PROPOSED REVISION OF RULES 1.15 AND 1.15A AND RELATED COMMENTS

The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct is publishing for comment proposed revisions to Rule 1.15 and 1.15A(e) of the Massachusetts Rules of Professional Conduct and related comments.

Background. In *Matter of Olchowski*, 485 Mass. 807 (2020) ("*Olchowski*"), the Supreme Judicial Court held that where Bar Counsel determines after reasonable investigation that the owner of funds held in a lawyer's IOLTA Account cannot be identified or located, Bar Counsel should request the single justice of the county court to find that the funds are presumptively abandoned and to order the transfer of the abandoned funds to the IOLTA Committee. In that opinion, the Court also directed the Standing Advisory Committee on the Rules of Professional Conduct to propose amendments to Rule 1.15 of the Massachusetts Rules of Professional Conduct to incorporate the guidance in *Olchowski*.

Proposed Amendments. The Committee consulted with Bar Counsel, the Board of Bar Overseers and the IOLTA Committee and prepared the attached proposed amendments to Rules 1.15 and 1.15A(e) and related comments. Except for a minor clarifying change to Rule 1.15(f), the proposed changes to Rule 1.15 implementing *Olchowski* are contained in revisions to paragraph (h) and the addition of paragraph (i). Related comments were added as Comments 6B and 14 through 17. An amendment to Rule 1.15A(e) has also been proposed to provide for retention of client files potentially related to unclaimed or unidentified funds that have been transferred to the IOLTA Committee.

The proposed revised provisions of Rules 1.15 and 1.15A and related comments are followed by a redline marked to show the changes from the current Massachusetts Rules 1.15 and 1.15A and related comments.

Notice of Inactivity. In *Olchowski*, the Court determined that agreements relating to IOLTA Accounts should require the bank to notify the Board of Bar Overseers if an IOLTA Account has no activity for two years, apart from automatic interest payments to the IOLTA Committee, but noted in footnote 12 that the Standing Advisory Committee in its proposed amendments may consider a different period. The Committee proposes to require the notice of inactivity after three years, rather than two years, to match more closely the timing of notices that banks give to the Treasurer under G.L. c. 200A, the Abandoned Property Statute. Even though the bank's notice would occur after a similar period of inactivity, the bank holding an IOLTA Account will still be required to modify its procedures to accommodate *Olchowski* and Rule 1.15, as the notice would be sent to the Board of Bar Overseers rather than the Treasurer, the bank would not turn the funds over to the Treasurer, and the bank would not turn the funds over to the IOLTA Committee unless and until an order of the single justice requires that the account be turned over to the IOLTA Committee.

Required Order of the Single Justice. The Committee considered proposals, similar to procedures adopted in some other jurisdictions, that would require automatic transfers to the IOLTA Committee if a lawyer reported that an owner of funds in an IOLTA Account could not be identified or found. However, the Committee's proposed amendments require an order of the single justice for all transfers, consistent with the guidance in *Olchowski*.

Additional Procedural Rules of the Board. The revisions in paragraph (i) also assume that the Board of Bar Overseers will adopt procedural rules to address the mechanics for publishing

notice that funds from a lawyer's IOLTA Account have been turned over to the IOLTA Committee and addressing any dispute over the ownership of unidentified or unclaimed funds. The Committee considered whether to incorporate such procedures in Rule 1.15, but concluded that such procedural rules do not involve obligations of lawyers governed by the Rules of Professional Conduct.

Additional Record Keeping. The Committee also recognized that if an IOLTA Account was closed when the balance in the IOLTA Account was turned over to the IOLTA Committee pursuant to Rule 1.15, the client files related to funds in such an IOLTA Account might later be needed to establish ownership of the funds. The Committee considered an indefinite obligation to keep such records, but concluded that such a requirement was impractical. Instead, it has proposed an addition to Rule 1.15A(e) to require the lawyer to maintain such records for 10 years after the funds are turned over to the IOLTA Committee.

Comments. Comments 6B and 14 through 16 to Rule 1.15 and revisions to Comment 7 to Rule 1.15A provide additional guidance to lawyers. Comment 17 to Rule 1.15 makes it clear that the *Olchowski* decision and Rule 1.15 do not address what a lawyer is required to do with funds held in a trust account that is not an IOLTA Account where the owner of the funds can no longer be located. In *Olchowski*, one of the reasons the Court gave in its determination that IOLTA Accounts are not subject to the Abandoned Property Law is that under the Treasurer's regulations, the Treasurer has the right to examine the account holder's books, papers and other records to verify reporting requirements. The Court reasoned that by opening an IOLTA Account an attorney cannot be understood to open his or her books and records that may contain client confidential records to outside review, which might constitute a breach of a lawyer's duties of confidentiality in Rule 1.6. See 485 Mass. at 820. That discussion may call into question whether funds held in a trust account that is not an IOLTA Account and for which the owner can no longer be located can be treated as abandoned property under the Abandoned Property Statute, if by turning over such funds to the Treasurer an attorney is deemed to be allowing the Treasurer to examine the attorney's books and records. The Committee decided not to address this situation, however, because it lies beyond the scope of the Court's decision and directive to the Committee in *Olchowski*.

RULE 1.15: SAFEKEEPING PROPERTY

(a) Definitions:

(1) "Trust property" means property of clients or third persons that is in a lawyer's possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as "trust funds."

(2) "Trust account" means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this Rule.

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer's own property.

(1) Trust funds shall be held in a trust account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer's interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

(3) A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred.

(4) All trust property shall be appropriately safeguarded. Trust property other than funds shall be identified as such.

(c) Prompt Notice and Delivery of Trust Property to Client or Third Person. Upon receiving trust funds or other trust 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 as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, 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.

(d) Accounting.

(1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.

(2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client’s funds in the trust account after the withdrawal.

(e) Operational Requirements for Trust Accounts.

(1) All trust accounts shall be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this Rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.

(2) Each trust account title shall include the words “trust account,” “escrow account,” “client funds account,” “conveyancing account,” “IOLTA account,” or words of similar import indicating the fiduciary nature of the account

(3) For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within the meaning of this Rule. The lawyer shall retain a copy executed by the bank and the lawyer for the lawyer's own records. The notice shall identify the bank, account, and type of account, whether pooled, with interest paid to the IOLTA Committee (IOLTA account), or individual account with interest paid to the client or third person on whose behalf the trust property is held. For purposes of this Rule, one notice is sufficient for a master or umbrella account with individual subaccounts.

(4) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to "cash" or "bearer" or by any other method which does not identify the recipient of the funds.

(5) Every withdrawal from a trust account for the purpose of paying fees to a lawyer or reimbursing a lawyer for costs and expenses shall be payable to the lawyer or the lawyer's law firm.

(6) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts: either (i) a pooled account ("IOLTA account") for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this Rule.

(7) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this Rule. As used in this paragraph, "family member" refers to those individuals specified in Rule 7.3(a)(3).

(f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain contemporaneous and complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this paragraph. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph (1)G of this paragraph (f) or they may be prepared manually.

(1) Trust Account Records. The following books and records must be maintained for each trust account:

A. Account Documentation. A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. Check Register. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. Individual Client Records. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or ledger for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. Bank Fees and Charges. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this Rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. Reconciliation Reports. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

(i) The balance which appears in the check register as of the reporting date.

(ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.

(iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. Account Documentation. For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

(i) bank statements.

(ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.

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

G. Electronic Record Retention. A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

(2) Business Accounts. Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) Trust Property Other than Funds. A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(4) Dissolution of a Law Firm. Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.

(g) Interest on Lawyers' Trust Accounts.

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of $100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm which deposited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest applied, and the method by which the interest was computed.

(3) Lawyers shall certify their compliance with this Rule as required by S.J.C. Rule 4:02, § (2).

(4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty-seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty-three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

(ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under this Rule;

(iii) the encouragement of the banking community and the public to support the IOLTA program;

(iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;

(v) the preparation of such guidelines and Rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;

(vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and

(vii) reporting to the court in such manner as the court may direct.

(5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.

(6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this Rule.

(h) Dishonored Check and IOLTA Account Inactivity Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board (i) in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason and (ii) in the event any IOLTA account has shown no activity for more than three years, apart from automatic interest payments to the IOLTA Committee.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Rule, and shall establish Rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) The IOLTA account inactivity notification shall be provided to the Board, to the IOLTA Committee, and to the lawyer, and shall contain the account name, the account number, the lawyer's (or firm's) name, the current balance of the account, and the date and amount of the last transaction in the account other than automatic interest accrual and disbursement of interest to the IOLTA Committee.

(6) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(7) The following definitions shall be applicable to this subparagraph:

(i) "Financial institution" includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) "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 Commonwealth.

(i) Disposition of Unidentified and Unclaimed Funds in IOLTA Accounts

(1) When the Office of Bar Counsel determines after reasonable investigation that an IOLTA account contains unidentified funds or unclaimed funds, bar counsel shall request the single justice of the Supreme Judicial Court to find that the funds are presumptively abandoned and to order their transfer to the IOLTA Committee.

(2) A client or other person who claims to be the owner of funds that have been transferred to the IOLTA Committee pursuant to subparagraph (i)(1) may submit a claim to the Office of Bar Counsel, which will investigate the merits of the claim.

(3) Any dispute concerning the ownership arising from subparagraphs (i)(1) or (i)(2) shall be resolved by the single justice of the Supreme Judicial Court.

(4) The following definitions shall be applicable to this paragraph (i):

(i) "Unidentified funds" refer to funds in an IOLTA account, the owner of which cannot be identified.

(ii) "Unclaimed funds" refer to funds in an IOLTA account, the owner of which can be identified but not located, or the owner of which can be located but has indicated an intent not to claim them.

(iii) The "owner" of unidentified or unclaimed funds refers to the person on whose behalf the lawyer was holding the funds and any court-appointed representative of that person or the person's estate.

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. Separate trust accounts are warranted when administering estate monies or acting in similar fiduciary capacities.

[2] In general, the phrase "in connection with a representation" includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument or by court appointment holds property "in connection with a representation". Likewise, a lawyer serving as an escrow agent in connection with litigation or a transaction holds that property "in connection with a representation". However, a lawyer serving as a fiduciary who is not actively practicing law does not hold property "in connection with a representation."

[2A] Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered or for expenses subsequently incurred are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account. These fees and expenses can be withdrawn by a lawyer only as fees are earned or expenses incurred. The Rule does not require flat fees to be deposited to a trust account, but a flat fee that is deposited to a trust account is subject to all the provisions of this Rule, including paragraphs (b)(2) and (d)(2). A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted. For the obligation to refund an unearned fee in the event of a discharge or withdrawal, see Rule 1.16(d).

[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 lawyer is not required to remit the portion from which the fee is to be paid. 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 trust 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, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[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 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.

[6] How much time should elapse between the receipt of funds by the lawyer and notice to the client or third person for whom the funds are held pursuant to paragraph (c) depends on the circumstances. By example, notice must be furnished immediately upon receipt of funds in settlement of a disputed matter, but a lawyer acting as an escrow agent or trustee routinely collecting various items of income may give notice by furnishing a complete statement of receipts and expenses on a regular periodic basis satisfactory to the client or third person. Notice to a client or third person is not ordinarily required for payments of interest and dividends in the normal course, provided that the lawyer properly includes all such payments in regular periodic statements or accountings for the funds held by the lawyer.

[6A] Paragraph (d)(2) provides that, on or before the date of any withdrawals from a trust account to pay fees due, the lawyers must provide the client in writing with, among other information, an itemized bill or other accounting showing the services rendered. Because the definition of "trust property" in paragraph (a)(1) includes funds held in a fiduciary capacity, lawyers who represent themselves as fiduciaries (such as personal representatives, executors, conservators, guardians or trustees) must comply with paragraph (d)(2) by creating, prior to or contemporaneous with any withdrawal of fees, the bills or accountings required by the Rule to justify payment. Such accountings may consist of itemized written time records, formal written bills, or other contemporaneous written accountings that show the services rendered and the method for calculating the fees. The lawyer is also required to maintain all trust account records specified in paragraphs (e) and (f) of this Rule.

[6B] A lawyer's inability to identify or locate the owner of funds held in the lawyer's IOLTA account does not relieve the lawyer of the duties set forth in paragraph (c) of this Rule. Where a lawyer has failed to disburse trust funds because of uncertainty as to the ownership of such funds, or because the owner is known but cannot be located or has failed to negotiate the lawyer's IOLTA account check, the lawyer must make timely and diligent efforts to identify or locate the owners and remit the funds to the owner. What constitutes reasonable diligence will depend on the circumstances, but may include, in the case of unidentified funds, a thorough review of bank records, accounting records, and client files; and, in the case of unclaimed funds, making inquiries of the client's family or acquaintances, examining public records, and conducting internet-based research. Where, even after the completion of such efforts, the funds in an IOLTA account remain unidentified or unclaimed, the provisions of paragraph (i) of this Rule will apply along with procedures established by the Office of Bar Counsel to effectuate the decision in *Matter of Olchowski*, 485 Mass. 807 (2020) ("*Olchowski*").

[7] Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer's own records. Forms for opening an IOLTA account (called an Attorney's Notice of Enrollment) may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. See the IOLTA Guidelines for additional procedures to be used when opening IOLTA accounts. Forms for notice to a bank when opening an individual (i.e., non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these forms shall not prevent the use of other forms consistent with this Rule.

[8] Paragraph (e)(4) states the general rule that all withdrawals and disbursements from trust account must be made in a manner which permits the recipient or payee of the withdrawal to be identified. It does not prohibit electronic transfers or foreclose means of withdrawal which may be

developed in the future, provided that the recipient of the payment is identified as part of the transaction. When payment is made by check, the check must be payable to a specific person or entity. A prenumbered check must be used, except that starter checks may be used for a brief period between the opening of a new account and issuance of numbered checks by the bank or depository.

[9] Paragraph (f) lists records that a lawyer is obliged to keep in order to comply with the requirement that "complete records" be maintained. Additional records may be required to document financial transactions with clients or third persons. Depending on the circumstances, these records could include retainer, fee, and escrow agreements and accountings, including RESPA or other real estate closing statements, accountings in contingent fee matters, and any other statement furnished to a client or third person to document receipt and disbursement of funds.

[10] The "Check Register," "Individual Client Ledger" and "Ledger for Bank Fees and Charges" required by paragraph (f)(1) are all chronological records of transactions. Each entry made in the check register must have a corresponding entry in one of the ledgers. This requirement is consistent with manual record keeping and also comports with most software packages. In addition to the data required by paragraph (f)(1)(B), the source of the deposit and the purpose of the disbursement should be recorded in the check register and appropriate ledger. For non-IOLTA accounts, the dates and amounts of interest accrual and disbursement, including disbursements from accrued interest to defray the costs of maintaining the account, are among the transactions which must be recorded. Check register and ledger balances should be calculated and recorded after each transaction or series of related transactions.

[11] Periodic reconciliation of trust accounts is also required. Generally, trust accounts should be reconciled on a monthly basis so that any errors can be corrected promptly. Active, high-volume accounts may require more frequent reconciliations. A lawyer must reconcile all trust accounts at least every sixty days.

The three-way reconciliation described in paragraph (f)(1)(E) must be performed for any account in which funds related to more than one client matter are held. The reconciliation described in paragraph (f)(1)(E)(iii) need not be performed for accounts which only hold the funds of a single client or third person, but the lawyer must be sure that the balance in that account corresponds to the balance in the individual ledger maintained for that client or third person.

The method of preparation and form of the periodic reconciliation report will depend upon the volume of transactions in the accounts during the period covered by the report and whether the lawyer maintains records of the account manually or electronically. By example, for an inactive single-client account for which the lawyer keeps records manually, a written record that the lawyer has reconciled the account statement from the financial institution with the check register maintained by the lawyer may be sufficient.

[12] Lawyers who maintain records electronically should back up data on a regular basis. For moderate to high-volume trust accounts, weekly or even daily backups may be appropriate.

[13] Paragraph (f)(4), along with Rule 1.17(e), provides for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. These provisions reflect the supervisory responsibilities of partners under Rule 5.1. Regardless of the arrangements the partners make among themselves for maintenance of the client trust records, each partner can be held

responsible for ensuring the availability of these records. For the definition of "law firm," "partner," and "reasonable," see Rules 1.0(d), (h), and (k).

[14] The provisions of paragraphs (h)(1)(ii), (h)(5) and (i) were added to the Rule to reflect the holding in *Olchowski*. The new sections provide a means by which unidentified and unclaimed funds in lawyers' IOLTA accounts may be transferred to the Massachusetts IOLTA Committee after investigation by bar counsel and approval by the Supreme Judicial Court. Bar counsel may learn of unidentified and/or unclaimed IOLTA funds in a variety of circumstances, including when an attorney dies, becomes disabled, is suspended or disbarred, or voluntarily discloses the existence of such funds; or when a bank notifies bar counsel of a dormant IOLTA account.

[15] Nothing in paragraphs (h)(1)(ii), (h)(5) and (i) alters a lawyer's duties to maintain complete records of all funds in an IOLTA account, comply with all operational requirements for a trust account, and promptly disburse funds held in trust for clients or third parties when payment is due. Lawyers who comply with the provisions of Rule 1.15 should rarely, if ever, encounter funds in an IOLTA account whose rightful owner cannot be identified or located.

[16] The records associated with unclaimed and unidentified funds may be necessary to a later determination of ownership of those funds pursuant to Rule 1.15(i)(1) and (2). Rule 1.15A prohibits a lawyer who has transferred such funds from destroying the related client file or files for up to 10 years.

[17] The *Olchowski* decision and Rule 1.15 do not address how funds that are held in trust accounts other than IOLTA Accounts and whose owner can be identified but not located are to be handled.

Rule 1.15A: Client Files (Revisions only to paragraph (e))

(e) A lawyer shall not destroy a client's file if the lawyer knows or reasonably should know that:

(1) a lawsuit or other legal claim related to the client matter is pending or anticipated;

(2) a criminal or other governmental investigation related to the client matter is pending or anticipated;

(3) a disciplinary investigation or proceeding related to the client matter or a claim before the Client Security Board is pending or anticipated; or

(4) less than ten years have elapsed since unclaimed or unidentified funds potentially related to the client file have been transferred to the IOLTA Committee pursuant to Rule 1.15(i).

Comments: (Revisions only to Comment 7)

[7] Under paragraphs (c) and (f) of this Rule, the nature of the underlying case dictates the minimum time period that a file must be retained before it may be destroyed without client agreement. In addition, a lawyer may not destroy the files under paragraph (e) if the lawyer knows that there are legal or disciplinary proceedings pending or anticipated that relate to the matter for which the lawyer created the files, if the materials at issue are intrinsically valuable

documents under paragraph (d), if less than 10 years have passed since funds relating to one or more client files were turned over to the IOLTA Committee under Rule 1.15(i), or if the lawyer has agreed otherwise. If the conditions imposed by this Rule are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law such as the Massachusetts Privacy Act, Mass. Gen. Laws c. 93H, and the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164. See Rule 1.6(c). A lawyer may destroy a client’s file in accordance with this Rule notwithstanding the possibility that there could be further proceedings after the expiration of the time limits set forth in this Rule (such as a motion for a new trial or for relief from a judgment in light of changes in the law or the discovery of additional evidence), so long as such proceedings are not pending or anticipated at the time of the destruction.

Proposed Amendments to Rules 1.15 and 1.15A(e) and Related Comments Marked for Changes from Current Massachusetts Rules 1.15 and 1.15A(e) and Related Comments

RULE 1.15: SAFEKEEPING PROPERTY

[No change to paragraphs (a) through (e)]

(f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain contemporaneous and complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this paragraph. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph (1)G of this paragraph (f) or they may be prepared manually.

(1) Trust Account Records. The following books and records must be maintained for each trust account:

A. Account Documentation. A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. Check Register. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. Individual Client Records. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or ledger for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. Bank Fees and Charges. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this Rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. Reconciliation Reports. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

(i) The balance which appears in the check register as of the reporting date.

(ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.

(iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. Account Documentation. For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

(i) bank statements.

(ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.

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

G. Electronic Record Retention. A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

(2) Business Accounts. Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) Trust Property Other than Funds. A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(4) Dissolution of a Law Firm. Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.

[No change in paragraph (g)]

(h) Dishonored Check and IOLTA Account Inactivity Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to

the Board (i) in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason and (ii) in the event any IOLTA account has shown no activity for more than three years, apart from automatic interest payments to the IOLTA Committee.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Rule, and shall establish Rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) The IOLTA account inactivity notification shall be provided to the Board, to the IOLTA Committee, and to the lawyer, and shall contain the account name, the account number, the lawyer's (or firm's) name, the current balance of the account, and the date and amount of the last transaction in the account other than automatic interest accrual and disbursement of interest to the IOLTA Committee.

(6) ~~(5)~~ Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(7) ~~(6)~~ The following definitions shall be applicable to this subparagraph:

(i) "Financial institution" includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) "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 Commonwealth.

(i) Disposition of Unidentified and Unclaimed Funds in IOLTA Accounts

(1) When the Office of Bar Counsel determines after reasonable investigation that an IOLTA account contains unidentified funds or unclaimed funds, bar counsel shall request the single justice of the Supreme Judicial Court to find that the funds are presumptively abandoned and to order their transfer to the IOLTA Committee.

(2) A client or other person who claims to be the owner of funds that have been transferred to the IOLTA Committee pursuant to subparagraph (i)(1) may submit a claim to the Office of Bar Counsel, which will investigate the merits of the claim.

(3) Any dispute concerning the ownership arising from subparagraphs (i)(1) or (i)(2) shall be resolved by the single justice of the Supreme Judicial Court.

(4) The following definitions shall be applicable to this paragraph (i):

(i) "Unidentified funds" refer to funds in an IOLTA account, the owner of which cannot be identified.

(ii) "Unclaimed funds" refer to funds in an IOLTA account, the owner of which can be identified but not located, or the owner of which can be located but has indicated an intent not to claim them.

(iii) The "owner" of unidentified or unclaimed funds refers to the person on whose behalf the lawyer was holding the funds and any court-appointed representative of that person or the person's estate.

Comment

[No change in comments 1 through 6A]

[6B] A lawyer's inability to identify or locate the owner of funds held in the lawyer's IOLTA account does not relieve the lawyer of the duties set forth in paragraph (c) of this Rule. Where a lawyer has failed to disburse trust funds because of uncertainty as to the ownership of such funds, or because the owner is known but cannot be located or has failed to negotiate the lawyer's IOLTA account check, the lawyer must make timely and diligent efforts to identify or locate the owners and remit the funds to the owner. What constitutes reasonable diligence will depend on the circumstances, but may include, in the case of unidentified funds, a thorough review of bank records, accounting records, and client files; and, in the case of unclaimed funds, making inquiries of the client's family or acquaintances, examining public records, and conducting internet-based research. Where, even after the completion of such efforts, the funds in an IOLTA account remain unidentified or unclaimed, the provisions of paragraph (i) of this Rule will apply along with procedures established by the Office of Bar Counsel to effectuate the decision in *Matter of Olchowski*, 485 Mass. 807 (2020) ("*Olchowski*").

[7] Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer's own records. Forms for opening an IOLTA account (called an Attorney's Notice of Enrollment) may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. See the IOLTA Guidelines for additional procedures to be used when opening IOLTA accounts. Forms for notice to a bank when opening an individual (i.e., non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these forms shall not prevent the use of other forms consistent with this Rule.

[8] Paragraph (e)(4) states the general ~~Rule~~rule that all withdrawals and disbursements from trust account must be made in a manner which permits the recipient or payee of the withdrawal to

be identified. It does not prohibit electronic transfers or foreclose means of withdrawal which may be developed in the future, provided that the recipient of the payment is identified as part of the transaction. When payment is made by check, the check must be payable to a specific person or entity. A prenumbered check must be used, except that starter checks may be used for a brief period between the opening of a new account and issuance of numbered checks by the bank or depository.

[No change in comments 9 through 13]

[14] The provisions of paragraphs (h)(1)(ii), (h)(5) and (i) were added to the Rule to reflect the holding in *Olchowski*. The new sections provide a means by which unidentified and unclaimed funds in lawyers' IOLTA accounts may be transferred to the Massachusetts IOLTA Committee after investigation by bar counsel and approval by the Supreme Judicial Court. Bar counsel may learn of unidentified and/or unclaimed IOLTA funds in a variety of circumstances, including when an attorney dies, becomes disabled, is suspended or disbarred, or voluntarily discloses the existence of such funds; or when a bank notifies bar counsel of a dormant IOLTA account.

[15] Nothing in paragraphs (h)(1)(ii), (h)(5) and (i) alters a lawyer's duties to maintain complete records of all funds in an IOLTA account, comply with all operational requirements for a trust account, and promptly disburse funds held in trust for clients or third parties when payment is due. Lawyers who comply with the provisions of Rule 1.15 should rarely, if ever, encounter funds in an IOLTA account whose rightful owner cannot be identified or located.

[16] The records associated with unclaimed and unidentified funds may be necessary to a later determination of ownership of those funds pursuant to Rule 1.15(i)(1) and (2). Rule 1.15A prohibits a lawyer who has transferred such funds from destroying the related client file or files for up to 10 years.

[17] The *Olchowski* decision and Rule 1.15 do not address how funds that are held in trust accounts other than IOLTA Accounts and whose owner can be identified but not located are to be handled.

Rule 1.15A: Client Files

(Revisions only to paragraph (e))

(e) A lawyer shall not destroy a client's file if the lawyer knows or reasonably should know that:

(1) a lawsuit or other legal claim related to the client matter is pending or anticipated;

(2) a criminal or other governmental investigation related to the client matter is pending or anticipated~~; or~~

(3) a disciplinary investigation or proceeding related to the client matter or a claim before the Client Security Board is pending or anticipated; or

(4) less than ten years have elapsed since unclaimed or unidentified funds potentially related to the client file have been transferred to the IOLTA Committee pursuant to Rule 1.15(i).

Comments:

(Revisions only to Comment 7)

[7] Under paragraphs (c) and (f) of this Rule, the nature of the underlying case dictates the minimum time period that a file must be retained before it may be destroyed without client agreement. In addition, a lawyer may not destroy the files under paragraph (e) if the lawyer knows that there are legal or disciplinary proceedings pending or anticipated that relate to the matter for which the lawyer created the files, if the materials at issue are intrinsically valuable documents under paragraph (d), if less than 10 years have passed since funds relating to one or more client files were turned over to the IOLTA Committee under Rule 1.15(i), or if the lawyer has agreed otherwise. If the conditions imposed by this Rule are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law such as the Massachusetts Privacy Act, Mass. Gen. Laws c. 93H, and the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164. See Rule 1.6(c). A lawyer may destroy a client's file in accordance with this Rule notwithstanding the possibility that there could be further proceedings after the expiration of the time limits set forth in this Rule (such as a motion for a new trial or for relief from a judgment in light of changes in the law or the discovery of additional evidence), so long as such proceedings are not pending or anticipated at the time of the destruction.