



IN FOR A PENNY: Amendments to Mass. R. Prof. C. 1.15 on Trust Accounts

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The substantial [revisions](#) to the Massachusetts Rules of Professional Conduct (Supreme Judicial Court Rule 3:07) in effect as of July 1, 2015 include several amendments to Rule 1.15 on trust accounting. Given the persistence of disciplinary issues relating to financial record keeping and the exacting nature of the requirements, the changes to Rule 1.15 are worth highlighting and the unchanged provisions are worth reiterating.

What's New

Advances for Expenses and Legal Fees

First, and probably having the most everyday significance, Rule 1.15(b) has been amended to require that advances for fees and expenses received from clients must now be deposited and held in an IOLTA or other trust account, to be withdrawn only as the fees are earned or the expenses are incurred. These changes conform the Massachusetts rule to the ABA model rule in this regard. In so doing, revised Rule 1.15(b) makes express the longstanding requirement in Massachusetts that advances for legal fees, i.e., retainers, must be deposited to a trust account and withdrawn only as earned.

The prior Massachusetts rule also contained an exception, now repealed, permitting advances for costs or expenses to be deposited to business accounts. That exception created complicated and unnecessary problems in accounting for expenditures. Under the amended rules, lawyers will have to account for advanced expenses in the IOLTA or other trust account in the same manner as for all other trust funds. Thus, to take a typical example, a lawyer who takes a personal injury case on a contingent fee basis may still receive an advance from the client to pay for an expert witness, medical records, and suchlike. This sum must now be deposited to the IOLTA account. The deposit must be identified in the main check register as funds for this personal injury matter, an individual ledger must be created for the case, and the funds can only be

withdrawn as expenses are paid. (But, of course, the converse is also true; if it is the law firm or the lawyer who is advancing costs, expenses must be paid with the lawyer's or law firm's own funds from an operating or business account.)

A new Comment 2A explains that flat fees are not required to be deposited to trust accounts and clarifies what constitutes a flat fee. If, however, a flat fee is deposited to a trust account, it is subject to the same accounting requirements as all other trust funds. And if a flat fee is deposited to a business or personal account, the Rule 1.16(d) requirement that any unearned fee be refunded still applies. Thus, if the lawyer is paid a flat fee of \$2500 for an OUI case, and the client terminates the representation a week later, the attorney will have to repay any unearned portion of the \$2500, regardless of whether it was deposited to a trust account or a business or personal account.

Bills from Lawyer Fiduciaries

The second revision to Rule 1.15 is the addition of a comment concerning lawyers who also act as fiduciaries. New Comment 6A clarifies that, consistent with the requirements of Rule 1.15(d)(2), lawyers who represent themselves in a fiduciary capacity (for example, as personal representatives, executors, administrators, guardians, or trustees) must create a bill or accounting to justify payment prior to, or contemporaneous with, any withdrawal of fees from estate accounts or other funds held by them as fiduciaries. Such accountings may be "itemized time records, formal written bills, or other contemporaneous accountings that show the services rendered and the method for calculating the fees." Lawyers representing themselves as fiduciaries are also required to maintain all trust account records required by paragraphs (e) and (f) of Rule 1.15.

Notification to Banks of Trust Account Opening

The final amendment to the rule relates to all individual (non-IOLTA) trust accounts. (See "What's Not New," below, for more information on this type of account.) Rule 1.15(e) has now been revised to add a requirement that attorneys provide a written notice to a bank or other depository when opening any account that is a trust account as

defined in Rule 1.15, regardless of whether the account is an IOLTA account or is an individual trust account. Prior to this change, such notice was required only for IOLTA accounts. The lawyer must retain a copy of the notice executed by both the bank and the lawyer.

The impetus for the change was the decision by the Supreme Judicial Court in *Go-Best Assets Ltd v. Citizens Bank*, 463 Mass. 50 (2012). In light of issues raised in the case, the opinion suggested that an attorney opening an individual non-IOLTA trust account should be required to give the bank notice of the opening of a trust account to avoid any ambiguity as to the nature of the account. In particular, the notification form for non-IOLTA trust accounts will put the bank on notice that the account is subject to the dishonored check reporting requirements.

Forms for opening an IOLTA account may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. [Forms](#) for notice to a bank when opening an individual (non-IOLTA) trust account can be downloaded from the website of the Board of Bar Overseers, but other forms consistent with the rule may also be used.

What's Not New

It is probably a good idea at this juncture to review what is not new. The basic IOLTA account model remains the same. Among other existing requirements, lawyers still must deposit all trust funds that are either nominal in amount or to be held for a short period of time to a pooled IOLTA account, with interest payable to the IOLTA Committee. Lawyers still must maintain required records—a detailed check register, as well as individual ledgers (including a ledger for the small amount of the lawyer's own funds used to pay bank charges) for each client matter—and must perform a “three-way” reconciliation not less than every sixty days of the check register both to the ledgers and to the bank statements. Mass. R. Prof. C. 1.15(b), (e) and (f).

Trust funds that are not nominal in amount or that are held for other than a short period of time must be maintained in separate individual trust accounts, with interest payable as directed by the client or third party for whom the funds are held.

Mass. R. Prof. C. 1.15(e)(6). The check register for an individual trust account is in fact the client ledger, so that for individual accounts, only a two-way reconciliation of the check register to the bank statement is required.

The concept of what constitutes trust property also remains essentially the same. Trust property includes both tangible property—for example, securities, jewelry, original documents such as marriage certificates or wills—and funds. The definition of trust funds has always included, and continues to include, funds of clients or third persons held by a lawyer in connection with a representation or in a fiduciary capacity. The obvious examples are settlement funds from a claim or lawsuit, mortgage proceeds, deposits on sales of real estate, and other traditional receipts, but also include funds held in a fiduciary capacity, such as personal representative, executor, guardian, or escrow agent. As to funds held as fiduciary, unless the funds received are a one-time, short-term deposit, the money must be maintained in an individual trust account with interest payable to the estate or beneficiary and not in an IOLTA account.

The definition of trust funds also continues to include retainers, that is, advance fees paid by clients to be earned in the future on an hourly or other basis. The rule amendments described earlier in this article merely codify what has long since been the case law on this point. Even costs and expenses, although not required to be deposited to a trust account until these most recent rules changes, were nonetheless always considered to be trust property.

Retainers and other trust funds belonging in part to a lawyer and in part to a client must be deposited to a trust account. Mass. R. Prof. C. 1.15(b)(2)(ii). On the other hand, earned fees—fees paid after services have already been rendered—cannot be deposited to a trust account and must be deposited to a business or personal account.

Subject to the notification and billing requirements in Rule 1.15(d) and to other requirements concerning disputed fees in Rule 1.15(b)(ii), lawyers must withdraw fees from the trust account in full when earned. Fees must be withdrawn at the earliest reasonable time after the lawyer's interest becomes fixed; a lawyer who leaves earned fees in a trust account is commingling. Thus, if the lawyer is due a one-third contingent

fee on a settlement of \$10,000, the entire \$3333 must be withdrawn promptly. The lawyer cannot withdraw \$500 this week, \$1000 next week, and so on until the full amount is paid.

Lawyers also cannot withdraw fees by paying their own bills directly from a trust account. The rule is explicit that funds withdrawn from a trust account to pay fees must be payable to the lawyer or law firm. Combined with the requirement that no withdrawals can be made in cash or by ATM, the bottom line is that fees must be payable only to the lawyer or law firm and only by check or electronic funds transfer. Whether fees are paid by check or by electronic funds transfer, the check register must indicate the client or client matter for which the fees were paid.

And, of course, the dishonored check provisions of Rule 1.15(h) remain. Financial institutions offering IOLTA and other trust accounts are still required to notify bar counsel when a check drawn on a trust account is returned unpaid. Bear in mind that bar counsel's examination of a lawyer's trust account records when a notice of dishonored check has been received will by necessity trigger an examination of the lawyer's compliance with all trust account record-keeping requirements.

Finally, if you have questions about any of these issues, please review the IOLTA Committee's [Client Fund Manual 2015](#) or call bar counsel's helpline, (617)728-8750, on Monday, Wednesday and Friday afternoons. Bar counsel and the Boston Bar Association also offer a [free, one-hour program on trust accounting](#) monthly between October and May.