

Proposed Amendments to Rule 1.15

Offered by the Attorney Registration and Disciplinary Commission

(underlining reflects proposed changes to Proposal 04-19 (Revised Final Report on Ethics 2000) as modified after the September 14, 2007 Public Hearing)

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 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 such 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.

(b) A lawyer may deposit the 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) Unless the client and lawyer agree otherwise in a writing that conforms to the requirements specified in subparagraphs (1) through (5) below, legal fees paid in advance remain the property of the client, and a lawyer shall deposit into a client trust account all such legal fees, to be withdrawn by the lawyer only as fees are earned. A lawyer shall deposit into a client trust account all payments for expenses that have been received in advance, to be withdrawn by the lawyer only as the expenses are incurred. Any agreement between the client and the lawyer that legal fees paid in advance shall become the property of the lawyer upon payment shall be made only when necessary to accomplish some special purpose for the client that cannot be accomplished by using a security retainer and must comply with the following requirements:

(1) the agreement must be in writing;

(2) the agreement must be identified as an advance payment retainer agreement;

(3) the agreement must state that the payment becomes the property of the lawyer when paid and that the funds will not be held in a client trust account;

(4) the agreement must make clear disclosure to the client of the nature of the retainer, that it will be deposited in the lawyer's general account, and how the funds from the retainer will be applied in payment for services rendered; and

(5) the agreement must advise the client that he or she has the option to place the payment into a security retainer and that the choice of the type of retainer is the client's alone; provided, however, that, if the lawyer is unwilling to represent the client without an advance payment retainer, the agreement must so specify and must state the lawyer's reasons for that condition, together with an explanation of the special purpose of the advance payment retainer and an explanation why the advance payment retainer is advantageous to the client, in the circumstances of the legal matter.

(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.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property 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.

(f) All nominal or short-term funds of clients or third persons held by a lawyer or law firm, 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 pooled interest- or dividend-bearing trust accounts, hereinafter "IOLTA accounts," established with an eligible financial institution selected by a lawyer or law firm in the exercise of ordinary prudence, and with the Lawyers Trust Fund of Illinois designated as income beneficiary. 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. An 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, 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.

(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. 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.

(6) Each lawyer or law firm shall deposit into such interest-bearing trust accounts all clients’ funds which are nominal in amount or are expected to be held for a short period of time.

(7) The decision as to whether funds are nominal in amount or are expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm, and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer’s or law firm’s judgment on what is nominal or short term.

(g) 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) Definitions

(1) “IOLTA account” means an interest- or dividend-bearing trust account benefiting the Lawyers Trust Fund of Illinois, established in an eligible institution 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.

(2) “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.

(3) “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.

(4) “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.

(5) “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 bank 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.

(i) 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.

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 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 trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice.

[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 which part of the funds are the lawyer's.

[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 shall be promptly distributed. ~~This Rule must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 875 N.E.2d 1012 (2007).~~ Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Attorney Registration and Disciplinary Commission as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.

Paragraph (c) must be read in conjunction with the Illinois Supreme Court decision in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill.2d 277, 875 N.E.2d 1012, rehearing denied (September 24, 2007). There, the Court recognized the viability of advance payment retainers in Illinois. Prior to *Dowling*, the Court explicitly recognized only two types of retainers: a classic retainer and a security retainer. A classic retainer, also referred to as a true or general retainer, is paid by a client to the lawyer in order to secure the lawyer's availability during a specified period of time or for a specified 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. Under a security retainer arrangement, funds paid to the lawyer are not considered present payment for future services. Rather, the retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered. Any unearned funds are refunded to the client. The purpose of a security retainer is to secure payment of fees for future services that the lawyer is expected to perform. A security retainer must be deposited in a trust account and kept separate from the lawyer's own property. An advance payment retainer consists of 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. It is deposited into the lawyer's general account, not into a trust account. However, any portion of an advance payment retainer that is not earned must be refunded to the client.

The guiding principle in the choice of the type of retainer is the protection of the client's interests. The type of retainer that is appropriate will depend on the circumstances of the case. In the vast majority of cases, this will dictate that the funds paid to retain a lawyer will be considered a security retainer and placed in the trust account. An advance payment retainer is to be used only sparingly, when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. Any written retainer agreement, regardless of the type of retainer contemplated, should clearly define the kind of retainer being paid, and the agreement must be construed as providing for a security retainer in the event that the parties' intent cannot be gleaned from the language of their agreement. If the parties agree that the client will pay a security retainer, that term should be used in the agreement; it should also state that the funds remain the property of the client until used to pay for services rendered and that the funds will be deposited in a client trust account.

[4] Paragraph (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] Paragraph (f) requires that certain client funds be deposited in a pooled, interest-bearing trust account and provides that the interest earned on any such account 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 sole discretion of the depositing lawyer or law firm. Client funds that are neither nominal or short-term may continue to be deposited in separate, interest-bearing trust accounts for the benefit of the client as set forth in Paragraph (a).

[7] Paragraph (i) 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.