owner of the account. For non-IOLTA client trust accounts, which are opened for the benefit of a particular client or third person, the name of the account would include that fact.

6. Opening an IOLTA Client Trust Account

For an IOLTA account, the lawyer or firm enrolls in the IOLTA program by completing the sign-up forms (Notice to Financial Institution to Establish IOLTA Account and Notice of Enrollment in the IOLTA Program) and submitting the forms to the bank. The enrollment forms instruct the bank to establish an IOLTA account. The taxpayer identification number (TIN) on the account is the Lawyers Trust Fund of Illinois. The IOLTA enrollment forms may be submitted electronically or downloaded from the Lawyers Trust Fund website at *www.ltf.org* or obtained by contacting the Lawyers Trust Fund at (800) 624-8962 or (312) 938-2906.

7. Use Client Trust Account Checks that are Distinguishable from Business Account Checks

Select checks that have the client trust account name on them and are of a different color than those of the operating account so that checks written on the client trust account can be more easily distinguished from checks written on the attorney's operating account. Also, some lawyers maintain their business and personal accounts at a different financial institution from where they have their client trust accounts so that no client trust account moneys will be inadvertently accessed.

8. Select Signatories with Care

Illinois does not prohibit a lawyer from delegating check-signing authority to someone other than the lawyer. However, the lawyer has a non-delegable duty to protect and preserve the funds in the client trust account (*see In re Vrodolyk*, 137 Ill. 2d 407, 560 N.E.2d 840 (1990)) and can be disciplined for failure to supervise subordinates. *See In re Waddy*, M.R. 13084, 95 CH 686 (Ill. 1997).

D. Handling Certain Types of Funds and Property

1. Advances for Costs and Expenses

If a client advances to the lawyer money for costs and expenses to be incurred in the future, the money shall be deposited and maintained in the client trust account until the cost or expense has been incurred. *See* Rule 1.15(d). If a lawyer advances the court costs and expenses of litigation on behalf of a client, which is permitted under Rule 1.8(e), and bills the client for the expense, the funds received by the lawyer would not be deposited in the client trust account since the client is reimbursing the lawyer. Expenses must be reasonable as governed by Rule 1.5(a).

2. Handling Settlement Checks

Settlement checks in contingent fee matters typically will have as payees the client, the lawyer or lawyer's law firm and any third persons who have served a notice of a lien on the proceeds (often a medical provider). The settlement check must be deposited in the client trust account. Funds of clients and third persons include funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm; and funds in which two or more persons (one of whom may be the lawyer) claim interests. *See* Comment [2] to Rule 1.15. Some lawyers may be tempted to deposit the settlement check into the lawyer's business account and write the client's portion of the proceeds from the lawyer's own business account. This is a violation of Rule 1.15. *See In re Elias,* 114 Ill. 2d 321, 333, 449 N.E.2d 1327, 1331 (1986).

When disbursing funds, the proper procedure is to secure the signatures of all the payees and deposit the settlement check into the client trust account. A deposit in the client trust account may not be disbursed until the funds are at least available for withdrawal as determined by the account agreement with the financial institution. If a lawyer writes a check to the client or others for settlement proceeds before the settlement has been credited to the account on the theory that there is other money in the client trust account, if the check is honored it will be drawing on the funds of other clients. This is conversion because it is the unauthorized use of one client's money to pay another client under Rule 1.15(a). *See In re Thebus*, 108 Ill. 2d 255, 260, 483 N.E.2d 1258, 1260 (1985).

3. Real Estate Transactions

Lawyers who act as closing agents for real estate transactions face the dilemma of the commercial necessity of immediately issuing checks from the client trust account on funds that have not even been deposited, much less cleared the banking process. Rule 1.15B(f) permits a lawyer in the closing of a real estate transaction to disburse funds

deposited, but not yet collected, so long as the lawyer deposited the funds into a segregated Rule Estate Funds Account (REFA), established prior to the closing and maintained solely for the receipt and disbursement of such funds, and the lawyer was either acting as a closing agent as prescribed by Rule 1.15B(f)(1) or the instrument for deposit meets the "good-funds" requirements set forth in Rule 1.15B(f)(2). However, while the rule protects a lawyer from any disciplinary consequences in this context, Rule 1.15B(f) states that the disbursing lawyer is responsible for reimbursing the client trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

4. Non-Client and Third Person Claims

The duties of prompt notification, delivery and accounting of trust property also extend to third persons under Rule 1.15(e). Medical providers who have perfected their lien on the settlement funds or a lawyer who has agreed to hold earnest money as an escrowee in a real estate transaction are common examples in which a lawyer has a fiduciary duty to non-clients to protect and preserve funds the non-client is presently or potentially entitled.

5. Disputed Amounts

When there is a dispute over property held in trust, whether it be between the client and a third person or between the client and lawyer, Rule 1.15(f) requires the lawyer to maintain the disputed portion of the funds in the client trust account until the dispute is resolved. Typical examples arise in connection with amounts the lawyer is holding as an escrowee in a real estate transaction or when there is a dispute over the amount of lien asserted by a medical provider or when the client disputes the amount of the fees the lawyer claims are earned. For fee disputes with the client, Comment [8] of Rule 1.15 instructs:

> [8] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds must be promptly distributed. …

For third parties that may have lawful claims to the funds, Comment [9] of Rule 1.15 gives the following guidance:

> [9] Paragraph (f) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate

a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

6. Retainers and Advances for Fees

Effective July 1, 2023, Rule 1.5, entitled "Fees," governs how legal fees and expenses received in advance are to be handled and where they are to be deposited. Rule 1.5(d) identifies five "common" types of fee agreements and prescribes where those fees must be deposited – in the lawyer's business account or in a client trust account:

(1) *Fixed Fees*: A fixed fee, also described as a "flat" or "lump-sum" fee, is a sum of money paid by a client to the lawyer to provide a specific service for a fixed amount. The fixed amount constitutes complete payment for the performance of the described services and may be paid in whole or in part in advance of the lawyer providing those services. A fixed fee may not be deposited in the lawyer's client trust account.

(2) *Contingent Fees*: A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (c) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(3) *Engagement Retainers*: An engagement retainer, also described as a "general," "classic," or "true" retainer, is a fixed sum of money paid by a client to the lawyer to ensure a lawyer's availability during a specified period of time or for a specified matter. Funds received as an engagement retainer are earned when paid and immediately become property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. A lawyer is compensated separately for any legal services actually rendered by the lawyer. Funds received as an engagement retainer may not be deposited into a client trust account.

(4) *Security Retainers*: A security retainer, also referred to as a "security payment retainer," describes funds paid to the lawyer intended to secure payment of fees and expenses for future services and costs the lawyer is expected to perform or incur. Funds received as a security retainer remain the property of the client and, therefore, must be deposited in a client trust account and kept separate from the

lawyer's own property until the lawyer applies the retainer to charges for services that are actually rendered. The term "security retainer" should be used in any written agreement describing the retainer.

(5) *Special Purpose Retainers*: A special purpose retainer, also referred to as an "advance payment retainer," describes funds paid to the lawyer intended by the client to be present payment to the lawyer in exchange for the commitment to provide legal services in the future and may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. Ownership of a special purpose retainer passes to the lawyer immediately upon payment and is generally the lawyer's property and, therefore, may not be deposited in the lawyer's client trust account. An agreement for a special purpose retainer shall be in a writing signed by the client that uses the term "special purpose retainer" to describe the retainer and must include provisions as set forth in subparagraphs (5)(i) through (v).

While Illinois recognizes the general rule of freedom of contract between lawyers and clients with respect to fee agreements, the "guiding principle" is what is in the best interests of the client. *See* Comment [7] to Rule 1.5. The type of retainer that is appropriate will depend on the circumstances of each case, and any fee agreement should clearly define the kind of retainer being paid. In most cases, the funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer. *Id.*

Regardless of what the advance for fees is termed, all fee agreements are subject to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee and any fees that have not been earned must be refunded to the client pursuant to Rule 1.16(d). *See* Comments [3] and [7] to Rule 1.5. If a fee is not reasonable or has not been earned, it is subject to refund and any provision in an agreement that permits a lawyer to keep a fee without meeting these ethical requirements is unenforceable and a violation of Rule 1.5(c).

Nonrefundable Fee Agreements or Retainers. A client has an unqualified right to discharge a lawyer and, if discharged, the lawyer may retain only a sum that is reasonable in light of the services the lawyer performed prior to being discharged. Any agreement that purports to restrict a client's right to terminate the representation or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees is prohibited under Rule 1.5(c). *See* ABA Formal Opinion 505 (May 3, 2023) *Fees Paid in Advance for Contemplated Services* (provides guidance on handling advances for fees under the Model Rules; lawyers should look to the rules of the jurisdiction (*see* Rule 8.5 Choice of Law) in which the fee will most likely be regulated).

Practice Pointer – All retainer agreements should:

1. be in writing, signed by the client;

2. clearly disclose to the client the basis or rate of fee and nature of the retainer; and

3. indicate where the money will be deposited and how withdrawals will be handled.

For a "special purpose" or "advance payment retainer" agreement (deposit in the lawyer's business account), the agreement must include provisions #1, 2 and 3 above, and include the following five provisions as outlined in Rule 1.5(d)(5):

1. the special purpose for the special purpose retainer and an explanation as to why it is advantageous to the client;

2. that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

3. the manner in which the retainer will be applied for services rendered and expenses incurred;

4. that any portion of the retainer that is not earned or required for expenses will be refunded to the client; and

5. that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving a special purpose retainer, the agreement must so state and provide the lawyer's reasons for that condition. Other considerations:

Special purpose retainers are to be used sparingly, *i.e.,* those circumstances in which it is in the client's best interests as it relates to the representation. *See* Comment [6] to Rule 1.5.

7. Handling Electronic Payments for Legal Fees and Expenses

The use of electronic payment methods by clients to pay for legal fees and expenses has become increasingly common in the last few years. While the general consensus of authority is that lawyers may use such forms of payment (*see* ABA Formal Ethics Op. 00-419 (approved the use of credit cards to pay legal fees); ABA/BNA Lawyers' Manual on Professional Conduct, sec. 41:601-606), a lawyer who receives funds or property by any means must take reasonable steps to safeguard and segregate client and third-person funds and property pursuant to Rule 1.15.

In accepting electronic methods of payment, a lawyer needs to understand the terms of service of the electronic payment provider including knowing how, when and where funds are transferred, what any associated costs will be, and what level of security and privacy the service provider has in place. Comments [5] and [6] to Rule 1.15 instructs that a lawyer must take reasonable steps to ensure that the use of an electronic payment

method does not result in any commingling with the funds of the lawyer, does not risk the loss of any client or third-person funds, does not compromise the identity of any client or third-person funds, and assures that funds are transferred immediately to an IOLTA account or non-IOLTA client trust account maintained by the lawyer.

With regards to credit cards, ISBA Ethics Opinion 14-01 (May 2014) opines that when a lawyer accepts credit card payments for both earned fees (the lawyer's property) and security retainers (the client's property), the lawyer must designate two accounts - a trust account and a business account - with the credit card company. Some lawyer-friendly credit card processors like LawPay (www.lawpay.com/isba), an ISBA partner vendor, have the ability to direct funds separately into lawyers' business and trust accounts thereby avoiding commingling. A lawyer also must carefully consider how credit card service fees and chargebacks will be addressed and take adequate precautions to protect what the lawyer is required to maintain in trust. A lawyer may charge service fees to clients, according to ISBS Op. 14-01, so long as the "fee is reasonable and…is disclosed to the client, preferably in writing, before or within a reasonable time after commencing the representation, such as in the engagement agreement." Before accepting credit card payments, a lawyer should have a thorough understanding of the agreement with the credit card company.

7a. Handling E-Filing Electronic Payments

Lawyers often pay filing fees from funds advanced by their clients. Since these funds belong to the client, they must be held only in an IOLTA account or a non-IOLTA client trust account established for the benefit of the client. Traditionally lawyers used paper checks to pay filing fees and other court costs from IOLTA accounts and other client trust accounts. Mandatory e-filing renders that practice obsolete and presents the question of which methods of electronic payment may be made from an IOLTA or client trust account. The Illinois Supreme Court ordered the implementation of mandatory e-filing in all Illinois civil cases effective January 1, 2018. Documents in civil cases must be filed electronically through a centralized manager called eFileIL. In addition, filing fees will need to be paid electronically.

Permitted E-filing payment methods are credit cards, debit cards, and E-checks, which are paperless transactions that are cleared through the ACH (Automated Clearinghouse) network. Using these methods of payment from the client trust account is consistent with Rule 1.15. Unlike paper checks, however, electronic payments usually contain less information than a paper check; therefore, lawyers need to be conscientious about make clear contemporaneous record of the date, purpose and payee on each transaction. Also, lawyers need to account for fees for e-filing transactions, including any payment and provider service fees.

Further guidance can be found in *Guide to E-filing and IOLTA Accounts*, *prepared by the Lawyers Trust Fund of Illinois (LTF) in collaboration with the ARDC, available on the LTF website (*www.ltf.org*) or ARDC website.* This guide responds to some of the common questions and concerns of lawyers as they make the transition to electronic payment of filing fees.

8. Withdrawing Earned Fees

A lawyer must promptly withdraw funds held in the client trust account from which the lawyer's fees are to be withdrawn once the fees have been earned and there is no dispute over the amount of funds to be withdrawn. *See* Rule 1.15(f). However, before fees can be withdrawn the lawyer must apprise the client of the withdrawal and give the client a reasonable opportunity to raise any objection. While a lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. Therefore, any disputed portion of the funds must be kept in a client trust account until there is a prompt resolution of the dispute, such as arbitration. The undisputed portion should be promptly distributed. *See* Comment [9] to Rule 1.15.

For contingent fee matters, this is accomplished in the settlement statement required by Rule 1.5(c), which shows the amount that will go to the lawyer. For hourly-fee agreements, where the lawyer has received a security retainer and the funds are being held in the client trust account, the lawyer would send a billing statement indicating the services rendered and the amount the lawyer intends to withdraw from the client trust account unless the lawyer hears otherwise from the client within a reasonable period of time.

In withdrawing the undisputed portion, the lawyer should promptly write a check, payable to the lawyer's law firm, for the full amount of the fee earned. The lawyer must not let earned fees accumulate in the client trust account and withdraw fees on an "as needed" basis; otherwise, commingling occurs, and consequently, the trust funds are put at risk. Also, the appearance may be created that the lawyer is hiding money in the account to avoid creditors or income taxes thereby exposing the client trust account to possible attachment or levy by the lawyer's creditors.

In withdrawing earned fees, the lawyer should make the trust check payable to the lawyer's law firm and indicate in the memo portion of the check the purpose of the payment and the client matter, as well as make the appropriate entries in the checkbook register, client ledger and disbursement journal.

Practice Pointer – The payee on a trust check for earned fees should be made payable to the lawyer's law firm. Trust checks for earned fees made payable to the lawyer's own creditors or made out to cash make it difficult to trace the source and purpose of the payment and could create the appearance that the lawyer is using the client trust account as a personal account, thereby endangering the account's status as a client trust account, or that the lawyer is using client funds for personal purposes.

9. Dealing with Unclaimed or Unidentified Funds

Situations may arise where there is an unclaimed or unidentified amount of funds in the client trust account due to (1) the disappearance of a client or third person before a client trust account check could have been issued; (2) the fact that the client trust account check has yet to be cashed; or (3) there is an unexplained amount of money that cannot be traced as belonging to either a client, a third person or the lawyer. Whatever the situation, the bottom line is that the lawyer is not entitled to take the money.

a. Unclaimed Funds

When the person to whom trust funds are being held disappears before the lawyer has issued a check to that person, the lawyer must first take all reasonable steps to locate that person. *See In re Walner*, 119 Ill.2d 511, 519 N.E.2d 903 (1988). How much effort a lawyer must undertake to find the missing client or third person will vary in each case. Typically, a lawyer would check with the post office to see if the client or third person left a forwarding address. The lawyer would then send a letter to the person's last known address by regular mail and by certified return receipt advising that person that the lawyer is holding their funds and asking that person for direction in disbursing the money. The lawyer may attempt to contact the person's relatives, employers, neighbors and friends, publish notice in places where that person might frequent, use an investigator or check with the Social Security Administration. *See Michigan State Bar Opinion RI-38* (November 20, 1989).

If the client or third person cannot be located and the funds have remained unclaimed for three years, under the Revised Disposition of Unclaimed Property Act, 765 ILCS secs. 1026/1 *et seq*. (eff. 1/1/18), the funds are presumed unclaimed and the lawyer will remit the funds to the Illinois State Treasurer thru the "I Cash" program on the Illinois State Treasurer website at http://illinoistreasurer.gov/; *see* Comment [4] to Rule 1.15B.

The same analysis applies if a client trust account check was issued but had not been cashed. The lawyer should contact the person to whom the check is made payable at the person's last known address, advising that person that the client trust account check has not been cashed and that unless that person advises the lawyer to issue a replacement check, the funds will be presumed to be unclaimed in accordance with the Revised Disposition of Unclaimed Property Act and the funds will be remitted to the Illinois State Treasurer.

b. Unidentified Funds

Sometimes ownership of the funds cannot be traced to either a client, a third person or the lawyer. This could be typically due to mathematical error, faulty bookkeeping or the lawyer failure to withdraw past earned legal fees and now lacks sufficient records to claim. Rule 1.15B(d) establishes a procedure by which

lawyers remit unidentified trust funds to the Lawyers Trust Fund when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful as follows:

> A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If, after 12 months from the discovery of the unidentified funds, the lawyer determines that further efforts to ascertain the ownership or secure the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. A lawyer who remits funds in error or subsequently identifies the owner of the remitted funds may make a claim for a refund to the Lawyers Trust Fund. The Lawyers Trust Fund will return the funds to the lawyer after verifying the claim. A lawyer who exercises reasonable judgment in making a determination under this paragraph will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

Instruction on remitting unidentified trust funds to the Lawyers Trust Fund are on the Lawyer Trust Fund website (www.ltf.org) at http://ltf.org/lawyers/unidentified-funds/.

Rule 1.15B(d) applies only to trust funds for which no owner can be ascertained. Trust funds where the owner is known but the funds have not been claimed should be handled according to the Revised Disposition of Unclaimed Property Act. *See* Comment [4] to Rule 1.15B and discussion at IV.D.9.a., *supra*.

"Unidentified funds" are defined in Rule 1.15C(j) as "amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm."

10. Bank Charges and Fees

Rule 1.15(c) specifically provides that "[a] lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges or minimum balance requirements on that account, but only in an amount necessary for that purposed." For an IOLTA account, the Lawyers Trust Fund of Illinois will pay certain "[a]llowable reasonable fees," defined in Rule 1.15C(i) as "per-check charges, per-deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account." *See* Rule 1.1.5B(c)(4)(iii).

Practice Pointer - Any deposits of the lawyer's own funds to cover bank charges and fees must be entered into and accounted for in the trust accounting records that must be maintained. *See* Comment [4] to Rule 1.15.

V. Client Trust Accounting

A. Establishing Accountability

A lawyer has the duty to give an accurate and complete accounting to the client or third person. *See* Rule 1.15(e). In order to fulfill that duty, Rule 1.15A also requires that all complete records of all client trust account funds and other property held pursuant to Rule 1.15 are kept for seven years after the end of the representation. For client trust account funds, the "complete records" that must be prepared and maintained are set forth in some detail in Rule 1.15A. There are various manual and automated accounting systems that are available. In the first instance, many lawyers will consult with an accountant to set up an appropriate accounting system. Whichever accounting method or system is used, it must be one that the lawyer understands, puts into practice, and follows (and that others auditing the lawyer's account can follow).

In establishing an accounting system that meets the requirements of Rule 1.15, the following accounting principles and the specific account and recordkeeping requirements of Rule 1.15A should be kept in mind:

1. Separate Clients Should Be Thought of as Separate Accounts

With an IOLTA client trust account, where the funds of more than one client or third person are being held at any given time (a/k/a pooled), it is important to keep in mind that while funds deposited in the client trust account belong to more than one person, the lawyer must know and account for each client or third person's funds as if each client or third person had a separate account. Client A's funds have nothing to do with Client B's funds. NEVER allow the funds being held for one client or third person to be used, even momentarily, to satisfy the obligations of another client or third person. Separation is obtained by maintaining a separate log or subsidiary ledger sheet for each client or third person. In this way, the lawyer will be able to account exactly for all money received or paid out on behalf of each client or third person at any given time as well as know the total balance of all client and third person funds the lawyer is required to maintain in the client trust account. Also, for FDIC insurance to cover each client or third person's funds in the pooled client trust account up to the federally insured limits, the name and ownership interest of each client or third person must be ascertainable from the client trust account records maintained by the lawyer. *See* www.fdic.gov.

Recordkeeping Requirement: Rule 1.15A(b)(2) requires that for all client trust accounts contemporaneous ledger records must be prepared and maintained for each separate trust client or beneficiary whose funds are being held in trust. The ledger records must show for each separate trust client or beneficiary the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed.

2. You Can't Spend What You Don't Have or Timing is Everything

A deposit in the client trust account cannot be disbursed until the deposited item has cleared the banking process and been credited to the client trust account. The funds in the client trust account cannot be used by anyone other than the client or third person who owns them, and the lawyer is responsible for assuring that the funds are not, even inadvertently, diverted to another.

The rule of uncollected funds is simply: if you write a check from the client trust account after you have deposited a check or draft on behalf of a particular client, but before the deposited monies have cleared the banking process and have been credited to the client trust account, if the check is presented, either it will bounce or you will be drawing on funds belonging to other clients or third persons. This is considered conversion even if the lawyer has no dishonest motive and no client or third person is ultimately harmed. *In re Clayter,* 78 Ill. 2d 276, 283, 399 N.E.2d 1318 (1980) Conversion is defined as any unauthorized use of trust funds that deprives the client or third person of the use of those funds even temporarily. *See In re Lenz,* 108 Ill. 2d 445, 484 N.E.2d 1093 (1985).

For example, do not be tempted to do your client a favor by writing a check to the client for settlement proceeds before the settlement check has cleared on the theory that there is other money in the client trust account. By doing so, you are putting at risk the funds of other clients or third persons. *See In re Reeves*, M.R. 11056, 93 SH 599 (Ill. 1995) (lawyer suspended for, *inter alia*, conversion of client funds where the lawyer would often issue a client a check drawn on the client trust account prior to the deposited settlement check clearing and its proceeds being posted to the client trust account. His clients would frequently cash their checks on the same day the client trust account check was issued and the lawyer's bank would pay out on the check from the funds currently in the account belonging to other clients).

Therefore, it is important to know the financial institution's check clearing procedures and schedules of when funds can be withdrawn. The time it takes for funds to become available after deposit can vary between a day to several weeks depending on the form in which the money is deposited. Ask your financial institution for their schedule of when deposits are posted to the account. Many banks have automated account information systems where you can check the activity on an account.

Automatic Overdraft Notification Rule: Rule 1.15B(e) requires all IOLTA and non-IOLTA client trust accounts be established at financial institutions that have agreed to notify the Attorney Registration and Disciplinary Commission (ARDC) when a client trust account is overdrawn, irrespective of whether or not the instrument is honored. A bounced check drawn on a client trust account can be an early warning that a lawyer is engaging in conduct that could injure clients. When the ARDC receives an overdraft notice, an investigation is opened and the lawyer will be required to explain why and provide proof that the lawyer is complying with the recordkeeping requirements of Rule 1.15C. Experience demonstrates, however, that most lawyer regulatory action under an overdraft notification rule does not result in lawyer disciplinary charges. Instead, the rule helps identify those lawyers who simply need education on managing their client trust accounts.

Practice Tip: Normally, checks will be presumed good and many financial institutions will automatically honor and credit a deposit a certain number of banking days after deposit without actually having received verification from the drawee bank that the funds have been paid. In such cases, the lawyer can safely disburse funds against the check when the lawyer's bank credits the deposit to the account. However, even after an item has been posted to an account, it still may be returned due to insufficient funds, stop payment or improper endorsement and a lawyer may not learn of the dishonor until several days after the item was posted. When a lawyer has any concerns that a check might be dishonored, the safest way to determine that an item has cleared is to call the bank upon which it is drawn to find out if the item has been honored.

Real Estate Transactions: Lawyers who act as the closing agents for real estate transactions face the dilemma of the commercial necessity of immediately issuing checks from the client trust account on funds that have not even been deposited, much less cleared the banking process. Rule 1.15(f) permits lawyers in the closing of a real estate transaction to disburse funds deposited, but not yet collected, so long as the lawyer deposited the funds into a segregated Real Estate Funds Account (REFA), established prior to the closing and maintained solely for the receipt and disbursement of such funds. Also, the lawyer must either be acting as a closing agent as prescribed in subparagraph (f)(1) or the instrument for deposit must meet the "good-funds" requirements set forth in subparagraph (f)(2). However, while the rule protects a lawyer from any disciplinary consequences in this context, the rule may not affect the lawyer's civil liability if any deposit does not clear. *See* Rule 1.15(f)(2).

3. Always Maintain an Audit Trail

Accountability requires that all aspects of the transaction can be traceable from the time of receipt of the funds, up to and including the disbursement of the funds. A "paper" trail consists of the physical or digital record of documented evidence that tracks the sequence of events or transactions. In the typical transaction, where the client gives funds to the lawyer, who then deposits those funds in the client trust account and pays funds out at the direction of the client, the following documents would provide a paper trail for the lawyer of what actions were taken:

- the initial deposit slip or copy of a bank receipt, which would show the date of deposit, the amount of deposit, the name of the client or third person on whose behalf the money has been received, the source of the funds and the date stamp showing the date the deposit was received by the bank;
- the bank statement, which would show that the bank credited the deposit and when it was credited;
- the checkbook stub, which would show when disbursements were made and to whom;

- the disbursement check, which would show the date it was drawn, the amount and the name of the payee, the purpose of the check, the order of negotiation (from the endorsements) and the date deposited for collection;

- the bank statement, which would show the date the client trust account was actually charged for the check; and

- any file documentation that would explain the deposit or the authority for how the money should be distributed, such as a closing statement, a court order or a signed authorization by the client for the disbursement of funds.

Each deposit and disbursement should describe the client or third person and the matter to which it relates. In addition, for each electronic transfer, the journals should include the name of the person authorizing transfer and the financial institution and account number to or from which funds were transferred. *See* Rule 1.15A(b)(1).

Recordkeeping Requirement: Rule 1.15A(b)(1)-(8) requires specific recordkeeping requirements for all IOLTA and non-IOLTA client trust accounts. Rule 1.15A(b)(1)-(8) proscribes the following records:

Maintenance of complete records of client trust accounts shall require that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits to and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited and the date, payee, client matter, and purpose of each disbursement. In addition, for each electronic transfer, the journals should include the name of the person authorizing transfer and the financial institution and account number to or from which funds were transferred;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited; the date of each deposit; the names of all persons for whom the funds are or were held; the amount of such funds; the dates, descriptions, and amounts of charges or withdrawals; and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain three-way reconciliation reports of all client trust accounts on at least a quarterly basis; and;

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records may be maintained by electronic, photographic, or other media provided that printed copies can be produced and the records are readily accessible to the lawyer.

B. Essential Accounting Systems

Rule 1.15 requires lawyers to do more than just deposit client or third person funds into a separate and identifiable client trust account. Under Rule 1.15(e), the lawyer also has the duty to give an accurate and complete accounting to the client or third person concerning how their property was handled by the lawyer. Rule 1.15A(b)(1) through (7) sets forth the accounting records or books listed below that must be maintained for funds held in the client trust account. Trust account records required under the rule can be kept manually or electronically through some type of accounting software program so long as printed copies can be produced and the records are readily accessible to the lawyer. *See* Rule 1.15A(b).

There are various manual and automated accounting systems that are available. In the first instance, many lawyers will consult with an accountant to set up an appropriate accounting system. Basic accounting journals and forms that can be used as guides, as well as a form reconciliation report can be downloaded from the ARDC website at www.iardc.org under the "Client Trust Account" tab. For records kept manually, the lawyer must record each trust account transaction a number of different times. For example, for a trust account check, the lawyer would have to prepare the check, enter the check into the check register, enter the check in the client subsidiary ledger, and enter the check in the disbursement journal.

In comparison, the use of computer software for trust accounting permits the lawyer to only make one computer entry and the software will enter the information into the correct ledgers and journals assuming the software is properly setup that way. This ensures that all the required journal entries are up-to-date and saves time for the lawyer. While a lawyer can purchase software specifically designed for attorney trust accounting, two commonly used, generic accounting programs that can be modified to provide the necessary trust account records are Quicken® and *QuickBooks*. Whichever accounting system is used it must be one that the lawyer understands, puts into practice, and follows (and that others auditing the lawyer's account can follow).

Required Journals: Rule 1.15A(b) requires the following journals must be prepared and maintained, either manually or computerized, for all IOLTA and non-IOLTA client trust accounts:

1. Receipts and Disbursement Journals - Rule 1.15A(b)(1).

These journals provide a chronological record of all deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited and the date, payee, client matter, and purpose of each disbursement. In

addition, for each electronic transfer, the journals should include the name of the person authorizing transfer and the financial institution and account number to or from which funds were transferred.

TRUST ACCOUNT RECEIPTS JOURNAL

TRUST ACCOUNT NO. _____

ACCOUNT NAME: _____

FINANCIAL INSTITUTION _____

DATE	SOURCE	CLIENT	CASE/FILE NO.	AMOUNT OF DEPOSIT	TOTAL DAILY BALANCE

TRUST ACCOUNT DISBURSEMENTS JOURNAL

TRUST ACCOUNT NO. _____

ACCOUNT NAME: _____

FINANCIAL INSTITUTION _____

DATE	CHECK NO.	PAYEE	PURPOSE	CLIENT	CASE/FILE NO.	AMOUNT

2. Client Ledger Pages - Rule 1.15A(b)(2).

This ledger records chronologically for each client or third person for whom funds are held in trust all receipts, disbursements and balances. Without a client subsidiary ledger, the lawyer would likely be unable to know the amount of funds that must be maintained for a given client or third person and to provide an accurate and complete accounting on request. Also, the FDIC insurance rules require that to fully insure each client's or third person's funds being held in the IOLTA client trust account, each client and third person's interests must be ascertainable from the client trust account records. *See* discussion on Page 15-16. Each client subsidiary ledger would include:

- Separate subsidiary ledger pages for each client or third person for whom funds are held in trust.
- Posting transactions (receipts and disbursements) by date, purpose and amount.

- If the client trust account is opened for the benefit of one client or third person or if the account allocates interest to each client or third person, any net interest (accrued interest less service charges) credited to the client or third person.

TRUST ACCOUNT CLIENT LEDGER PAGE

NAME OF CLIENT/THIRD PERSON: _____

LEGAL MATTER/ADVERSE PARTY: _____

FILE OR CASE NUMBER: _____

DATE	DESCRIPTION OF TRANSACTION	PAYOR/ PAYEE	CHECK NO.	FUNDS PAID	FUNDS RECEIVED	BALANCE

3. Checkbook Register - Rule 1.15A(b)(4).

A client trust account checkbook register is like any other checkbook register. It is used to record deposits and client trust account checks in sequential order and is also used to maintain a running balance. To properly maintain the checkbook register, check stubs, bank statements, records of deposit, and checks or other records of debits must also be maintained.

TRUST ACCOUNT CHECKBOOK REGISTER

TRUST ACCOUNT NO. _____

ACCOUNT NAME: _____

FINANCIAL INSTITUTION _____

DATE	CHECK NO.	PAYEE OR DEPOSIT SOURCE	CASE/FILE NO.	AMOUNT OF CHECK	AMOUNT OF DEPOSIT	TOTAL DAILY BALANCE

4. Reconciliation Report - Rule 1.15A(b)(7).

Prepare and maintain "three-way" reconciliation reports of all client trust accounts preferably on a monthly basis but not less than on a quarterly basis, including reconciliations of ledger balances with client trust account balances. Under Rule 1.15A(c), a "three-way" reconciliation consists of the following three steps:

(1) Take the balance in the checkbook register at the end of the reconciliation period and compare it with the adjusted bank statement balance for that period. The bank

statement balance is adjusted by adding deposits not yet credited and subtracting any checks or other debits not yet posted to the account.

(2) Add together the ending balances of all client ledgers.

(3) Subtract the disbursements journal balance from the receipts journal balance by (i) taking the ending figure calculated for the previous period, (ii) adding the receipts journal balance for the period in question, and (iii) subtracting the disbursements journal balance for that period.

All three balances must be the same and equal to the adjusted bank statement (less for outstanding checks & net interest for IOLTA accounts, plus in-transit deposits).

TRUST ACCOUNT RECONCILIATION REPORT

PERIOD OF _____ **to** _____

TRUST ACCOUNT NO.: _____
ACCOUNT NAME: _____
FINANCIAL INSTITUTION: _____

Checkbook Balance:	**$**	_____
Receipts Minus Disbursement Journals Balance:	**(**	_____ **)**
Client Ledger Pages Balance:		_____

Bank Statement

Balance on _____	**$**	_____
Plus outstanding deposits		_____
Less net interest accrued	(	_____)
Less outstanding checks	(	_____)

Adjusted Bank Statement Balance: _____

Required Copies of Account Records: In addition to preparing and maintaining the above journals, Rule 1.15A(b) requires that copies of the following records generated in operating the client trust account be maintained:

- copies of all accountings, to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them - Rule 1.15A(b)(3);

- all check stubs, bank statements, records of deposit, and checks or other records of debits – Rule 1.15A(b)(4);

- copies of all retainer and compensation agreements with clients - Rule 1.15A(b)(5); and

- copies of all bills rendered to clients for legal fees and expenses - Rule 1.15A(b)(6).

Rule 1.15A(a) requires that all of the books and records required under the rule must be maintained for a period of seven years after termination of the representation. The records can be maintained by electronic, photographic or other media provided that printed copies can be produced and the records are readily accessible to the lawyer as set forth in Rule 1.15A(b).

In addition, Rule 1.15A(b)(8) requires a lawyer to make "appropriate arrangements" for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice. *See also* Comment [5] to Rule 1.3 (duty of diligence may require sole practitioner to a successor plan in place in the event of death or disability).

C. Tracking Client Trust Account Funds: Record Entries

1. Depositing Client Trust Account Funds

Deposit client funds in the client trust account promptly upon receipt. Generate the following:

a. Deposit slip (receipt for cash), which identifies client or file for whom deposit is being made;

b. Checkbook register deposit entry;

c. Client subsidiary ledger entry; and

d. Cash receipts journal entry.

Checks payable jointly to the client and the lawyer should be deposited in the client trust account and not endorsed over to the client.

2. Disbursing Client Trust Account Funds

Disbursements to the client or on behalf of the client must be made promptly after the deposit has been credited. Generate the following:

a. Check made payable to the client or third party, with notation of the client matter and purpose in memo portion of the check;

b. Checkbook register disbursement entry;

c. Client subsidiary ledger entry; and

d. Cash disbursements journal entry.

3. Proper Methods For Withdrawing Legal Fees

Before an earned legal fee may properly be withdrawn from a client trust account, the client should be given notice of the nature of the services rendered and the amount of the legal fee proposed to be paid to the lawyer. *See In re Smith*, 63 Ill. 2d 250, 347 N.E.2d 133 (1976). If no objection is received within a reasonable time, the lawyer may withdraw the fee from the client trust account.

Moreover, if no dispute over the fee exists, the lawyer's fees which are justly due and owing, may not remain in the client trust account, but MUST be promptly withdrawn. *See* Rule 1.15(f). If not, the lawyer is commingling his or her own funds with the clients' funds and, as a consequence, is endangering the integrity of the client trust account. *See In re Enstrom*, 104 Ill. 2d 410, 472 N.E.2d 446 (1984).

Disbursements out of the client trust account for earned legal fees should be made payable to the lawyer and not to a third party creditor of the lawyer. Otherwise, a lawyer creates the appearance of using the client trust account for the lawyer's own personal or business expenses. This could potentially subject the client trust account to attachment by the lawyer's creditors, thereby endangering existing client funds and the status of the account as a client trust account.

4. Reconciling Account Records with Monthly Bank Statements

Rule 1.15A(b)(7) requires that a "three-way" reconciliation be made for all IOLTA and non-IOLTA client trust accounts, on at least a quarterly basis.

Rule 1.15A(c) sets forth the three steps that consist of a "three-way" reconciliation as follows:

> (1) Take the balance in the checkbook register at the end of the reconciliation period and compare it with the adjusted bank statement balance for that period. The bank statement balance is adjusted by adding deposits not yet credited and subtracting any checks or other debits not yet posted to the account;
>
> (2) Add together the ending balances of all client ledgers; and
>
> (3) Subtract the disbursements journal balance from the receipts journal balance by
>
> (i) taking the ending figure calculated for the previous period,
>
> (ii) adding the receipts journal balance for the period in question, and
>
> (iii) subtracting the disbursements journal balance for that period. All three balances (figures from the check register, client ledgers, and receipts/disbursement journals) must agree with the adjusted bank statement balance.

The figures for Step 1, 2, and 3 (figures from the check register, client ledgers, and receipts/disbursement journals) must be equal and agree with the adjusted bank

statement balance. If they are not, look for entries that do not match or addition or subtraction errors, until all three figures are the same.

5. Interest and Bank Costs

a. For IOLTA accounts, interest credits are paid by the financial institution directly to the Lawyers Trust Fund of Illinois, and certain legitimate and reasonable bank costs are paid by the Lawyers Trust Fund directly to the bank. If your monthly bank statement reflects interest credited but not yet paid out to the Lawyers Trust Fund or bank charges not yet paid by the Lawyers Trust Fund, you should adjust the balance shown on the monthly bank statement accordingly. The interest and the charges should not be entered on your ledgers, cash journals, or checkbook register.

b. For non-IOLTA client trust accounts, where the interest is credited to individual clients or beneficiaries, after bank costs are deducted, you will not adjust the balance shown on the bank statement, but you must add the net interest to your client subsidiary ledger pages, your cash receipts journal, and your checkbook register.

6. Monthly client trust account reconciliation.

The bank statement balance must reconcile with the other ledger balances as follows:

a. Take the balance shown on the monthly bank statement. (For IOLTA accounts, that balance may have to be adjusted as discussed in (5)(a) above.)

b. Add any deposits not credited on the bank statements.

c. Subtract checks not debited on the bank statement.

d. The balance should be equal to the three balances described in Step 1, 2 and 3 -- the client subsidiary ledger pages balance, the cash disbursements and receipts journals balance, and the checkbook register balance.

Practice Tips:

- **Have an Accounting System** - You must have a way of accounting to a client or third persons as to how their funds were handled. Rule 1.15A does not prescribe any particular accounting system or method but does mandate that specific recordkeeping be performed and specific records for client trust accounts be maintained as set forth in Rule 1.15A(b)(1)-(8). Some common accounting record systems are discussed below. However, you must have a system that you and anyone else looking at your records can understand. If you don't know how to set up an accounting system, consult with an accountant. *See In re Sebela*, M.R. 10859, 92 CH 577 (Ill. 1995) (conversion of client funds occurred because lawyer had no accounting system, withdrew his fees on an "as needed" basis based on his memory and, consequently, paid himself more than what he was entitled).

- **Reconcile Monthly** - You should have a practice where you reconcile all of your accounts on a monthly basis, regardless of whether you do your own accounting or you have someone assisting you. if you fail to reconcile on a regular basis, you may not be aware of bank errors, miscalculations and employee embezzlement. Rule 1.15A(c) requires that "three-way" reconciliations (the three steps of which are described in paragraph (c)) be performed for IOLTA and non-IOLTA client trust accounts on at least on a quarterly basis and that records of those reconciliations be maintained. However, since most financial institutions require notification of any errors less than 90 days after a statement is issued, you run the risk of waiving your right to contest any bank errors and you could be held financially responsible for any discrepancies.

- **Don't Share Client Trust Accounts With Lawyers Not in the Same Firm** - A lawyer has a non-delegable fiduciary duty to safeguard client or third person property entrusted to the lawyer during a representation. If you are in a law firm, each lawyer in the law firm need not open up a separate client trust account for each lawyer in the firm. However, you must not allow lawyers that are not in your law firm to deposit trust funds into the law firm's client trust account; you are responsible for those funds. Conversely, if you deposit funds entrusted to you by a client or third person for safekeeping, you cannot deposit those funds into another lawyer's client trust account.

- **Do Not Withdraw Your Fees in the Form of Trust Checks Payable for Your Own Personal Expenses** - Only client related charges, such as court costs, expert witness fees or lawyers' fees, may be paid out of the client trust account. The lawyer should not withdraw earned fees from the client trust account in the form of trust checks payable to the lawyer's own creditors. An earned fee must be withdrawn promptly from the client trust account and deposited in the lawyer's own personal or business account. For example, a trust check made payable to the gas or electric company to pay the lawyer's gas or electric bill creates the appearance that the lawyer is using the client trust account as a personal account and thereby endanger its status as a client trust account, or that the lawyer is using client funds for personal purposes.

- **Withdraw Your Fees Promptly from the Client Trust Account Once You have Earned Them** - When a fee has been earned, the lawyer must promptly write a check, payable to the lawyer or the lawyer's law firm, for the full amount of the fee earned. The lawyer must not let earned fees accumulate in the client trust account and withdraw fees on an "as needed" basis; otherwise, commingling occurs and, consequently, the trust funds are put at risk. Also, the appearance is created that the lawyer is hiding money in the account to avoid creditors or income taxes. In which case, the client trust account could be subject to attachment or levy by the lawyer's creditors.

- **No Cash or ATM Withdrawals** – Rule 1.15(g) prohibits withdrawals from a client trust account must be made only by check payable to a named payee

or by electronic transfer and not by cash. No check may be made payable to "cash." No withdrawal of cash may be made from a deposit to a client trust account or by automated teller or cash dispensing machine.

- **Let Deposits Clear Before Writing Checks** - The important thing to remember is that disbursing funds before the deposit has cleared puts the funds of other clients or third persons at risk of loss, thereby resulting in conversion. Also, if there are insufficient funds at the time the trust check is presented for payment, the trust check will be dishonored and the financial institution will report the overdraft to the ARDC, irrespective of whether or not the trust check is honored. *See* discussion "You Can't Spend What You Don't Have or Timing is Everything" on Page 29.

- **If a Mistake Happens, Don't Panic** - If you find that an error occurred in making calculations or deposits, don't panic. Take remedial action. Call your financial institution. Failure to act not only may compound the problem but failure to notify the financial institution of any errors, forgeries, unauthorized signatures or alterations within a certain period of time may waive all claims that you may have against the financial institution regarding these problems.

7. Retention of Records

Rule 1.15A Required Records sets forth the "complete records" of all client trust account funds and other property maintained in trust pursuant to Rule 1.15 that must be kept by the lawyer for a period of seven years after termination of the representation. "Complete records" for all trust funds held in IOLTA and non-IOLTA client trust accounts that must be maintained is set forth in Rule 1.15A(b)(1)-(8). Rule 1.15A(b) expressly allows the records required under the rule to be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Also, under Supreme Court Rule 769(2) Maintenance of Records, all financial records related to a lawyer's practice of law must also be maintained for a minimum of seven years after the fiduciary obligation ends. Financial records include, but are not limited to, bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports. Under the rule, the records maintained can be originals, copies, or computer-generated images. If a computer accounting software package is used for the client trust accounting, to guard against the potential loss of such computer-stored data, experts suggest that you print out a hard copy of the accounting records on a monthly basis. Also, it is suggested that the data is backed up on a regular basis.

VI. Sample Client Trust Account Transactions, Trust Account Trial Balances and Trust Account Reconciliation

A. Sample Client Trust Account Transactions

Julia Dolan is a sole practitioner. On January 31, 2023, the bank statement balance for Dolan's IOLTA client trust account is $10,241.66. These funds are identified as follows:

a. $10,000 represents escrow money which was deposited into Dolan's client trust account on January 1, 2023, on behalf of her client Ron Roper.

b. $200 represents funds of Julia Dolan which were deposited into the client trust account in order to maintain a minimum balance necessary to avoid bank service charges.

c. $41.66 represents the interest credited for the month of January which has yet to be paid by the bank to IOLTA.

The only client subsidiary ledger pages with outstanding balances on January 31, 2023, are those for Roper and Dolan. Because this is an IOLTA account, the interest figure ($41.66) does not appear on the client subsidiary ledger.

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **Ron Roper**
Legal Matter/Adverse Party: **Real Estate Escrow-Hadley**
File or Case Number: **10-161**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
01/01/23	Deposit-Escrow			$10,000	$10,000

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **Julia Dolan, Attorney at Law**
Legal Matter/Adverse Party: **None**
File or Case Number: **None**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
01/01/09	Minimum balance amount to avoid service charge.			$200	$200

On February 1, 2023, Joan Smith, a client, gives Dolan a $1000 retainer. The fee agreement with Smith provides that the retainer is a security retainer to be placed in the client trust account and withdrawn as earned.

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **Joan Smith**
Legal Matter/Adverse Party: **Marital Dissolution**
File or Case Number: **10-1057**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
02/01/23	Retainer-Smith			$1,000	$1,000

Cash Receipt Journal
Client Trust Account No. 123-456
February 2023

DATE	SOURCE	CLIENT	DEPOSIT	AMOUNT
02/01/23	Smith - Check #2398	Joan Smith	50062	$1,000

On February 5, 2023, client James Johnson is ordered to endorse his federal and state tax refunds of $2,000 and deposit them into Dolan's client trust account. The refunds will be distributed upon further order of the court.

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **James Johnson**
Legal Matter/Adverse Party: **Dissolution**
File or Case Number: **09-1058**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
02/05/23	Red/State Refund			$2,000	$2,000

James Johnson Continued

Cash Receipt Journal
Client Trust Account No. 123-456
February 2023

DATE	SOURCE	CLIENT	DEPOSIT	AMOUNT
02/01/23	Smith - Check #2398	Joan Smith	50062	$1,000
02/05/23	Fed/State Refund	James Johnson	50145	$2,000

On February 13, 2023, Dolan receives a settlement check in the amount of $15,000 from Ace Insurance Company for her client Bill Grey. Dolan prepares a written settlement statement, in accordance with the terms of the written contingent fee agreement and Rule 1.5(c):

Personal Injury
Settlement Statement
Bill Grey vs. Ace Insurance Co.

Settlement Amount from Ace Insurance Co.		$ 15,000.00
Court Reporter Inc.	$ 400.00	$
Process Server Inc.	$ 60.00	$
Dr. Bailey, Expert	$ 340.00	$
Total Expenses		$ 800.00
Attorney Fees (1/3 gross rec.)		$ 5,000.00
Amount Due Bill Grey		$ 9,200.00

On February 20, 2023, Dolan makes the disbursements in accordance with the settlement statement after allowing seven days for the insurance company check to clear.

Name of Client: **Bill Grey**
Legal Matter/Adverse Party: **Personal Injury-Ace Ins. Co.**
File or Case Number: **05-1002**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
02/13/23	Ace Insurance Co.			$15,000	$15,000
02/20/23	Court Reporter Inc.	1005	$400		$14,600
02/20/23	Process Server Inc.	1006	$60		$14,540
02/20/23	Dr. Bailey	1007	$340		$14,200
02/20/23	Bill Grey	1008	$9,200		$5,000
02/20/23	Julia Dolan-Fees	1009	$5,000		$0

Cash Receipt Journal
Client Trust Account No. 123-456
February 2023

DATE	SOURCE	CLIENT	DEPOSIT	AMOUNT
02/01/23	Smith - Check #2398	Joan Smith	50062	$1,000
02/05/23	Fed/State Refund	James Johnson	50145	$2,000
02/13/23	Ace Insurance Co.	Bill Grey	62001	$15,000

Cash Disbursements Journal
Client Trust Account No. 123-456

February 2023

DATE	CHECK	PAYEE	PURPOSE	CLIENT	AMOUNT
02/20/23	1005	Court Reporter Inc.	Costs	Grey	$400
02/20/23	1006	Process Server Inc.	Costs	Grey	$60
02/20/23	1007	Dr. Bailey	Costs	Grey	$340
02/20/23	1008	Bill Grey	Settlement	Grey	$9,200
02/20/23	1009	Julia Dolan	Fees	Grey	$5,000

On February 21, 2023, the court orders that $1,500 be paid to Johnson's wife from the escrowed income tax refunds.

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **James Johnson**
Legal Matter/Adverse Party: **Dissolution**
File or Case Number: **03-1058**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
02/05/23	Red/State Refund			$2,000	$2,000
02/21/23	Mrs. James Johnson	1010	$1,500		$500

Cash Disbursements Journal
Client Trust Account No. 123-456

February 2023

DATE	CHECK	PAYEE	PURPOSE	CLIENT	AMOUNT
02/20/23	1005	Court Reporter Inc.	Costs	Grey	$400
02/20/23	1006	Process Server Inc.	Costs	Grey	$60
02/20/23	1007	Dr. Bailey	Costs	Grey	$340
02/20/23	1008	Bill Grey	Settlement	Grey	$9,200
02/20/23	1009	Julia Dolan	Fees	Grey	$5,000
02/21/23	1010	Mrs. J. Johnson	Ct. Order	Johnson	$1,500

On February 28, 2023, Dolan is retained by Sam Spade and paid a $5,000 retainer which under the fee agreement is to be deposited in the client trust account and withdrawn as earned.

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **Sam Spade**
Legal Matter/Adverse Party: **Business Litigation-Olson**
File or Case Number: **10-1096**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
02/28/23	Retainer			$5,000	$5,000

Cash Receipt Journal
Client Trust Account No. 123-456
February 2023

DATE	SOURCE	CLIENT	DEPOSIT	AMOUNT
02/01/23	Smith Check #2398	Joan Smith	50062	$1,000
02/05/23	Fed/State Refund	James Johnson	50145	$2,000
02/13/23	Ace Insurance Co.	Bill Grey	62001	$15,000
02/28/23	Spade Retainer	Sam Spade	64662	$5,000

On February 28, 2023, Dolan bills Joan Smith $250 for court costs paid by Dolan on Smith's behalf during February and issues a client trust account check for that amount made payable to herself.

CLIENT SUBSIDIARY LEDGER PAGE
CLIENT TRUST ACCOUNT NO. 123-456

Name of Client: **Joan Smith**
Legal Matter/Adverse Party: **Marital Dissolution**
File or Case Number: **10-1057**

DATE	DESCRIPTION OF TRANSACTION	CHECK	FUNDS PAID	FUNDS RECEIVED	BALANCE
01/01/23	Retainer-Smith			$1,000	$1,000
02/28/23	Costs- J. Dolan	1011	$250		$750

Cash Disbursements Journal
Client Trust Account No. 123-456

February 2023

DATE	CHECK	PAYEE	PURPOSE	CLIENT	AMOUNT
02/20/23	1005	Court Reporter Inc.	Costs	Grey	$400
02/20/23	1006	Process Server Inc.	Costs	Grey	$60
02/20/23	1007	Dr. Bailey	Costs	Grey	$340
02/20/23	1008	Bill Grey	Settlement	Grey	$9,200
02/20/23	1009	Julia Dolan	Fees	Grey	$5,000
02/21/23	1010	Mrs. J. Johnson	Ct. Order	Johnson	$1,500
02/28/23	1011	Julia Dolan	Costs	J. Smith	$250

B. Sample Client Trust Account Trial Balances

Before Dolan's IOLTA client trust account can be reconciled, the checkbook register, the cash balance and the client subsidiary ledger pages must balance.

1. **Checkbook Register Balance.** On February 28, 2023, Dolan's checkbook register balance is $16,450.

CHECKBOOK REGISTER

CHECK	DATE	PAYEE OR DEPOSIT SOURCE	AMOUNT OF CHECK	DEPOSIT AMOUNT	BALANCE
	01/31/23	Balance			$10,200
	02/01/23	Joan Smith		$1,000	$11,200
	02/05/23	Johnson Tax Ref		$2,000	$13,200
	02/13/23	Ace. Ins. Co.		$15,000	$28,200
1005	02/20/23	Court Reporter	$400		$27,800
1006	02/20/23	Process Server	$60		$27,740

CHECK	DATE	PAYEE OR DEPOSIT SOURCE	AMOUNT OF CHECK	DEPOSIT AMOUNT	BALANCE
1007	02/20/23	Dr. Bailey	$340		$27,400
1008	02/20/23	Bill Grey	$9,200		$18,200
1009	02/20/23	Julia Dolan	$5,000		$13,200
1010	02/21/23	Mrs. Johnson	$1,500		$11,700
	02/28/23	Sam Spade		$5,000	$16,700
1011	02/28/23	Julia Dolan	$250		$16,450

2. **Client Subsidiary Ledger Pages Trial Balance.** Dolan's client subsidiary ledger pages trial balance for February is calculated by totaling all of the client subsidiary ledger pages that have an outstanding balance on February 28, 2023.

CLIENT SUBSIDIARY LEDGER
TRIAL BALANCE

PERIOD OF 02/1/23 - 02/28/23
CLIENT TRUST ACCOUNT NO. 123-456

CLIENT	BALANCE ON 02/28/23
Julia Dolan	$200
Ron Roper	$10,000
Joan Smith	$750
James Johnson	$500
Sam Spade	$5,000
Trial Balance Total	$16,450

3. **Cash Balance.** Dolan's cash balance for February is calculated by taking the cash balance from January and adding the total February receipts and subtracting the total February disbursements.

CASH RECEIPTS JOURNAL
CLIENT TRUST ACCOUNT NO. 123-456

FEBRUARY 2023

DATE	SOURCE	CLIENT	DEPOSIT	AMOUNT
02/01/23	Smith - Check #2398	Joan Smith	50062	$1,000
02/05/23	Fed/State Refund	James Johnson	50145	$2,000
02/13/23	Ace Insurance Co.	Bill Grey	62001	$15,000
02/28/23	Spade Retainer	Sam Spade	64662	$5,000
03/01/23		FEBRUARY TRIAL		$23,000

CASH DISBURSEMENTS JOURNAL
CLIENT TRUST ACCOUNT NO. 123-456

FEBRUARY 2023

DATE	CHECK	PAYEE	PURPOSE	CLIENT	AMOUNT
02/20/23	1005	Court Reporter Inc.	Costs	Grey	$400
02/20/23	1006	Process Server Inc.	Costs	Grey	$60
02/20/23	1007	Dr. Bailey	Costs	Grey	$340
02/20/23	1008	Bill Grey	Settlement	Grey	$9,200
02/20/23	1009	Julia Dolan	Fees	Grey	$5,000
02/21/23	1010	Mrs. J. Johnson	Ct. Order	Johnson	$1,500
02/28/23	1011	Julia Dolan	Costs	J. Smith	$250
03/01/23			FEBRUARY TRIAL		$16,750

CASH BALANCE
PERIOD OF 02/01/23 – 02/28/23
CLIENT TRUST ACCOUNT NO. 123-456

Cash Balance from January		$ 10,200
Plus February Receipts	$ 23,00	
Minus February Disbursements		$ (16,750)
February Cash Balance	$ 16,450	$

4. **February Trial Balances.** The checkbook register balance, cash balance, and client subsidiary ledger pages trial balance must be identical.

Checkbook Register Balance	$16,450
Cash Balance	$16,450
Client Subsidiary Ledger Pages Trial Balance	$16,450

C. Sample Monthly Client Trust Account Reconciliation

After the checkbook register, cash balance, and client subsidiary ledger pages have been balanced, the February bank statement is reconciled with the February trial balances figure (*i.e.*, $16,450).

Julia Dolan
Attorney at Law
IOLTA Trust Account
125 Practice Avenue
New Justice, IL 00000-0000

ACCOUNT NUMBER: 123-456

CHECKING ACCOUNT SUMMARY FOR 02/01/23 THRU 02/28/23

Continued

OPENING BALANCE	DEPOSITS	WITHDRAWLS INTEREST	SERVICE & CHECKS	CLOSING CHARGE	BALANCE
$10,241.66	$18,000.00	$62.50	$16,451.66	$0.00	$11,852.50

Julia Dolan
Attorney at Law
IOLTA Trust Account
125 Practice Avenue
New Justice, IL 00000-0000

ACCOUNT NUMBER: 123-456

CHECKING ACCOUNT SUMMARY FOR 02/01/23 THRU 02/28/23

◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆ ◆

CHECKING ACCOUNT TRANSACTIONS

DEPOSITS	DATE	AMOUNT
50062	02/01/23	$ 1,000.00
50145	02/05/23	$ 2,000.00
62001	02/13/23	$ 15,000.00
Net Interest For February	02/28/23	$ 62.50

WITHDRAWALS	DATE	AMOUNT
Net Interest paid to IOLTA for January	02/28/23	$ 41.66

CHECKS			BALANCES	
ITEM	DATE	AMOUNT	DATE	BALANCE
1005	02/25/23	$ 400.00	02/06/23	$ 13,241.66
1006	02/24/23	$ 60.00	02/13/23	$ 28,241.66
1008*	02/21/23	$ 9,200.00	02/26/23	$ $12,081.66
1009	02/23/23	$ 5,000.00	02/28/23	$ 11,852.50
1010	02/26/23	$ 1,500.00		$
1011	02/28/23	$ 250.00		$

* denotes gap in check sequence

The bank statement balance is reconciled with the trial balances figure by adding: (1) any outstanding deposits; and by subtracting: (2) net interest accrued, and any outstanding checks. Accrued interest is subtracted because it will be paid directly to Lawyers Trust Fund and will thus never be added to the checkbook balance or the journal or ledger pages balance. (*See* discussion at Page 38.) In this example, the bank statement and the checkbook register reflect that check number 1007 in the amount of $340 is outstanding and that the $5,000 Spade deposit has not yet been credited. There are no monthly service charges and the interest accrued figure is taken from the bank statement.

MONTHLY RECONCILIATION
PERIOD OF 02/01/23- 02/28/23

CLIENT TRUST ACCOUNT NO. 123-456

Checkbook Balance		$ 16,450.00
Cash Balance From Journals		$ 16,450.00
Client Subsidiary Ledger Pages Trial Balance		$ 16,450.00
Bank Statement		
Balance on 02/28/23	$ 11,852.50	
Plus outstanding deposits	$ 5,000.00	
Less net interest accrued	$ (62.50)	
Less outstanding checks	$ (340.00)	
Adjusted Bank Statement Balance		$ 16,450.00

All of the records discussed above must be kept for a period of seven years after termination of the representation. The foregoing sample is used to illustrate the typical daily procedures necessary to maintain proper client trust account records. Lawyers may consult with a reputable accountant to help them set up an accounting system that they can understand and follow.

D. Sample Trust Account Record Forms

These sample recordkeeping forms are available on the ARDC website at https://www.iardc.org/Files/Sample%20Recordkeeping%20Account%20Forms%20for%20Client%20Trust%20Accounts.pdf.

Trust Account Receipts Journal - Rule 1.15A(b)(1)
Lists all receipts chronologically for all deposits in the trust account and identifies the date and source of each receipt.

Trust Account Disbursements Journal - Rule 1.15A(b)(1)
Lists all disbursements chronologically and identifies the recipient, purpose and date of each disbursement.

Trust Account Client Ledger Page – Rule 1.15A(b)(2)
A separate page for each client/matter showing chronologically all receipts, disbursements and balances for each client/matter.

Trust Account Checkbook Register - Rule 1.15A(b)(4)
Lists sequentially all trust account deposits and checks and reflects a current and accurate daily balance on the trust account.

Trust Account Monthly Reconciliation Report – Rule 1.15A(b)(7)
(Done at least quarterly)

Trust Account Record Retention Checklist

VII. Where to Find Help

- *ARDC Ethics Inquiry Program* - a telephone inquiry line that provides general information on where to find sources to help resolve hypothetical questions arising under the Rules. Call the ARDC at either the Chicago office at: 312/565-2600 or 800/826-8625 or the Springfield office at: 217/546-3523 or 800/252-8048.

- *Lawyers Trust Fund of Illinois (IOLTA)* - Lawyers Trust Fund of Illinois, Two Prudential Plaza, 65 East Wacker Drive, Suite 1900, Chicago, Illinois 60601; (312) 938-2906 or (800) 624-8962; Fax (312) 938-3091 or visit the Lawyers Trust Fund website at *www.ltf.org*.

- Bar associations – Illinois State Bar Association (ISBA) Committee on Professional Responsibility - advisory committee that receive inquiries and render opinions either addressed to the inquiring lawyer or published in the Illinois Bar Journal. The ISBA ethics advisory opinions may be obtained from the ISBA website at *www.illinoisbar.org*.

APPENDIX

IOLTA Enrollment Forms and Instructions

To establish an IOLTA account, the Lawyers Trust Fund of Illinois (LTF) has step-by-step instructions available on its website at www.ltf.org, and staff members at the Lawyers Trust Funds can provide assistance.

Lawyers Trust Fund of Illinois
65 East Wacker Drive, Suite 1900
Chicago, IL 60601
(312) 938-2906 [Main]
(312) 938-3091 [Fax]
1-800-624-8962 [Toll Free]

All forms required to open, manage and close IOLTA accounts can be found on the Lawyers Trust Fund website in downloadable format. If you have any questions or need forms faxed to you, please contact Director of Banking Terri Smith Ashford via email or at 312-938-3001 or 800-624-8962.

NOTICE TO FINANCIAL INSTITUTION TO ESTABLISH IOLTA ACCOUNT

Instructions for Lawyers

Fill out both pages of this form and return via email or fax to the Lawyers Trust Fund of Illinois.

To: _____
(Financial Institution)

_____
(Financial Institution Address)

_____
(City, State, Zip Code)

From: _____
(Lawyer/Firm)

_____
(Lawyer/Firm Address)

_____
(City, State, Zip Code)

Date:_____

LAWYERS TRUST FUND *of* ILLINOIS

Email:
IOLTAREPORT@LTF.ORG
Fax: 312.938.3091

Pursuant to Illinois Rule of Professional Conduct 1.15, the undersigned directs the financial institution to establish an interest- or dividend-bearing lawyer trust account with interest or dividends payable to the Lawyers Trust Fund of Illinois (hereinafter "IOLTA account") for the deposit of nominal and short-term client funds.

Instructions for Financial Institutions

The Federal Reserve System and the Federal Home Loan Bank Board have approved the establishment of IOLTA accounts by law firms, including professional corporations. The Lawyers Trust Fund will provide supporting documentation regarding government rulings upon request.

Eligible Financial Institution: IOLTA accounts may be maintained only at an eligible financial institution as defined in Rule 1.15(i)(3). Eligible financial institutions must offer IOLTA accounts that meet the Comparable Rate Requirement of Rule 1.15 and must agree to provide dishonored instrument notification pursuant to Rule 1.15(h).

Account Name: The IOLTA account and checks printed for customers' use **CANNOT** identify the Lawyers Trust Fund in its account title, as designee, trustee or owner. Instead, the account name should include the name of the lawyer or law firm and a designation such as client funds account, IOLTA account, or client trust account.

Tax Information: Any interest earned on this IOLTA account should be attributed to the TIN of the Lawyers Trust Fund of Illinois (contact LTF for details). IRS Form W-9 should bear the LTF's TIN as payee and certify exemption from backup withholding taxes. Contact the Lawyers Trust Fund for a signed Form W-9.

The Lawyers Trust Fund is tax-exempt. **No Form 1099 should be issued** for the IOLTA account. Further, a payor is not liable for a penalty under Section 6676(b) for filing an information return with a mismatched TIN number when, pursuant to IRS regulation Section 35a.9999-1, A-29, and IRS Publication 1281 (Rev. 8-90), p. 42, the payee is an exempt organization.

Interest calculation: Interest should be calculated on the average monthly balance in the account, or as otherwise computed in accordance with the financial institution's standard practices.

Interest remittance: Interest must be remitted electronically to the Lawyers Trust Fund **monthly** unless otherwise approved by the Lawyers Trust Fund. Remittances must be sent via **ACH** to **Bank of America (contact LTF for details). ONLY if approved,** checks can be mailed to: **Lawyers Trust Fund of Illinois, P.O. Box 64547, Chicago, Illinois 60664.**

Reporting requirements: Each remittance must be accompanied by an **Interest Remittance Report** that is sent electronically via secure or encrypted email to IOLTAREPORT@LTF.ORG unless otherwise approved by the Lawyers Trust Fund. If approved, reports can be submitted via fax to 312.938.3091.

For each account, the Interest Remittance Report must contain: 1) Bank routing number, 2) Account Number, 3) Name of the lawyer or law firm; 4) Account Status; 5) Dates of reporting period; 6) Rate of interest paid; 7) Gross interest; 8) Allowable service charges, if any; and 8) Net interest remitted.

Negative netting is not permitted. Under no circumstances can the negative interest balance be deducted from the corpus of an IOLTA account. Fees charged in excess of the earnings accrued on an individual account for any month cannot be taken out of earnings accrued on other IOLTA accounts nor from the principal of the account.

Questions: Call Monday - Friday, 9 a.m. to 4 p.m. (312) 938-2906 or via email to: IOLTAREPORT@LTF.ORG

NOTICE OF ENROLLMENT IN THE IOLTA PROGRAM

After completing send this notice to the Lawyers Trust Fund
via email: IOLTAREPORT@LTF.ORG
via fax: 312.938.3091

Date:_____

The undersigned, in accordance with Illinois Rule of Professional Conduct 1.15, has established an IOLTA account for the deposit of nominal and short-term client funds with the eligible financial institution specified below. I have directed the financial institution to remit interest on the account to the Lawyers Trust Fund of Illinois. My/my law firm's contact and account information are below.

FINANCIAL INSTITUTION INFORMATION:

_____ _____
(Account Name) (Account Number)

_____ _____
(Financial Institution) (Routing Number)

_____
(Financial Institution Address)

_____ _____ _____
(City) (State) (Zip Code)

_____ _____ _____
(Financial Institution Contact) (Telephone Number) (County)

LAWYER INFORMATION:

_____
(Lawyer or Law Firm) *Print Name*

_____
(By) *Signature*

_____
(Firm Address)

_____ _____ _____
(City) (State) (Zip Code)

_____ _____ _____
(Telephone Number) (County) (Email Address)

Revised 4 2022

Admin.1.Notice_Establish_Account.2_23

Suggested Sources for Researching Ethics Issues

1. *Annotated Model Rules of Professional Conduct*, (10th ed. 2023) - an ABA publication available from the ABA Center for Professional Responsibility (*www.americanbar.org*). Consists of the ABA Model Rules, as amended in 2002 and 2003, and legal background notes analyzing case law, opinions, law review articles and legal treatises.

2. *Restatement of the Law (Third), The Law Governing Lawyers*, American Law Institute (ALI) (2000) –two-volume set that is a highly regarded as a resource for researching legal ethics and professional responsibility. To order go to the ALI website at www.ali.org.

3. ABA/BNA, *The Lawyer's Manual on Professional Conduct* - multi-volume, subscription service, consisting of a substantive discussion on the state of the law on professional responsibility, the full text of the ABA Model Codes, recent ABA ethics opinions, digests of ethics opinions issued by state and local bar associations, and recent developments in the field of professional responsibility including opinions, case law and reports of conferences and law reviews. Updated bi-weekly. Available in print or electronic format. To subscribe call Bloomberg BNA at 800-372-1033 or visit the Bloomberg Law website at https://pro.bloomberglaw.com/.

4. Hazard, G., Hodes, W. & Jarvis, P., *Law of Lawyering*, 4th Ed. - looseleaf publication, updated annually, explaining the *ABA Model Rules of Professional Conduct* with examples of common practice issues and the authors' commentary. Published by Wolters Kluwer Legal & Regulatory U.S.

5. Ethics Opinions issued by the ABA Standing Committee on Ethics and Professional Responsibility, both formal opinions (beginning with 1924) and informal opinions (beginning with 1961), available in bound volumes from the ABA Center on Professional Responsibility. Most opinions can also be obtained from WESTLAW or LEXIS.

6. Illinois State Bar Association (ISBA) Advisory Opinions on Professional Conduct - prepared as an educational service to members of the ISBA, the opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation. Opinions issued from 1980 to the present can be obtained from the ISBA website at Ethics | Illinois State Bar Association (isba.org).

7. *ARDC Ethics Inquiry Program* - provides general information on where to find sources to help resolve questions arising under the Rules. Call either the ARDC Chicago office at: 312/565-2600 or 800/826-8625 or Springfield office at: 217/546-3523or 800/252-8048.

Trust Accounting Software Resources

ABA Legal Technology Buyer's Guide: Not a comprehensive list, but a great resource. Includes practice management software as well.

Generic Accounting Programs

QuickBooks
Maintaining Client Trust Accounts with QuickBooks Online Essentials (2017)
- published by Minnesota State Bar Association. Available for order on Amazon.

Quicken
Using Quicken 2011 for Trust Accounting (2011)
https://oregonlawpracticemanagement.com/2011/01/24/using-quicken-2011-for-trust-accounting/
– published by the Oregon Law Practice Management.

Stand-Alone Programs

e.g., Timeslips (www.timeslips.com)

Trust Account Programs for Integrated Systems

Tabs3 (www.tabs3.com)

TrustBooks: (https://www.trustbooks.com/)

LexisNexis: PCLaw TimeMatters/Billing Matters (https://pclawtimematters.com/product-pclaw/)

AbacusNext: (www.abacusnext.com)

Clio: **(**http://www.clio.com)

EasySoft: **(**http://www.easysoft-usa.com/)

ProLaw: (http://www.elite.com/prolaw/)

Rocket Matter: **(**http://www.rocketmatter.com/)

Smokeball – (https://www.smokeball.com/)

RULE 756 Registration and Fees

***

(d) *Disclosure of Trust Accounts*. As part of registering under this rule, each lawyer shall identify any and all accounts maintained by the lawyer during the preceding 12 months to hold property of clients or third persons in the lawyer's possession in connection with a representation, as required under Rule 1.15(a) of the Illinois Rules of Professional Conduct, by providing the account name, account number and financial institution for each account. For each account, the lawyer shall also indicate whether each account is an IOLTA account, as defined in Rule 1.15(d) of the Illinois Rules of Professional Conduct. If a lawyer does not maintain a trust account, the lawyer shall state the reason why no such account is required.

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(g) *Removal from the Master Roll*. On February 1 of each year the Administrator shall remove from the master roll the name of any person who has not registered for that year. A lawyer will be deemed not registered for the year if the lawyer has failed to provide trust account information required by paragraph (d) of this rule or if the lawyer has failed to provide information concerning malpractice coverage required by paragraph (e) or information on voluntary pro bono service required by paragraph (f) of this rule. Any person whose name is not on the master roll and who practices law or who holds himself out as being authorized to practice law in this State is engaged in the unauthorized practice of law and may also be held in contempt of the court.

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Adopted January 25, 1973, effective February 1, 1973; amended, effective May 17, 1973, April 1, 1974, and February 17, 1977; amended August 9, 1983, effective October 1, 1983; amended April 27, 1984, and June 1, 1984, effective July 1, 1984; amended July 1, 1985, effective August 1, 1985; amended November 1, 1986; amended December 1, 1988, effective immediately; amended November 20, 1991, effective immediately; amended June 20, 1999, effective November 1, 1999; amended July 6, 2000, effective November 1, 2000; amended July 26, 2001, effective immediately; amended October 4, 2002, effective immediately; amended June 15, 2004, effective October 1, 2004; amended May 23, 2005, effective immediately; amended September 29, 2005, effective immediately; amended June 14, 2006, effective immediately; amended September 14, 2006, effective immediately; amended March 26, 2008, effective July 1, 2008.

RULE 766 Confidentiality and Privacy

(amended November 19, 2004, effective January 1, 2005)

(a) **Public Proceedings.** Proceedings under Rules 751 through 780 shall be public with the exception of the following matters, which shall be private and confidential:

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(10) information concerning trust accounts provided by lawyers as part of the annual registration pursuant to Rule 756(d);

RULE 769 Maintenance of Records

It shall be the duty of every attorney to maintain originals, copies or computer-generated images of the following:

(1) records which identify the name and last known address of each of the attorney's clients and which reflect whether the representation of the client is ongoing or concluded; and

(2) all financial records related to the attorney's practice, for a period of not less than seven years, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports.

Adopted October 20, 1989, effective November 1, 1989; amended July 18, 1990, effective August 1, 1990, Adopted December 2, 1986, effective January 1, 1987; amended June 12, 1987, effective August 1, 1987; amended November 25, 1987, effective November 25, 1987; amended August 6, 1993, effective immediately; amended October 15, 1993, effective immediately; amended March 26, 2001, effective immediately; amended April 1, 2003, effective immediately.

Committee Comment

(April 1, 2003)

This amendment gives attorneys the option of maintaining records in forms that save space and reduce cost without increasing the risk of premature destruction. For example, CDs and DVDs have a normal life exceeding seven years, so an attorney might use them to maintain financial records. At present, however, floppy disks, tapes, hard drives, zip drives, and other magnetic media have insufficient normal life to meet the requirements of this rule.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed, contingent, or some type of retainer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees is prohibited.

(d) Common Types of Fee Agreements

(1) Fixed Fees: A fixed fee, also described as a "flat" or "lump-sum" fee, is a sum of money paid by a client to the lawyer to provide a specific service for a fixed amount. The fixed amount constitutes complete payment for the performance of the described services and may be paid in whole or in part in advance of the lawyer providing those services. A fixed fee may not be deposited in the lawyer's client trust account.

(2) Contingent Fees: A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (c) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(3) Engagement Retainers: An engagement retainer, also described as a "general," "classic," or "true" retainer, is a fixed sum of money paid by a client to the lawyer to ensure a lawyer's availability during a specified period of time or for a specified matter. Funds received as an engagement retainer are earned when paid and immediately become property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. A lawyer is compensated separately for any legal services actually rendered by the lawyer. Funds received as an engagement retainer may not be deposited into a client trust account.

(4) Security Retainers: A security retainer, also referred to as a "security payment retainer," describes funds paid to the lawyer intended to secure payment of fees and expenses for future services and costs the lawyer is expected to perform or incur. Funds received as a security retainer remain the property of the client and, therefore, must be deposited in a client trust account and kept separate from the lawyer's own property until the lawyer applies the retainer to charges for services that are actually rendered. The term "security retainer" should be used in any written agreement describing the retainer.

(5) Special Purpose Retainers: A special purpose retainer, also referred to as an "advance payment retainer," describes funds paid to the lawyer intended by the client to be present payment to the lawyer in exchange for the commitment to provide legal services in the future and may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. Ownership of a special purpose retainer passes to the lawyer immediately upon payment and is generally the lawyer's property and, therefore, may not be deposited in the lawyer's client trust account. An agreement for a special purpose retainer shall be in a writing signed by the client that uses the term "special purpose retainer" to describe the retainer, and states the following:

(i) the special purpose for the special purpose retainer and an explanation as to why it is advantageous to the client;

(ii) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(iii) the manner in which the retainer will be applied for services rendered and expenses incurred;

(iv) that any portion of the retainer that is not earned or required for expenses will be refunded to the client; and

(v) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving a special purpose retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(e) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(f) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Adopted July 1, 2009, effective January 1, 2010; amended Mar. 1, 2023, eff. July 1, 2023.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Fixed fees are generally not subject to the obligation to refund any portion to the client if the lawyer completes the agreed-upon services; however, fixed fees are subject, like any other fees, to the reasonableness standard of paragraph (a) of this Rule, and when circumstances so warrant, the attorney is obligated to return the portion that is not earned pursuant to Rule 1.16(d).

[4] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative

basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[5] In *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007), the Court distinguished different types of retainers. It recognized advance payment retainers (referred to in this Rule as special purpose retainers) and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expenses, and must be deposited in a client trust account pursuant to Rule 1.15B(b). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[6] A special purpose retainer, identified in *Dowling* as an advance payment retainer, is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of a special purpose retainer that is not earned must be refunded to the client. A special purpose retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. A special purpose retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (d)(5). A special purpose retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike a special purpose retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[7] The type of retainer that is appropriate will depend on the circumstances of each case, and any written retainer agreement should clearly define the kind of retainer being paid. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, and if the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer. Any unapplied funds of a security retainer are refunded to the client under Rule 1.16(d).

Terms of Payment

[8] A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[8A] Rule 1.5 allows fee agreements that are not on an hourly rate, for example, fixed fee arrangements, so long as the fee charged or collected is reasonable for the services performed as allowed under Rule 1.5. Where appropriate, lawyers should consider alternative arrangements to deliver affordable representation. In structuring any fee agreement, lawyers should strive to make the cost of legal services transparent and predictable, with the goal of reducing misunderstandings and avoiding fee disputes with clients.

[9] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[10] Paragraph (e) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[11] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, or referral of a matter where appropriate, and often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial responsibility for

the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d)(2) of this Rule. Joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership. See *In re Storment*, 203 Ill. 2d 378 (2002). A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[12] Paragraph (f) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm, or payments made pursuant to a separation or retirement agreement.

Disputes over Fees

[13] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by law or rule, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Adopted July 1, 2009, effective January 1, 2010; amended Dec. 22, 2022; amended Mar. 1, 2023, eff. July 1, 2023.

RULE 1.15: GENERAL DUTIES REGARDING SAFEKEEPING PROPERTY

(a) A lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer's own purposes without authorization.

(b) A lawyer must hold funds or property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own funds or property. All such funds must be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. A client trust account means an IOLTA account as defined in Rule 1.15C(b), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in Rule 1.15C(c). Other, tangible property must be identified as such and appropriately safeguarded. Each client trust account must be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary care.

(c) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges or minimum balance requirements on that account, but only in an amount necessary for that purpose.

(d) A lawyer must deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses are incurred. A lawyer must deposit in the lawyer's general account or other account belonging to the lawyer funds received as a fixed fee, an engagement retainer, or a special purpose retainer, as described in Rule 1.5.

(e) Upon receiving funds or property in which a client or third person has an interest, a lawyer must promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer must promptly deliver to the client or third person any funds or property that the client or third person is entitled to receive. Upon request by the client or third person, a lawyer must promptly render a full accounting regarding such funds or property.

(f) When in the course of representation a lawyer is in possession of funds or property in which two or more persons (one of whom may be the lawyer) claim interests, the funds or property must be kept separate by the lawyer until the dispute is resolved. The lawyer must promptly distribute all portions of the funds or property as to which the interests are not in dispute.

(g) Withdrawals from a client trust account must be made only by check payable to a named payee or by electronic transfer and not by cash. No check may be made payable to "cash." No withdrawal of cash may be made from a deposit to a client trust account or by automated teller or cash dispensing machine.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015; amended Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] An attorney's unauthorized use of another's funds is called conversion. The Illinois

Supreme Court has drawn a distinction between the common-law tort of conversion and the conduct by an attorney that warrants the imposition of discipline, noting that "[a] typical, although not necessarily exclusive, type of conversion by an attorney which warrants discipline involves the conversion of funds that have been deposited or received by an attorney for a specific purpose or for the use of another." *In re Thebus*, 108 Ill. 2d 255, 264 (1985). Conversion of trust funds occurs when a lawyer uses those funds for a purpose other than that for which they were delivered. Conversion is typically proven when the client trust account is either overdrawn or when the lawyer allows the balance in the client trust account to become less than the sum total of all client and/or third person funds the lawyer is required to maintain in trust. *In re Ushijima*, 119 Ill. 2d 51, 58 (1987); *In re Cheronis*, 114 Ill. 2d 527 (1986).

[2] Funds of clients and third persons include amounts received by a lawyer to secure payment of legal fees and expenses and to be withdrawn by the lawyer only as fees are earned and expenses incurred; funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm; and funds in which two or more persons (one of whom may be the lawyer) claim interests.

[3] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as "client trust account" or "client funds account" or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (c) provides that it is permissible when necessary to pay bank service charges or to meet minimum balance requirements on that account. The lawyer must keep accurate records regarding which part of the funds belong to the lawyer.

[5] A lawyer who receives funds or property by any means must take reasonable steps to safeguard and segregate client and third-person funds and property pursuant to Rule 1.15. Lawyers using an electronic payment method, including credit cards, ACH transfers (Automated Clearing House electronic funds transfers), and online payment systems, to accept the payment of client or third-person funds must take reasonable steps to ensure that the use of such a method does not result in any commingling with the funds of the lawyer, does not risk the loss of any client or third- person funds, and does not compromise the identity of any client or third-person funds. A lawyer also must take reasonable steps to ensure that client or third-person funds accepted through an electronic payment method are transferred immediately to an IOLTA account or non-IOLTA client trust account maintained by the lawyer.

[6] In addition to the steps described in Comment [5], lawyers have an obligation to make a reasonable investigation into the reliability, stability, and viability of an electronic payment method or system to determine whether the method or system takes appropriate measures to segregate, safeguard, and ensure the prompt transfer of client funds. Rule 1.1 governs a lawyer's

duty to understand the benefits and risks of relevant technology. Rule 1.6 governs a lawyer's duty to maintain confidentiality of information relating to a representation.

[7] Paragraph (d) relates to legal fees and expenses that have been paid in advance. The types of fee agreements are described, and the reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[8] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds must be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission and available on its website (www.iardc.org).

[9] Paragraph (f) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015; amended Mar. 1, 2023, eff. July 1, 2023.

RULE 1.15A: REQUIRED RECORDS

(a) For each client matter, complete records of client trust account funds and other property must be kept by the lawyer and must be preserved for a period of seven years after termination of the representation.

(b) Maintenance of complete records of client trust accounts requires that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits to and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited and the date, payee, client matter, and purpose of each disbursement. In addition, for each electronic transfer, the journals should include the name of the person authorizing transfer and the financial institution and account number to or from which funds were transferred;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited; the date of each deposit; the names of all persons for whom the funds are or were held; the amount of such funds; the dates, descriptions, and amounts of charges or withdrawals; and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain three-way reconciliation reports of all client trust accounts on at least a quarterly basis; and

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced and the records are readily accessible to the lawyer.

(c) A three-way reconciliation consists of the following steps:

(1) The first step is to take the balance in the checkbook register at the end of the reconciliation period and compare it with the adjusted bank statement balance for that period. The bank statement balance is adjusted by adding deposits not yet credited and subtracting any checks or other debits not yet posted to the account.

(2) The second step in the reconciliation is to add together the ending balances of all client ledgers.

(3) The third step in the reconciliation is to subtract the disbursements journal balance from the receipts journal balance by (i) taking the ending figure calculated for the previous period, (ii) adding the receipts journal balance for the period in question, and (iii) subtracting the disbursements journal balance for that period.

All three balances (figures from the check register, client ledgers, and receipts/disbursement journals) must agree with the adjusted bank statement balance.

Adopted Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] A lawyer must maintain on a current basis complete records of client trust account funds, including transfers made electronically, as required by paragraph (b), subparagraphs (1) through (8). These are minimum requirements, which articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the lawyer and the client or third person, as these funds will be safeguarded and documentation will be available to fulfill the lawyer's obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] A three-way reconciliation is a comparison of the bank statement balance with the balances in the lawyer's records to determine that the figures in the lawyer's records are accurate and in agreement with the bank's figures. The three-way reconciliation report amount must always equal the total sum belonging to all clients and third persons whose money the lawyer is holding in trust. While a lawyer must prepare and maintain three-way reconciliation reports of all trust accounts on at least a quarterly basis, lawyers should note that banks may allow only 30 days from statement date to notify the bank of errors.

[3] If the balances in a three-way reconciliation do not agree, records should be reviewed for entries that do not match or for any addition or subtraction errors, until all three figures are the same. For a more detailed discussion, see the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission and available on its website (www.iardc.org).

RULE 1.15B: TRUST ACCOUNTS AND OVERDRAFT NOTIFICATION

(a) Use of IOLTA Accounts. A lawyer must deposit all funds belonging to a client or third person into an IOLTA account unless the funds can otherwise earn net income for the client or third person. Net income means interest that exceeds the costs incurred to secure such interest. A lawyer must deposit client or third-person funds that can earn net income for the benefit of the client or third person in a separate, interest- bearing non-IOLTA client trust account, with the client or third person designated as the recipient of net interest generated on that account. A lawyer must not deposit any client or third-person funds into an account that does not bear interest or pay dividends.

(b) Account Determination. A lawyer must consider the following factors in determining whether the client or third-person funds can earn net income for the benefit of the client or third person:

(1) The amount of client or third-person funds to be deposited;

(2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) The rate of interest at the financial institution where the funds are to be deposited;

(4) The cost of establishing and administering a non-IOLTA client trust account for the benefit of the client, including the cost of the lawyer's services, financial institution fees and service charges, and the cost of preparing tax reports;

(5) The capability of the financial institution, through sub-accounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client; and

(6) Any other circumstances that affect the ability of the client's funds to earn net interest for the client.

The lawyer must review the lawyer's IOLTA account(s) at reasonable intervals to determine whether changed circumstances require further action regarding the deposited client or third-person funds. A lawyer who exercises reasonable judgment in determining whether to deposit client or third-person funds into an IOLTA account or a non-IOLTA client trust account pursuant to this rule will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

(c) Eligible Financial Institutions.

(1) A lawyer must use an IOLTA account established at an eligible financial institution that is authorized by federal or state law to do business in the state of Illinois; that has complied with the Overdraft Notification provisions of Rule 1.15B(e); and that offers IOLTA accounts within the comparable rate, remittance, and reporting requirements of this paragraph (c) as administered by the Lawyers Trust Fund of Illinois.

(2) To be eligible to hold IOLTA funds deposited by Illinois lawyers, a financial institution must offer IOLTA accounts that pay no less than the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when the IOLTA account meets or exceeds the same minimum balance or other account eligibility guidelines.

(3) To meet the requirements of paragraph (c)(2), an eligible financial institution must offer one or more of the account product options identified in this paragraph (c)(3). For all account product options, IOLTA funds must be subject to withdrawal upon request and without delay as soon as permitted by law.

(i) An eligible financial institution may hold IOLTA funds in a checking account paying preferred interest rates, such as money market or indexed rates.

(ii) An eligible financial institution may use alternative account products for IOLTA accounts with higher balances, including:

(A) A government (such as for municipal deposits) checking account;

(B) A business checking account with an automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities;

(C) A money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least $250 million; or

(D) Any other suitable interest-bearing deposit account offered by the eligible financial institution to its non-IOLTA customers.

(iii) An eligible financial institution may pay on its existing IOLTA accounts the highest rates it offers on the account product options in paragraph (c)(3)(ii) in lieu of moving the funds into those products.

(iv) As an alternative to the account product options in paragraph (c)(3)(i-iii), an eligible financial institution may pay on IOLTA deposits a "safe harbor" yield equal to 70% of the current Federal Funds Target Rate, or a rate of 1.0% (100 basis points), whichever is higher. An eligible financial institution that pays the safe harbor yield must agree to pay the rate and then ensure that the monthly IOLTA interest it remits to the Lawyers Trust Fund meets the safe harbor threshold.

(v) An eligible financial institution periodically may be required to certify to the Lawyers Trust Fund that the rates it pays on IOLTA deposits, regardless of account type, meet the requirements of this paragraph (c).

(4) An eligible financial institution must remit monthly earnings on each IOLTA account directly to the Lawyers Trust Fund.

(i) For each individual IOLTA account, the eligible financial institution must provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent, the account number, the remittance period, the rate of interest applied, the account balance on which the interest was calculated, the reasonable service fee(s) if any, the gross earnings for the remittance period, and the net amount of earnings remitted.

(ii) Remittances must be sent to the Lawyers Trust Fund electronically unless otherwise agreed.

(iii) The financial institution may assess only allowable reasonable fees, as defined in Rule 1.15C(i). Fees in excess of the earnings accrued on an individual IOLTA account for any month must not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(d) Unidentified Funds. A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If, after 12 months from the discovery of the unidentified funds, the lawyer determines that further efforts to ascertain the ownership or secure the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. A lawyer who remits funds in error or subsequently identifies the owner of the remitted funds may make a claim for a refund to the Lawyers Trust Fund. The Lawyers Trust Fund will return the funds to the lawyer after verifying

the claim. A lawyer who exercises reasonable judgment in making a determination under this paragraph will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

(e) Overdraft Notification. All trust accounts, whether IOLTA or non-IOLTA, must be established in compliance with the following provisions on overdraft notification:

(1) A lawyer must maintain a client trust account only at an eligible financial institution that has agreed to notify the Attorney Registration and Disciplinary Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution must file an agreement using a form provided by the ARDC. Any such agreement must apply to all branches of the financial institution and must not be canceled except upon advance notice of 30 days or more made in writing to the ARDC. The ARDC must annually publish a list of financial institutions that have agreed to comply with this paragraph and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement must provide that all reports made by the financial institution to the ARDC will be in the following format:

(i) In the case of a dishonored instrument, the financial institution's report must be identical to the overdraft notice customarily forwarded to the depositor and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the financial institution's report must identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, and the amount of the resulting overdraft. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer admitted to practice in this jurisdiction is conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing in this paragraph (e) may preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this paragraph. Fees charged for the reasonable cost of producing the reports and records required by paragraph (e) are the sole responsibility of the lawyer or law firm and are not allowable reasonable fees for IOLTA accounts as those are defined in Rule 1.15C(i).

(f) Disbursement of Real Estate Transaction Funds. In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15B if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified

dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits:

(i) a certified check;

(ii) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States;

(iii) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government;

(iv) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state;

(v) a personal check or checks in an aggregate amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA;

(vi) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2;

(vii) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent.

Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Adopted Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] Paragraph (a) requires that a lawyer deposit client or third-person funds that cannot earn net interest for an individual client or third person into one or more IOLTA accounts as defined in Rule 1.15C(b), with the interest earned on any such accounts remitted to the Lawyers Trust Fund of Illinois. Paragraph (b) identifies the factors a lawyer must consider when making the determination about whether client or third-person funds should be deposited into an IOLTA or non-IOLTA client trust account. The lawyer should exercise reasonable judgement in making this determination.

[2] The Lawyers Trust Fund of Illinois will use the interest remitted from IOLTA accounts for the purposes set forth in its bylaws, including financial support to Illinois legal aid organizations. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois.

[3] Paragraph (c) requires that lawyers maintain IOLTA accounts only at an eligible financial institution that pays interest rates on IOLTA accounts that are comparable to those it pays on non-IOLTA accounts. An eligible financial institution may use one or more of the account products or alternatives described in paragraph (c) for the deposit of IOLTA funds. To assist lawyers in identifying eligible financial institutions, the Lawyers Trust Fund maintains a periodically updated list of such financial institutions on its website (www.ltf.org).

[4] Paragraph (d) applies when a lawyer cannot document accumulated balances in an IOLTA account as belonging to an identifiable client or third person, or to the lawyer or law

firm. Paragraph (d) provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois. Paragraph (d) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but that have not been claimed—should be handled according to applicable statutes including the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025 *et seq.*).

[5] The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (d) will be distributed to qualifying organizations and programs according to the purposes set forth in the bylaws of the Lawyers Trust Fund.

[6] Paragraph (e) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[7] Paragraph (f) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

RULE 1.15C: DEFINITIONS FOR RULES 1.15, 1.15A, AND 1.15B

(a) "Funds" denotes any form of money, including cash; payment instruments such as checks, money orders, or sales drafts; and electronic fund transfers.

(b) "IOLTA account" means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of client or third-person funds as provided in Rule 1.15B(a) and from which funds may be withdrawn upon request as soon as permitted by law.

(c) "Non-IOLTA client trust account" means a separate and identifiable interest- or dividend-bearing client trust account established to hold the funds of a client or third person as provided in Rule 1.15B(a). This type of client trust account is not pooled, and the client or third person for whom it is established should be designated as the income beneficiary.

(d) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide overdraft notification regarding any type of client trust account as provided in Rule 1.15B(e) and that, with respect to IOLTA accounts, offers IOLTA accounts within the requirements of Rule 1.15B(c).

(e) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(f) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(g) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(h) "Safe harbor" is a yield that, if paid by the financial institution on IOLTA accounts, will be deemed as a comparable return in compliance with Rule 1.15B. The safe harbor yield must be calculated as 70% of the Federal Funds Target Rate or a rate of 1.0% (100 basis points), whichever is higher. When the Federal Funds Target Rate is expressed as a range, the point of reference for the safe harbor yield should be the top of that range.

(i) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per-deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(j) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

Adopted Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] Rule 1.15C provides definitions that pertain specifically to Rule 1.15, Rule 1.15A, and Rule 1.15B. Paragraph (a) defines expansively the meaning of "funds," to include any form of money, including electronic funds. Paragraphs (b) and (c) define an IOLTA account and a non-

IOLTA client trust account, respectively. Paragraph (d) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (e) defines “promptly payable,” a term used in the overdraft notification provisions in Rule 1.15B(e). Paragraphs (f) through (i) define terms pertaining to IOLTA accounts. Paragraph (j) defines “unidentified funds” as that term is used in Rule 1.15B(d).

M.R. 3140

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

Order entered March 1, 2023.

(Deleted material is struck through, and new material is underscored.)

Effective July 1, 2023, Rules 1.5 and 1.15 of the Illinois Rules of Professional Conduct of 2010 are amended, and new Rules 1.15A, 1.15B, and 1.15C are adopted, as follows.

Amended Rule 1.5

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed, ~~or~~ contingent, or some type of retainer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees is prohibited.

(d) Common Types of Fee Agreements

(1) Fixed Fees: A fixed fee, also described as a "flat" or "lump-sum" fee, is a sum of money paid by a client to the lawyer to provide a specific service for a fixed amount. The fixed amount

constitutes complete payment for the performance of the described services and may be paid in whole or in part in advance of the lawyer providing those services. A fixed fee may not be deposited in the lawyer's client trust account.

(2) Contingent Fees: ~~(e)~~A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (c)~~(d)~~ or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(3) Engagement Retainers: An engagement retainer, also described as a "general," "classic," or "true" retainer, is a fixed sum of money paid by a client to the lawyer to ensure a lawyer's availability during a specified period of time or for a specified matter. Funds received as an engagement retainer are earned when paid and immediately become property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. A lawyer is compensated separately for any legal services actually rendered by the lawyer. Funds received as an engagement retainer may not be deposited into a client trust account.

(4) Security Retainers: A security retainer, also referred to as a "security payment retainer," describes funds paid to the lawyer intended to secure payment of fees and expenses for future services and costs the lawyer is expected to perform or incur. Funds received as a security retainer remain the property of the client and, therefore, must be deposited in a client trust account and kept separate from the lawyer's own property until the lawyer applies the retainer to charges for services that are actually rendered. The term "security retainer" should be used in any written agreement describing the retainer.

(5) Special Purpose Retainers: A special purpose retainer, also referred to as an "advance payment retainer," describes funds paid to the lawyer intended by the client to be present payment to the lawyer in exchange for the commitment to provide legal services in the future and may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. Ownership of a special purpose retainer passes to the lawyer immediately upon payment and is generally the lawyer's property and, therefore, may not be deposited in the lawyer's client trust account. An agreement for a special purpose retainer shall be in a writing signed by the client that uses the term "special purpose retainer" to describe the retainer, and states the following:

(i) the special purpose for the special purpose retainer and an explanation as to why it is advantageous to the client;

(ii) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(iii) the manner in which the retainer will be applied for services rendered and expenses incurred;

(iv) that any portion of the retainer that is not earned or required for expenses will be refunded to the client; and

(v) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving a special purpose retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(e)~~(d)~~ A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(f)~~(e)~~ A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Adopted July 1, 2009, effective January 1, 2010; amended Mar. 1, 2023, eff. July 1, 2023.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the

course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Fixed fees are generally not subject to the obligation to refund any portion to the client if the lawyer completes the agreed-upon services; however, fixed fees are subject, like any other fees, to the reasonableness standard of paragraph (a) of this Rule, and when circumstances so warrant, the attorney is obligated to return the portion that is not earned pursuant to Rule 1.16(d).

[4][~~3~~] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[5] In *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007), the Court distinguished different types of retainers. It recognized advance payment retainers (referred to in this Rule as special purpose retainers) and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expenses, and must be deposited in a client trust account pursuant to Rule 1.15B(b). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[6] A special purpose retainer, identified in *Dowling* as an advance payment retainer, is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of a special purpose retainer that is not earned must be refunded to the client. A special purpose retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. A special purpose retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (d)(5). A special purpose retainer is distinguished from a fixed fee (also described as a "flat" or "lump- sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike a special purpose retainer, a fixed fee is

generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[7] The type of retainer that is appropriate will depend on the circumstances of each case, and any written retainer agreement should clearly define the kind of retainer being paid. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, and if the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer. Any unapplied funds of a security retainer are refunded to the client under Rule 1.16(d).

Terms of Payment

~~[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Comments [3B] through [3D] to Rule 1.15 and Rule 1.16(d).~~

[8] A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[8A]~~[4A]~~ Rule 1.5 allows fee agreements that are not on an hourly rate, for example, fixed fee arrangements, so long as the fee charged or collected is reasonable for the services performed as allowed under Rule 1.5. Where appropriate, lawyers should consider alternative arrangements to deliver affordable representation. In structuring any fee agreement, lawyers should strive to make the cost of legal services transparent and predictable, with the goal of reducing misunderstandings and avoiding fee disputes with clients.

[9]~~[5]~~ An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[10]~~[6]~~ Paragraph (e)~~(d)~~ prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[11][~~7~~] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, or referral of a matter where appropriate, and often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d)(2)~~(c)~~ of this Rule. Joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership. See *In re Storment*, 203 Ill. 2d 378 (2002). A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[12][~~8~~] Paragraph (f)~~(e)~~ does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm, or payments made pursuant to a separation or retirement agreement.

Disputes over Fees

[13][~~9~~] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by law or rule, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Adopted July 1, 2009, effective January 1, 2010; amended Dec. 22, 2022; amended Mar. 1, 2023, eff. July 1, 2023.

Amended Rule 1.15

RULE 1.15: GENERAL DUTIES REGARDING SAFEKEEPING PROPERTY

(a) A lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer's own purposes without authorization.

(b) A lawyer must hold funds or property~~shall hold property~~ of clients or third persons that is in the~~a~~ lawyer's possession in connection with a representation separate from the lawyer's own funds or property. ~~Funds shall~~ All such funds must be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent

of the client or third person. ~~For the purposes of this Rule, a~~ A client trust account means an IOLTA account as defined in Rule 1.15C(b), ~~paragraph (j)(2),~~ or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in Rule 1.15C(c). ~~paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account.~~ Other, tangible property ~~shall~~ must be identified as such and appropriately safeguarded. ~~Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.~~

~~Maintenance of complete records of client trust accounts shall require that a lawyer:~~

~~(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;~~

~~(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;~~

~~(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;~~

~~(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;~~

~~(5) maintain copies of all retainer and compensation agreements with clients;~~

~~(6) maintain copies of all bills rendered to clients for legal fees and expenses;~~

~~(7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;~~

~~(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.~~

~~Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.~~

Each client trust account must~~shall~~ be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary care~~prudence~~.

(c)~~(b)~~ A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges or minimum balance requirements on that account, but only in an amount necessary for that purpose.

(d)~~(c)~~ A lawyer must~~shall~~ deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses are incurred. ~~Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited~~ A lawyer must deposit in the lawyer's general account or other account belonging to

the lawyer funds received as a fixed fee, an engagement retainer, or a special purpose retainer, as described in Rule 1.5. ~~An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:~~

~~(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;~~

~~(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;~~

~~(3) the manner in which the retainer will be applied for services rendered and expenses incurred;~~

~~(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;~~

~~(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.~~

(e)~~(d)~~ Upon receiving funds or ~~other~~ property in which a client or third person has an interest, a lawyer mustshall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer mustshall promptly deliver to the client or third person any funds or ~~other~~ property that the client or third person is entitled to receive. Upon ~~and, upon~~ request by the client or third person, a lawyer mustshall promptly render a full accounting regarding such funds or property.

(f)~~(e)~~ When in the course of representation a lawyer is in possession of funds or property in which two or more persons (one of whom may be the lawyer) claim interests, the funds or property mustshall be kept separate by the lawyer until the dispute is resolved. The lawyer mustshall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

(g) Withdrawals from a client trust account must be made only by check payable to a named payee or by electronic transfer and not by cash. No check may be made payable to "cash." No withdrawal of cash may be made from a deposit to a client trust account or by automated teller or cash dispensing machine.

~~(f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more IOLTA accounts, as defined in paragraph (j)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest or dividend bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non interest bearing or non dividend bearing account. Each IOLTA account shall comply with the following provisions:~~

~~(1) Each lawyer or law firm in receipt of nominal or short term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the~~

~~requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.~~

~~(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.~~

~~(3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest yield bank product:~~

~~(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest bearing deposit account offered by the eligible institution to its non-IOLTA customers.~~

~~(b) for accounts with balances of $100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).~~

~~(c) for accounts with balances of $100,000 or more, a money market fund with, or tied to, check writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least $250 million.~~

~~(4) As an alternative to the account options in paragraph (f)(3), the financial institution may pay a "safe harbor" yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.~~

~~(5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph (j)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.~~

~~(g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client~~

funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:

(1) A lawyer shall maintain trust accounts only in eligible financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph (j)(8).

(i) A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts

~~to identify and return the funds to the rightful owner. If after 12 months of the discovery of the unidentified funds the lawyer determines that ascertaining the ownership or securing the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i).~~

~~A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Lawyers Trust Fund, which after verification of the claim will return the funds to the lawyer.~~

~~(j) Definitions~~

~~(1) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.~~

~~(2) "IOLTA account" means a pooled interest or dividend bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of nominal or short term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.~~

~~(3) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open end investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.~~

~~(4) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.~~

~~(5) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.~~

~~(6) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.~~

~~(7) "Safe harbor" is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.~~

~~(8) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non IOLTA depositors. All other fees are the~~

~~responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.~~

~~(9) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.~~

~~(k) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:~~

~~(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or~~

~~(2) has met the "good funds" requirements. The good funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.~~

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015; amended Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] An attorney's unauthorized use of another's funds is called conversion. The Illinois Supreme Court has drawn a distinction between the common-law tort of conversion and the conduct by an attorney that warrants the imposition of discipline, noting that "[a] typical, although not necessarily exclusive, type of conversion by an attorney which warrants discipline involves the conversion of funds that have been deposited or received by an attorney for a specific purpose

or for the use of another." *In re Thebus*, 108 Ill. 2d 255, 264 (1985). Conversion of trust funds occurs when a lawyer uses those funds for a purpose other than that for which they were delivered. Conversion is typically proven when the client trust account is either overdrawn or when the lawyer allows the balance in the client trust account to become less than the sum total of all client and/or third person funds the lawyer is required to maintain in trust. *In re Ushijima*, 119 Ill. 2d 51, 58 (1987); *In re Cheronis*, 114 Ill. 2d 527 (1986).

[2] Funds of clients and third persons include amounts received by a lawyer to secure payment of legal fees and expenses and to be withdrawn by the lawyer only as fees are earned and expenses incurred; funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm; and funds in which two or more persons (one of whom may be the lawyer) claim interests.

[3] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as "client trust account" or "client funds account" or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. ~~A lawyer should maintain on a current basis complete records of client trust account funds as required by paragraph (a), including subparagraphs (1) through (8). These requirements articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the attorney and the client or third party as these fiduciary funds will be safeguarded and documentation will be available to fulfill the lawyer's fiduciary obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.~~

[4]~~[2]~~ While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (c)~~(b)~~ provides that it is permissible when necessary to pay bank service charges or to meet minimum balance requirements on that account. The lawyer must keep accurate~~Accurate~~ records ~~must be kept~~ regarding which part of the funds belong to the lawyer.~~ are the lawyer's.~~

[5] A lawyer who receives funds or property by any means must take reasonable steps to safeguard and segregate client and third-person funds and property pursuant to Rule 1.15. Lawyers using an electronic payment method, including credit cards, ACH transfers (Automated Clearing House electronic funds transfers), and online payment systems, to accept the payment of client or third-person funds must take reasonable steps to ensure that the use of such a method does not result in any commingling with the funds of the lawyer, does not risk the loss of any client or third-person funds, and does not compromise the identity of any client or third-person funds. A lawyer also must take reasonable steps to ensure that client or third-person funds accepted through an electronic payment method are transferred immediately to an IOLTA account or non-IOLTA client trust account maintained by the lawyer.

[6] In addition to the steps described in Comment [5], lawyers have an obligation to make a reasonable investigation into the reliability, stability, and viability of an electronic payment

method or system to determine whether the method or system takes appropriate measures to segregate, safeguard, and ensure the prompt transfer of client funds. Rule 1.1 governs a lawyer's duty to understand the benefits and risks of relevant technology. Rule 1.6 governs a lawyer's duty to maintain confidentiality of information relating to a representation.

[7] Paragraph (d) relates to legal fees and expenses that have been paid in advance. The types of fee agreements are described, and the reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[8]~~[3]~~ Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds mustshall be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission and available on its website (www.iardc.org).~~as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.~~

~~[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.~~

~~[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.~~

~~[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish~~

~~a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.~~

~~[3D] The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.~~

[9]~~[4]~~ Paragraph (f)~~(e)~~ also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

~~[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.~~

~~[6] Paragraphs (a), (f) and (g) requires that nominal or short-term funds belonging to clients or third persons be deposited in one or more IOLTA accounts as defined in paragraph (j)(2) and provides that the interest earned on any such accounts shall be submitted to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund of Illinois will disburse the funds so received to qualifying organizations and programs to be used for the purposes set forth in its by-laws. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois. The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm. Client and third-person funds that are neither nominal or short-term shall be deposited in separate, interest- or dividend-bearing client trust accounts for the benefit of the client as set forth in paragraphs (a) and (f).~~

~~[7] Paragraph (h) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.~~

~~[8] Paragraph (i) applies when accumulated balances in an IOLTA account cannot be documented as belonging to an identifiable client or third party, or to the lawyer or law firm. This paragraph provides a mechanism for a lawyer to remove these funds from an IOLTA account~~

~~when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois.~~

~~The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (i) will be distributed to qualifying organizations and programs according to the purposes set forth in the by-laws of the Lawyers Trust Fund. When a lawyer learns that funds have been remitted in error or later identifies the owner of remitted funds, the lawyer may make a claim to the Lawyers Trust Fund for the return of the funds. After verification of the claim, the Lawyers Trust Fund will return the funds to the lawyer who then ensures the funds are restored to the owner.~~

~~Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but have not been claimed—should be handled according to applicable statutes including the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025 et seq.).~~

~~[9] Paragraph (j) provides definitions that pertain specifically to Rule 1.15. Paragraph (1) defines expansively the meaning of "funds," to include any form of money, including electronic fund transfers. Paragraph (2) defines an IOLTA account and paragraph (3) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (4) defines "properly payable," a term used in the overdraft notification provisions in paragraph (h)(1). Paragraphs (5) through (8) define terms pertaining to IOLTA accounts. Paragraph (9) defines "unidentified funds" as that term is used in paragraph (i).~~

~~[10] Paragraph (k) applies only to the closing of real estate transactions and adopts the "good funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.~~

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015; amended Mar. 1, 2023, eff. July 1, 2023.

New Rule 1.15A

RULE 1.15A: REQUIRED RECORDS

(a) For each client matter, complete records of client trust account funds and other property must be kept by the lawyer and must be preserved for a period of seven years after termination of the representation.

(b) Maintenance of complete records of client trust accounts requires that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits to and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited and the date, payee, client matter, and purpose of each disbursement. In addition, for each

electronic transfer, the journals should include the name of the person authorizing transfer and the financial institution and account number to or from which funds were transferred;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited; the date of each deposit; the names of all persons for whom the funds are or were held; the amount of such funds; the dates, descriptions, and amounts of charges or withdrawals; and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain three-way reconciliation reports of all client trust accounts on at least a quarterly basis; and

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced and the records are readily accessible to the lawyer.

(c) A three-way reconciliation consists of the following steps:

(1) The first step is to take the balance in the checkbook register at the end of the reconciliation period and compare it with the adjusted bank statement balance for that period. The bank statement balance is adjusted by adding deposits not yet credited and subtracting any checks or other debits not yet posted to the account.

(2) The second step in the reconciliation is to add together the ending balances of all client ledgers.

(3) The third step in the reconciliation is to subtract the disbursements journal balance from the receipts journal balance by (i) taking the ending figure calculated for the previous period, (ii) adding the receipts journal balance for the period in question, and (iii) subtracting the disbursements journal balance for that period.

All three balances (figures from the check register, client ledgers, and receipts/disbursement journals) must agree with the adjusted bank statement balance.

Adopted Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] A lawyer must maintain on a current basis complete records of client trust account funds, including transfers made electronically, as required by paragraph (b), subparagraphs (1) through (8). These are minimum requirements, which articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the lawyer and the client or third person, as these funds will be safeguarded and documentation will be available to fulfill the lawyer's obligation to

provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] A three-way reconciliation is a comparison of the bank statement balance with the balances in the lawyer's records to determine that the figures in the lawyer's records are accurate and in agreement with the bank's figures. The three-way reconciliation report amount must always equal the total sum belonging to all clients and third persons whose money the lawyer is holding in trust. While a lawyer must prepare and maintain three-way reconciliation reports of all trust accounts on at least a quarterly basis, lawyers should note that banks may allow only 30 days from statement date to notify the bank of errors.

[3] If the balances in a three-way reconciliation do not agree, records should be reviewed for entries that do not match or for any addition or subtraction errors, until all three figures are the same. For a more detailed discussion, see the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission and available on its website (www.iardc.org).

New Rule 1.15B

RULE 1.15B: TRUST ACCOUNTS AND OVERDRAFT NOTIFICATION

(a) **Use of IOLTA Accounts.** A lawyer must deposit all funds belonging to a client or third person into an IOLTA account unless the funds can otherwise earn net income for the client or third person. Net income means interest that exceeds the costs incurred to secure such interest. A lawyer must deposit client or third-person funds that can earn net income for the benefit of the client or third person in a separate, interest- bearing non-IOLTA client trust account, with the client or third person designated as the recipient of net interest generated on that account. A lawyer must not deposit any client or third-person funds into an account that does not bear interest or pay dividends.

(b) **Account Determination.** A lawyer must consider the following factors in determining whether the client or third-person funds can earn net income for the benefit of the client or third person:

(1) The amount of client or third-person funds to be deposited;

(2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) The rate of interest at the financial institution where the funds are to be deposited;

(4) The cost of establishing and administering a non-IOLTA client trust account for the benefit of the client, including the cost of the lawyer's services, financial institution fees and service charges, and the cost of preparing tax reports;

(5) The capability of the financial institution, through sub-accounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client; and

(6) Any other circumstances that affect the ability of the client's funds to earn net interest for the client.

The lawyer must review the lawyer's IOLTA account(s) at reasonable intervals to determine whether changed circumstances require further action regarding the deposited client or third-person funds. A lawyer who exercises reasonable judgment in determining whether to deposit

client or third-person funds into an IOLTA account or a non-IOLTA client trust account pursuant to this rule will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

(c) Eligible Financial Institutions.

(1) A lawyer must use an IOLTA account established at an eligible financial institution that is authorized by federal or state law to do business in the state of Illinois; that has complied with the Overdraft Notification provisions of Rule 1.15B(e); and that offers IOLTA accounts within the comparable rate, remittance, and reporting requirements of this paragraph (c) as administered by the Lawyers Trust Fund of Illinois.

(2) To be eligible to hold IOLTA funds deposited by Illinois lawyers, a financial institution must offer IOLTA accounts that pay no less than the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when the IOLTA account meets or exceeds the same minimum balance or other account eligibility guidelines.

(3) To meet the requirements of paragraph (c)(2), an eligible financial institution must offer one or more of the account product options identified in this paragraph (c)(3). For all account product options, IOLTA funds must be subject to withdrawal upon request and without delay as soon as permitted by law.

(i) An eligible financial institution may hold IOLTA funds in a checking account paying preferred interest rates, such as money market or indexed rates.

(ii) An eligible financial institution may use alternative account products for IOLTA accounts with higher balances, including:

(A) A government (such as for municipal deposits) checking account;

(B) A business checking account with an automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities;

(C) A money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least $250 million; or

(D) Any other suitable interest-bearing deposit account offered by the eligible financial institution to its non-IOLTA customers.

(iii) An eligible financial institution may pay on its existing IOLTA accounts the highest rates it offers on the account product options in paragraph (c)(3)(ii) in lieu of moving the funds into those products.

(iv) As an alternative to the account product options in paragraph (c)(3)(i-iii), an eligible financial institution may pay on IOLTA deposits a "safe harbor" yield equal to 70% of the current Federal Funds Target Rate, or a rate of 1.0% (100 basis points), whichever is higher. An eligible financial institution that pays the safe harbor yield must agree to pay the rate and then ensure that the monthly IOLTA interest it remits to the Lawyers Trust Fund meets the safe harbor threshold.

(v) An eligible financial institution periodically may be required to certify to the Lawyers Trust Fund that the rates it pays on IOLTA deposits, regardless of account type, meet the requirements of this paragraph (c).

(4) An eligible financial institution must remit monthly earnings on each IOLTA account directly to the Lawyers Trust Fund.

(i) For each individual IOLTA account, the eligible financial institution must provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent, the account number, the remittance period, the rate of interest applied, the account balance on which the interest was calculated, the reasonable service fee(s) if any, the gross earnings for the remittance period, and the net amount of earnings remitted.

(ii) Remittances must be sent to the Lawyers Trust Fund electronically unless otherwise agreed.

(iii) The financial institution may assess only allowable reasonable fees, as defined in Rule 1.15C(i). Fees in excess of the earnings accrued on an individual IOLTA account for any month must not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(d) Unidentified Funds. A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If, after 12 months from the discovery of the unidentified funds, the lawyer determines that further efforts to ascertain the ownership or secure the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. A lawyer who remits funds in error or subsequently identifies the owner of the remitted funds may make a claim for a refund to the Lawyers Trust Fund. The Lawyers Trust Fund will return the funds to the lawyer after verifying the claim. A lawyer who exercises reasonable judgment in making a determination under this paragraph will not be subject to a charge of ethical impropriety or other breach of professional conduct on the basis of that determination.

(e) Overdraft Notification. All trust accounts, whether IOLTA or non-IOLTA, must be established in compliance with the following provisions on overdraft notification:

(1) A lawyer must maintain a client trust account only at an eligible financial institution that has agreed to notify the Attorney Registration and Disciplinary Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution must file an agreement using a form provided by the ARDC. Any such agreement must apply to all branches of the financial institution and must not be canceled except upon advance notice of 30 days or more made in writing to the ARDC. The ARDC must annually publish a list of financial institutions that have agreed to comply with this paragraph and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement must provide that all reports made by the financial institution to the ARDC will be in the following format:

(i) In the case of a dishonored instrument, the financial institution's report must be identical to the overdraft notice customarily forwarded to the depositor and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the financial institution's report must identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment

and the date paid, and the amount of the resulting overdraft. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer admitted to practice in this jurisdiction is conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing in this paragraph (e) may preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this paragraph. Fees charged for the reasonable cost of producing the reports and records required by paragraph (e) are the sole responsibility of the lawyer or law firm and are not allowable reasonable fees for IOLTA accounts as those are defined in Rule 1.15C(i).

(f) Disbursement of Real Estate Transaction Funds. In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15B if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits:

(i) a certified check;

(ii) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States;

(iii) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government;

(iv) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state;

(v) a personal check or checks in an aggregate amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA;

(vi) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2;

(vii) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent.

Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Adopted Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] Paragraph (a) requires that a lawyer deposit client or third-person funds that cannot earn net interest for an individual client or third person into one or more IOLTA accounts as defined in Rule 1.15C(b), with the interest earned on any such accounts remitted to the Lawyers Trust Fund of Illinois. Paragraph (b) identifies the factors a lawyer must consider when making the determination about whether client or third-person funds should be deposited into an IOLTA or non-IOLTA client trust account. The lawyer should exercise reasonable judgement in making this determination.

[2] The Lawyers Trust Fund of Illinois will use the interest remitted from IOLTA accounts for the purposes set forth in its bylaws, including financial support to Illinois legal aid organizations. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois.

[3] Paragraph (c) requires that lawyers maintain IOLTA accounts only at an eligible financial institution that pays interest rates on IOLTA accounts that are comparable to those it pays on non-IOLTA accounts. An eligible financial institution may use one or more of the account products or alternatives described in paragraph (c) for the deposit of IOLTA funds. To assist lawyers in identifying eligible financial institutions, the Lawyers Trust Fund maintains a periodically updated list of such financial institutions on its website (www.ltf.org).

[4] Paragraph (d) applies when a lawyer cannot document accumulated balances in an IOLTA account as belonging to an identifiable client or third person, or to the lawyer or law firm. Paragraph (d) provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois. Paragraph (d) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but that have not been claimed—should be handled according to applicable statutes including the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025 *et seq.*).

[5] The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (d) will be distributed to qualifying organizations and programs according to the purposes set forth in the bylaws of the Lawyers Trust Fund.

[6] Paragraph (e) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft

notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[7] Paragraph (f) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

New Rule 1.15C

RULE 1.15C: DEFINITIONS FOR RULES 1.15, 1.15A, AND 1.15B

(a) "Funds" denotes any form of money, including cash; payment instruments such as checks, money orders, or sales drafts; and electronic fund transfers.

(b) "IOLTA account" means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of client or third-person funds as provided in Rule 1.15B(a) and from which funds may be withdrawn upon request as soon as permitted by law.

(c) "Non-IOLTA client trust account" means a separate and identifiable interest- or dividend-bearing client trust account established to hold the funds of a client or third person as provided in Rule 1.15B(a). This type of client trust account is not pooled, and the client or third person for whom it is established should be designated as the income beneficiary.

(d) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide overdraft notification regarding any type of client trust account as provided in Rule 1.15B(e) and that, with respect to IOLTA accounts, offers IOLTA accounts within the requirements of Rule 1.15B(c).

(e) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(f) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(g) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(h) "Safe harbor" is a yield that, if paid by the financial institution on IOLTA accounts, will be deemed as a comparable return in compliance with Rule 1.15B. The safe harbor yield must be calculated as 70% of the Federal Funds Target Rate or a rate of 1.0% (100 basis points), whichever is higher. When the Federal Funds Target Rate is expressed as a range, the point of reference for the safe harbor yield should be the top of that range.

(i) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per-deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment

("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(j) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

Adopted Mar. 1, 2023, eff. July 1, 2023.

Comment

[1] Rule 1.15C provides definitions that pertain specifically to Rule 1.15, Rule 1.15A, and Rule 1.15B. Paragraph (a) defines expansively the meaning of "funds," to include any form of money, including electronic funds. Paragraphs (b) and (c) define an IOLTA account and a non-IOLTA client trust account, respectively. Paragraph (d) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (e) defines "promptly payable," a term used in the overdraft notification provisions in Rule 1.15B(e). Paragraphs (f) through (i) define terms pertaining to IOLTA accounts. Paragraph (j) defines "unidentified funds" as that term is used in Rule 1.15B(d).

LAWYERS TRUST FUND of ILLINOIS

MAR 24, 2023

The Revised Safekeeping Rules: What You Need to Know

The Illinois Supreme Court recently announced changes to Rules of Professional Conduct 1.5 and 1.15 that will take effect on July 1, 2023. This overview will focus on the changes to Rule 1.15, particularly those related to the IOLTA program. The Lawyers Trust Fund (LTF) expects that additional information and resources about the changes to both rules will become available from the Attorney Registration & Disciplinary Commission and LTF before July 1.

Reorganization
The most prominent change to Rule 1.15 is that the current rule has been divided into four smaller parts: Rule 1.15, 1.15A, 1.15B, and 1.15C. Each contains provisions drawn from the current rule:

- Rule 1.15 contains the basic safekeeping requirements.
- Rule 1.15A contains the recordkeeping provisions found in paragraph (a) of the current rule.
- Rule 1.15B includes the IOLTA requirements and other provisions related to IOLTA-eligible banks, unidentified funds, and trust account overdraft agreements.
- Rule 1.15C contains definitions of terms used in Rules 1.15, 1.15A, and 1.15B.

By grouping related concepts together, the reorganized rules should be easier for readers to follow and locate specific provisions.

IOLTA Requirements
The basic requirement that lawyers hold appropriate client funds in an IOLTA account has been carried over from the current rule, but it is now located in its own paragraph (a) at the beginning of Rule 1.15B. Paragraph (a) also states that all client funds must be held in an interest-bearing account – either an IOLTA account or a non-IOLTA client trust account. In paragraphs (a) and (b), the new rule identifies the key determination lawyers must make about where to deposit client funds (whether the client funds are capable of generating net income for the benefit of an individual client) and provides a list of factors to consider in making that determination.

New Rule 1.15B(c) contains provisions formerly part of paragraph (f) that concern financial institutions eligible to hold IOLTA accounts. Eligible banks must pay comparable rates of interest on deposits in IOLTA accounts.

Recordkeeping Requirements
The provisions in new Rule 1.15A detail the requirements related to trust account recordkeeping. Lawyers must maintain client trust account records that meet the specifications of the rule and keep them for seven years. The rule also contains a new requirement that lawyers perform a three-way reconciliation of bank statements, client ledgers, and disbursement journals on no less than a quarterly basis.

Substantive Safekeeping Changes
Rule 1.15 includes several additions that lawyers who handle client funds should keep in mind. First, paragraph (a) in the new Rule 1.15 explicitly prohibits lawyers from using client funds or property without consent. Similarly, new paragraph (g) prohibits cash and cash-related withdrawals from client trust accounts. Several new comments to Rule 1.15 address conversion (Comment [1]); and clarify the nature of the client and third-party funds that are subject to Rule 1.15 (Comment [2]). Additionally, the amended Rule 1.15(c) now states that lawyers may maintain their own funds in a client trust account for the purpose of meeting minimum balance requirements, along with the previously permitted purpose of paying bank service charges.

Electronic Payments
Today's lawyers frequently use electronic payment platforms to move client funds. For the first time, the new Comments [5] and [6] to Rule 1.15 establish important obligations for lawyers using or considering use of these platforms. Comment [5] states that lawyers must take

reasonable steps to ensure that their use of electronic payments won't result in commingling, risk of loss, or comprised identity of client funds. Comment [5] also requires lawyers to ensure that client funds accepted through electronic means are immediately transferred an IOLTA account or non-IOLTA client trust account. Comment [6] imposes a duty on lawyers to reasonably investigate whether the platform they are using has "appropriate measures" in place to properly handle client funds and maintain client confidentiality.

Other Provisions in Rule 1.15
Rule 1.15B also carries over and stylistically updates provisions regarding unidentified funds (paragraph d) and the requirement that banks notify the ARDC when an attorney trust account is overdrawn (paragraph e).

Fee Provisions in Rule 1.5
The amended Rule 1.5 contains several provisions moved from the current Rule 1.15 related to fees and fee agreements. These include fixed fees and different types of retainer payments, along with extensive comments regarding the Illinois Supreme Court's holding regarding advance payment retainers in *Dowling v. Chicago Options Associates, Inc.* 226 Ill. 2d 277 (2007). In a significant change, Rule 1.5 also contains a new prohibition on nonrefundable fees and retainers.

Conclusion
LTF will continue to post and link to new sources of explanation and interpretation of the new rules. If you have a question about the rule changes and how they impact your IOLTA account, please contact a member of LTF's staff.

- David Holtermann, General Counsel, via phone (312-938-3076) or email.
- Terri Smith-Ashford, Deputy Director for Finance & Operations via phone (312-938-3001) or email.

Posted in General

Lawyers Trust Fund of Illinois 65 East Wacker Place, Suite 1900, Chicago, IL 60601

Main: (312) 938-2906 **Fax:** (312) 938-3091

Fwd: What to know as attorney fee rules change: ARDC leader shares advice

From: PAMELA MENAKER (pammenaker@aol.com)

To: pammenaker@aol.com

Date: Thursday, June 29, 2023 at 04:34 PM CDT

What to know as attorney fee rules change: ARDC leader shares advice

By Grace Barbic

gbarbic@lawbulletinmedia.com

Posted June 29, 2023 11:41 AM

Jerome Larkin

Certain rules governing retainer fees and how lawyers handle funds in the Illinois Rules of Professional Conduct will look slightly different come July 1.

The Illinois Supreme Court said the recently approved amendments to Rules 1.5 on fees and 1.15 on the safekeeping of property are intended to address existing issues between the legal needs of the public and the lawyers who serve them.

The Illinois Attorney Registration and Disciplinary Commission, which was part of a work group that proposed the changes, said the amendments reorganize and revise certain language to make the rules more clear and modernized.

"These changes seem, to us, to clarify the rules and the precedent that guided us as lawyers for a long time," said ARDC administrator Jerome Larkin. "I don't think everyone sees it that way, but we certainly do."

Misuse of client funds is a top cause of lawyer discipline, and some cases of unreasonable fees lead to disciplinary action. The rules aim to provide guidance for lawyers and clarify the definitions and factors considered in such proceedings.

Larkin indicated that some attorneys he spoke with suggested different language that could be used in the revisions, but he said the work group was diligent in its word choices to ensure both lawyers and clients are protected.

In an interview as the changes approach, Larkin said the new amendments provide an opportunity for lawyers to do a checkup on the fee and trust account side of their practices.

"We're not trying to restrict the ability to make a living here or to put certain burdens on the expense of running an office," Larkin said, speaking generally about the new amendments. "We know lawyers have to make a living in order to do the great work they're doing already for clients."

The Lawyers Trust Fund was also part of the work group that proposed the changes. The amendments were reviewed by the Supreme Court's Committee on Professional Responsibility before their approval.

Fees and retainers

Rule 1.5 is titled "Fees" and addresses agreements for compensation between clients and lawyers.

The changes to this rule arose from an earlier study conducted by the ARDC and from the Chicago Bar Foundation's plain language recommendation in their task force report, Larkin said.

"The whole idea is to make it clear to lawyers and current clients what the rules are and what the precedent is so that there is no ambiguity. And we think that has been accomplished," Larkin said.

Lawyers will still be required to adhere to certain reasonableness factors and the preference for the agreements to be in writing.

"What is new is that the rule tells lawyers and clients specifically that there is no such thing as a nonrefundable fee because that restricts the absolute right of a client to move on from one lawyer to the next. That's the underlying theory there," Larkin said.

Rule 1.5(c) now specifically prohibits nonrefundable fees and retainers, as well as any agreement that purports or restrict a client's right to terminate representation or unreasonably restricts a client's right to obtain a refund of fees. Larkin said lawyers should revise their fee agreements to delete any provisions with that language.

"If a lawyer has been using the word 'nonrefundable' in his contract, that certainly is something that the court has said should not go forward," Larkin said. "And indeed before these changes, the law was to that same effect, but it wasn't clear in a rule."

Under Rule 1.5(d), the amendment now identifies common types of fee agreements, although there are other fee arrangements allowed outside the ones listed in the rule, Larkin noted.

The rule lists descriptions of the most common agreements, including fixed fee, contingent fee, engagement retainer, security retainer and special purpose retainer.

"There's some sense that I have that some lawyers are using the engagement retainer for services rendered, and that's just not going to work," Larkin said.

An engagement retainer, according to the rule, is a fixed sum paid by a client to the lawyer to ensure a lawyer's availability during a specified period of time or for a specified matter.

Funds received as an engagement retainer are earned when paid and immediately become property of the lawyer, regardless of whether the lawyer ever performs any services for the client. A lawyer is compensated separately for any legal services actually rendered.

"We had a disciplinary case in which a lawyer attempted to use an engagement retainer as a way to pay for services," Larkin said. "And if that were the case, it would swallow the entire universe of fees because a lawyer could make any fee to be an engagement retainer."

The change here is more of an organizational adjustment, as the descriptions of these common fee retainers were previously located in the comments section of Rule 1.15.

As lawyers prepare for these changes to take effect, Larkin advises they should review what types of fee agreements they utilize and compare them to the ones listed in Rule 1.5 to ensure they align. He advises restructuring fees, if necessary, to adhere to the changes.

In addition to the changes in language, a new Comment 8A was recently added to Rule 1.5 which specifically provides for fees that are not based on an hourly rate and stresses the importance of attorneys providing their clients with affordable representation and minimizing the potential for fee disputes.

Client funds

Rule 1.15, titled "General Duties Regarding Safekeeping Property," addresses how a lawyer must handle funds or property of clients or third persons.

The amendments to Rule 1.15 divide the rule into three categories in an attempt to make it easier for lawyers to reference. The three categories cover required records, trust accounts and overdraft notification and definitions of each of the sections of the rule.

The amendment to Rule 1.15(a) now specifically outlaws conversion of funds. The rule reads "a lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer's own purposes without authorization."

"Conversion in the disciplinary law has always held that, but it could be viewed differently if one wasn't cognizant of the disciplinary precedent," Larkin said. "We want to be real clear if you get money from client A, you have to use it pursuant to his or her discretion. If you use it for another purpose, you've converted it. That is something that causes lawyers to be dealt with significantly within the ARDC system, particularly if there was dishonesty about it."

The amendment to Rule 1.15(g) now requires withdrawals from client trust accounts only by check to named payee or by electronic transfer. The new rule does not allow cash withdrawals, checks to "cash" or ATM withdrawals.

"Cash is hard to trace. … Cash is not a proper fiduciary approach to handling clients or third parties," Larkin said.

Rule 1.15A(b)(7) now requires lawyers to prepare and maintain three-way reconciliation reports of all client trust accounts on at least a quarterly basis. It essentially requires balancing figures from checkbook register, client ledgers and receipts and disbursement journals, according to the rule.

"On trust accounting, just know as a fiduciary you have to have the right balance in the account," Larkin said. "The rules provide some guidance so that you can know that you do and prove that you do, so you can sleep at night."

The rule also explains how to perform the three-way reconciliation.

"Don't panic if your balance isn't quite right," Larkin said. "Work on it, consultant an accountant, reference the three-way reconciliation rules … go to an accountant and get some help."

Rules 1.15B(a) and 1.15B(b) touch on the use of Interest on Lawyers' Trust Accounts versus non-IOLTA trust accounts based on whether interest on held monies may earn net income for a client or third person. Rule 1.15B(c) describes banks that are eligible to hold IOLTA accounts.

How to learn more

The ARDC will make a free CLE to review the rule changes available on its online learning portal July 1.

"Do the ARDC CLE when it comes up," Larkin said. "If you're not fully aware of what your duties are, call us. Read our handbook if that helps you or consult with professional responsibility counsel and get it right because this is bedrock principles related to the practice of law."

The ARDC is also offering guidance on the rules through a hotline. The Chicago office can be reached at (312) 565-2600 and the Springfield office at (217) 522-6838. Questions can also be emailed to the ARDC Education Department at Education@iardc.org.

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Date: June 29, 2023 at 4:01:03 PM CDT
To: pammenaker@aol.com
Subject: What to know as attorney fee rules change: ARDC leader shares advice

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Chicago Daily Law Bulletin.

What to know as attorney fee rules change: ARDC leader shares advice

Certain rules governing retainer fees and how lawyers handle funds in the Illinois Rules of Professional Conduct will look slightly different come July 1.

Northwestern law professors weigh next steps for college diversity

Universities are "poring over ways" to cope with the U.S. Supreme Court ruling that they can no longer consider race as a specific basis for granting admission, a Northwestern Pritzker School of Law professor said Thursday.

Supreme Court strikes down affirmative action in college admissions

A divided Supreme Court on Thursday struck down affirmative action in college admissions, declaring race cannot be a factor and forcing institutions of higher education to look for new ways to achieve diverse student bodies.

SCOTUS sides with postal worker on religious day off