

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

[204 PA. CODE]

Amendments to Pennsylvania Rule
of Professional Conduct 1.15 Relating to
Safekeeping of Property

Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it amend Pennsylvania Rule of Professional Conduct 1.15 as set forth in Annex A to clarify the requirements of that rule with respect to the safekeeping of property of clients and third persons.

Changes to R.P.C. 1.15 were included in the recommendations of the American Bar Association's Ethics 2000 Commission. The recommended changes to R.P.C. 1.15 were subsequently approved by the Pennsylvania Bar Association. The changes to R.P.C. 1.15 were not included, however, with the other changes to the Rules of Professional Conduct that were recommended to the Supreme Court of Pennsylvania because the Board wanted to study the possibility of making additional changes to R.P.C. 1.15. The Board is now seeking comments on a proposed revision of R.P.C. 1.15. The proposed text of R.P.C. 1.15 set forth in Annex A includes all the changes recommended as part of Ethics 2000 and also includes changes that the Board has developed based on the Model Rule on Financial Recordkeeping prepared by the American Bar Association.

Interested persons are invited to submit written comments regarding the proposed amendments to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, First Floor, Two Lemoyne Drive, Lemoyne, PA 17043, on or before **May 7, 2004**.

By The Disciplinary Board of the
Supreme Court of Pennsylvania

Elaine M. Bixler
Executive Director and Secretary

Note: Material to be added is underlined.
Material to be deleted is bracketed.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation or in a fiduciary capacity separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of the receipt, maintenance and disposition of such account funds and other property and a copy of any writing required by Rule 1.5(b) or (c) with respect to each client whose funds or property are so held shall be preserved for a period of five years after termination of the representation, or after distribution of the property, whichever is later. At all times while a lawyer holds funds in connection with a representation or in a fiduciary capacity, the lawyer shall also maintain another account that is not used to hold such funds.

(b) A lawyer may deposit a lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of such funds in a different manner.

[(b)] (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall 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 shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

[(c)] (e) When in the course of representation a lawyer is in possession of property in which **[both the lawyer and another person]** two or more persons, one of whom may be the lawyer, claim interest, the property shall be kept separate by the lawyer until **[there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until]** the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

[(d)] (f) Notwithstanding paragraphs **[(a), (b) and (c)]** (a) through (e), and except as provided below in paragraph **[(e)]** (g), a lawyer shall place all funds of a client or of a third person in an interest bearing account. All qualified funds received by the lawyer shall be placed in an Interest On Lawyer Trust Account in a depository institution approved by the Supreme Court of Pennsylvania. All other funds of a client or a third

person received by the lawyer shall be placed in an interest bearing account for the benefit of the client or third person or in another investment vehicle specifically agreed upon by the lawyer and the client or third party.

(1) Qualified funds are monies received by a lawyer in a fiduciary capacity that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.

(2) Depository institutions are financial institutions approved by the Supreme Court of Pennsylvania pursuant to Rule 221 of the Pennsylvania Rules of Disciplinary Enforcement.

(3) An Interest on Lawyer Trust Account (IOLTA Account) is an unsegregated interest-bearing account with a depository institution for the deposit of qualified funds by a lawyer. The rate of interest payable on an IOLTA Account shall not be less than the rate paid by the depository institution on negotiable order of withdrawal accounts (NOW) or super negotiable order of withdrawal accounts. An account shall not be considered an IOLTA Account unless the depository institution at which the account is maintained shall:

(i) Remit at least quarterly any interest earned on the account to the IOLTA Board (as hereinafter defined).

(ii) Transmit to the IOLTA Board with each remittance a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from the account.

(iii) Transmit to the lawyer who maintains the IOLTA Account a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from the account.

[(e)] (g) A lawyer shall be exempt from the provisions of paragraph **[(d)] (f)** only upon exemption requested and granted by the IOLTA Board. Exemptions shall be granted if: (i) the nature of the lawyer's practice does not require the routine maintenance of a trust account in Pennsylvania; (ii) compliance with paragraph **[(d)] (f)** would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographical distance between the lawyer's principal office and the closest depository institution which is described in paragraph **[(d)(2)] (f)(2)**, or on other compelling and necessitous factors; or (iii) the lawyer's historical annual trust account experience, based on information from the depository institution in which the lawyer deposits trust funds, demonstrates the service charges on the account would be significantly and routinely exceed any interest generated.

[(f)] (h) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility because monies are deposited in an IOLTA Account pursuant to the lawyer's judgment in good faith that the monies deposited were qualified funds.

[(g)] (i) There is hereby created the Pennsylvania Interest on Lawyers Trust Account Board (herein called the IOLTA Board), which shall administer the IOLTA program. The IOLTA Board shall consist of nine members who shall be appointed by the Supreme Court. Two of the appointments shall be made from a list provided to the Supreme Court by the Pennsylvania Bar Association in accordance with its own rules and regulations. With respect to these two appointments, the Pennsylvania Bar Association shall submit three names to the Supreme Court, from which the Court shall make its final selections. The term of each member shall be three years and no member shall be appointed for more than two consecutive three year terms. The Supreme Court shall appoint a Chairperson. In order to administer the IOLTA program, the IOLTA Board shall promulgate rules and regulations consistent with this Rule for approval by the Supreme Court. Additionally, upon approval of the Supreme Court, the IOLTA Board shall distribute and/or expend IOLTA funds for the purpose set forth in this Rule. The IOLTA Board shall comply with the following:

(1) The IOLTA Board shall prepare an annual audited statement of its financial affairs.

(2) Disbursement and allocation of IOLTA Funds shall be subject to the prior approval of the Supreme Court, thus the IOLTA Board shall submit to the Supreme Court for its approval a copy of its audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program. Additionally, a copy of the IOLTA Board's proposed annual budget will be provided to the Court, designating the uses to which IOLTA Funds are recommended.

[(h)] (j) Interest earned on IOLTA Accounts (IOLTA Funds) may be used only for the following purposes:

(1) delivery of civil legal assistance to the poor and disadvantaged in Pennsylvania by non-profit corporations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

(2) educational legal clinical programs and internships administered by law schools located in Pennsylvania;

(3) administration and development of the IOLTA program in Pennsylvania; and

(4) the administration of justice in Pennsylvania.

[(i)] (k) The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P.L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P.L. 469, No. 117).

(l) The following books and records shall be maintained for each account (a “trust account”) in which a lawyer holds funds in connection with a representation or in a fiduciary capacity:

(1) bank statements and check registers (which shall include the payee, date, amount and the client matter involved);

(2) all transaction records returned by the bank, including canceled checks in whatever form and records of electronic transactions; and

(3) records of deposits and a ledger separately listing each deposited item and the client or third person for whom the deposit is being made.

(m) The records required by this rule may be maintained in electronic or other form if they can be retrieved in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

Comment:

1. 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 which is the property of clients or third persons **[should]**, including prospective clients, must be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Whenever a lawyer holds funds of another person, the lawyer must maintain at least two accounts: one in which those funds are held and another in which the lawyer’s own funds may be held.

2. While normally it is impermissible to commingle the lawyer’s own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding that part of the funds which are the lawyer’s.

3. Lawyers often receive funds from **[third parties from]** which the lawyer’s fee will be paid. **[If there is risk that the client may divert the funds without paying the fee, the]** The lawyer is not required to remit **[the portion from which the fee is to be paid]** 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 **[should]** 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 shall be promptly distributed.

4. [Third parties, such as a client's creditors,] Paragraph (e) also recognizes that third parties may have [just] 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[, and accordingly, may]. 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 unless the claims are resolved. [However, a] A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. 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. [A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.] A lawyer must participate in the Pennsylvania Lawyers Fund for Client Security. It is a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

7. Paragraphs (g) through (k) provide for the Interest on Lawyer Trust Account (IOLTA) program and distinguish two types of funds of clients and third parties held by a lawyer: qualified funds, which must be placed in an IOLTA account, and other funds, which are to be placed in an interest bearing account unless the client or third party agrees otherwise. There are further instructions in Rules 219 and 221 of the Pennsylvania Rules of Disciplinary Enforcement and in the Regulations of the Interest on Lawyers Trust Account Board, 204 Pa. Code, § 81.01 et seq., which are referred to as the IOLTA Regulations.

8. Paragraph (l) specifies the records that must be kept by a lawyer with respect to trust accounts. Those records may be kept in electronic form so long as they can be retrieved in printed hard copy. If records are kept in that form, it is essential that a back-up copy be prepared on a regular basis.

9. The records required by this rule may be subject to subpoena in connection with an investigation or hearing pursuant to the Enforcement Rules. Failure to produce such records may result in the initiation of proceedings pursuant to Rule 208(f)(5) of the

Pennsylvania Rules of Disciplinary Enforcement, which permits Disciplinary Counsel to commence a proceeding for the temporary suspension of a respondent-attorney who refuses to comply with a valid subpoena.

10. A lawyer who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of paragraphs (a) and (e) and also Rule 8.1(a).