

TRUST ACCOUNT MANAGEMENT: HANDLING CLIENT AND THIRD PARTY FUNDS
By the Staff of the Indiana Supreme Court Disciplinary Commission
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I. Introduction

How Lawyers End Up with Client and Third Party Funds

A lawyer may end up with client and third party funds in his or her possession in a variety of ways. Probably the most common way is for a lawyer to receive a settlement or judgment check made payable to the lawyer, his or her client, and a subrogation lien holder in a personal injury action. Lawyers also end up with client and third party funds in other ways. In a divorce, a lawyer may be asked by the court to sell the real estate and hold the funds from the sale of the real estate until the court makes its final decision on the property settlement. A lawyer may also ask a client to give him an advance on the lawyer's fee and bill against this advance on an hourly basis. Another common way for lawyers to end up with client funds is for the lawyer to ask a client to give him or her an advance to pay the expenses of litigating a case.

These examples are not a comprehensive list of how a lawyer ends up with client and/or third party funds. There are numerous other ways that a lawyer may end up with client and/or third party funds in his or her possession. Because of their duties as fiduciaries, lawyers must treat these funds with special care. This special care begins with lawyers properly designating funds as belonging to the lawyer, the client, and to a third party. Lawyers' fiduciary duties also require lawyers to properly maintain client funds and third party funds separate from the lawyer's funds in a trust account. Lawyers' fiduciary duties are spelled out in several rules.

II. Rules and Statutes Pertaining to Trust Account Management

- [Prof. Cond. R. 1.15](#)¹: Safekeeping Property (ATTACHMENT A)
- [Prof. Cond. R. 1.16](#)(d): Duty to refund unearned fees at the termination of representation
- [Prof. Cond. R. 5.1](#): Responsibilities of a Partner or Supervisory Lawyer
- [Prof. Cond. R. 5.2](#): Responsibilities of a Subordinate Lawyer
- [Prof. Cond. R. 5.3](#): Responsibilities Regarding Nonlawyer Assistants
- [Prof. Cond. R. 8.4](#)(b): Misconduct; criminal acts
- [Prof. Cond. R. 8.4](#)(c): Misconduct; dishonesty, fraud, deceit or misrepresentation
- [I.C. 35-43-4-2](#): Theft
- [I.C. 35-43-4-3](#): Conversion
- [Admis. Disc. R. 23](#), §29(a): Trust Account Recordkeeping Requirements (ATTACHMENT B)
- [Admis. Disc. R. 23](#), §29(b) through (g): Trust Account Overdraft Notification (ATTACHMENT C)
- [Admis. Disc. R. 23](#), §30: Audits of Trust Accounts (ATTACHMENT D)
- [Rules Governing Attorney Trust Account Overdraft Reporting](#) (ATTACHMENT E)

III. A Lawyer's Fiduciary Duties in Handling Client and Third Party Funds

A. What is a trust account?

¹ All references to the [Indiana Rules of Professional Conduct](#) are to the rules as amended effective July 1, 2005.

Most trust account management obligations grow out of [Prof. Cond. R. 1.15](#). Interestingly, [Rule 1.15\(a\)](#) does not mention trust accounts by name, it merely states that, "Funds shall be kept in a separate account" The Comment [1], however, provides: "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." See also, [Admis. Disc. R. 23](#), §29(a)(1): "Attorneys shall deposit all funds held in trust in accounts clearly identified as 'trust' or 'escrow' accounts"

B. Key Fiduciary Principles

In general, lawyers act in a fiduciary relationship to their clients. Many of the general principles that apply to a fiduciary's duties in handling the principal's property apply with equal (if not greater) force to lawyers. "A lawyer should hold property of others with the care required of a professional fiduciary." Comment [1] to [Prof. Cond. R. 1.15](#).

With respect to handling property of others, here are some key fiduciary principles. Each of these principles is embedded in [Rule 1.15](#).

1. Duty to segregate: "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." [Prof. Cond. R. 1.15\(a\)](#).
2. Duty to safeguard: "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." [Prof. Cond. R. 1.15\(a\)](#).
3. Duty to promptly notify of receipt of funds: "Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person." [Prof. Cond. R. 1.15\(d\)](#).
4. Duty to promptly deliver funds: "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" [Prof. Cond. R. 1.15\(d\)](#).
5. Duty to account: "[U]pon request by the client or third person, [a lawyer] shall promptly render a full accounting regarding such property." [Prof. Cond. R. 1.15\(d\)](#).

C. Prohibition against Commingling

The inverse side of the obligation to segregate client or third party funds is the prohibition against commingling. The concept of commingling is simple. Commingling is the simultaneous presence of funds belonging to a lawyer and a client or third party in the same account. When commingling occurs, there is a loss of identity of funds as between the lawyer and clients or third persons.

Commingling occurs anytime a lawyer's own funds are held in an account that also contains client or third party funds. Commingling can occur in two different ways. First, the lawyer

deposits his own funds into a trust account containing funds belonging to clients or third parties. Second, the lawyer deposits client or third party funds in an account that is not a trust account and that contains the lawyer's own funds.

1. Proper Identification of Trust Account

Part of the obligation to safeguard trust funds is the duty to assure that those funds are properly identified as such. It is insufficient for a lawyer to segregate trust funds in an account that is not properly designated as a trust account. The account must be formally designated a "Trust Account" or "Escrow Account." All documents associated with a trust account should indicate its trust nature by being properly labeled, including checks, deposit tickets, monthly bank statements. More importantly, the account must be identified as a trust account to the financial institution and the financial institution's records must reflect that it is a trust account. See [Admis. Disc. R. 23](#), §29(a)(1). Thus, the lawyer's agreement with the bank² should clearly provide that it is a trust account.³ This avoids any danger that the financial institution will freeze or attach the funds if proceedings supplementary to execution are filed by one of the lawyer's personal creditors or the bank exercises a set off against the funds upon a default on a personal obligation owed to the bank by the lawyer. It also assures that the funds in the account will not be considered a part of the lawyer's bankruptcy, probate or marital estate should the lawyer file for bankruptcy, die or divorce. It will also protect the funds from seizure by the IRS in the event of a levy against the lawyer.

2. Risks of Lawyer Commingling Money in Client Trust Account

²For simplicity, financial institutions will be occasionally referred to as "banks." It is understood that lawyers may use a variety of financial institutions as depositories for their trust accounts, including banks, savings and loan associations, savings banks, credit unions and the like. See [Admis. Disc. R. 23](#), section 29(g)(1).

³When opening a trust account, the bank is required to obtain a federal tax identification number or social security number from the lawyer or law firm for purposes of reporting interest (if any) to the Internal Revenue Service. How the lawyer handles this situation depends upon the circumstances. If the trust account is a non-IOLTA trust account that does not earn any interest, the lawyer may use his or her federal tax identification number or his or her own social security number. Because no interest will be earned or reported, there are no tax ramifications. If the trust account is an IOLTA account, the interest (less bank charges) will be paid over to the Indiana Bar Foundation pursuant to [Prof. Cond. R. 1.15\(f\)\(5\)\(A\)](#). For a discussion of the IOLTA program, see section III(E), *infra*. In this event, the lawyer will supply the Bar Foundation's federal tax identification number to the bank, and the bank will report the interest earned on the account to the IRS under the Bar Foundation's tax identification number. If a lawyer holds client funds that are not nominal in amount and not to be held for a short period of time, the lawyer may, in consultation with the client, determine to hold the funds in a separate interest-bearing account, with the interest, net of bank charges, accumulating for the benefit of the client. In this event, the lawyer **should not** use his or her tax identification or social security number on the account. If he or she does, the interest will be reported to the IRS as income of the lawyer or law firm. Instead, the lawyer should use the client's tax identification or social security number or apply for a separate federal tax identification number in the name of the client to assure that the interest is reported in the name of the client. The same rule applies to situations in which the lawyer controls an account as a fiduciary for a trust or an estate.

There are numerous risks that are imposed upon clients when a lawyer holds his own funds in a bank account that is denominated a trust account.

- (a) There is the risk that the lawyer's personal creditors will be able to gain access to client funds in the trust account in order to satisfy the lawyer's personal obligations.⁴
- (b) Negligent invasion of client funds. There is the problem that the lawyer is obligated to keep track of his or her own funds in the trust account, as well as funds of clients or third persons. Sloppiness in accounting or confusion in the identity of funds could lead to the reckless or negligent invasion of client funds when the lawyer innocently intends to access funds in the trust account erroneously thought to belong to the lawyer.
- (c) A lawyer's tendency to look to the trust account as a source of funds that belong, in part, to the lawyer, may habituate the lawyer to draw funds from the account for personal use even when it does not contain funds belonging to the lawyer. A lawyer's use of client funds for his personal benefit is a criminal act. See, section VI, infra.
- (d) Maintenance of a trust account is a public declaration that the funds in the account do not belong to the lawyer in his or her personal capacity. By placing or retaining his or her own funds in the trust account, the lawyer acts inconsistently with the established purpose of the account and, in effect, engages in misrepresentation to the world about the true purpose and function of the account.
- (e) The lawyer who deposits or retains his or her own funds in a trust account invites the accusation that he is using the account to shield his personal assets from his own creditors. It may not be that every lawyer who commingles personal funds in a trust account intends to defraud creditors, but such an improper use is not without precedent.
- (f) Especially by retaining earned fees in a trust account, a lawyer may be tempted to improperly use the trust account to shield income from recognition in the tax year received. Thus, the trust account is misused as a vehicle for defrauding the taxing authorities.
- (g) Importance of promptly disbursing funds earned by the lawyer. When funds are paid into trust and the lawyer is entitled to a portion of those funds as a fee after there has been a division of interests as between the client and the lawyer, the lawyer should promptly withdraw his earned fees. If the lawyer delays withdrawing fees after they are earned, the retention of the earned fees in the trust account constitutes improper commingling.

⁴The very nature of a fiduciary account is that it does not contain funds belonging to the fiduciary in any non-fiduciary capacity. It is certainly possible that a persistent personal creditor of a lawyer could discover the fact that the lawyer maintains personal funds in his trust account and argue persuasively that the account's fiduciary character should be disregarded because of the lawyer's failure to honor the obligation to segregate funds held in a fiduciary capacity from personal funds. In any event, there is the even greater risk, under these circumstances, that client funds will be frozen and unavailable to clients until there has been a full accounting and separation of the funds belonging to the lawyer from funds belonging to clients.

3. Risks of Lawyer Commingling Client Funds in Lawyer's Personal or Business Account

- (a) Client funds become available to the lawyer's personal creditors in the event of an attachment of those funds pursuant to proceedings supplementary to execution or otherwise under the [Depository Financial Institutions Adverse Claims Act. IC 28-9-1-1](#), et seq. Even if the identity of the funds is later clarified, the client funds may be frozen for up to ninety (90) days by virtue of the automatic hold provision of [IC 28-9-4-2](#).
- (b) Upon bankruptcy, dissolution of marriage or death of the lawyer, client funds may become a part of the lawyer's bankruptcy, marital or probate estate. Once again, there may eventually be a separation of interests in the funds, but in the meantime, client funds will be unavailable to their true owners.
- (c) Client funds are available to cover checks written for the personal benefit of the lawyer, resulting in conversion of client funds. See, section VI, infra.

D. Pooled trust accounts versus separate trust accounts.

Generally, funds held for clients that are small in amount or not being held for a substantial period of time will be combined into a pooled trust account. The administrative burden and costs of opening and maintaining a separate interest-bearing account for each client or sub-accounting for interest earned on a pooled account is generally not justified by the small amount of interest that could be earned on the funds. Notwithstanding the fact that the account is pooled, there must be sub-accounting methods in place (discussed below) that accurately account for each individual client's funds. When the lawyer is handling large amounts of client funds, especially for significant periods of time, the lawyer should consult with the client concerning whether or not that client's funds should be segregated into a separate trust account that earns interest. Any interest earned on trust funds belongs to the client, not to the lawyer. [Prof. Cond. R. 1.15\(f\)\(1\)](#); [In re Pub. Law No. 154-1990](#), 561 N.E.2d 791 (Ind. 1990).

E. IOLTA Accounts.

Effective February 1, 1998, the Indiana Supreme Court promulgated rules creating an Interest on Lawyers Trust Account (IOLTA) program in Indiana. [Prof. Cond. R. 1.15\(f\)](#) through (i). Whereas previously lawyers generally pooled their trust funds in non-interest bearing accounts, under the IOLTA program lawyers are allowed to have their pooled trust accounts draw interest. The interest on trust funds in an IOLTA account does not belong to the lawyer, nor does it belong to the clients. Instead, by opening an IOLTA account, the bank is directed to pay the interest on the account over to the Indiana Bar Foundation to be used to fund law-related programs that are in the public interest. The IOLTA program has been designed in such a way as to make participation by lawyers very simple. Attached as ATTACHMENT F are materials produced by the Indiana Bar Foundation about the IOLTA program. More information is available on the IOLTA program by contacting the Indiana Bar Foundation or visiting its website at: www.inbf.org.

In late 2004, the Supreme Court announced a change to the Interest on Lawyers Trust Account (IOLTA) program to require that all lawyers who maintain pooled trust accounts participate in the IOLTA program. Press release, "Legal Aid to the Poor Gets Boost from Supreme Court: Court to Adopt Universal IOLTA Plan" (Nov. 23, 2004), available on-line at <http://www.in.gov/judiciary/press/2004/1123b.html> (last visited Oct. 4, 2005). On February 5,

2005, the Court ordered amendments to [Prof. Cond. R. 1.15](#) implementing mandatory IOLTA participation, effective July 1, 2005. See, Attachment A.

F. Lawyers in Other Fiduciary Roles

When the lawyer holds funds in some capacity other than as an attorney acting in a representative capacity, e.g., as trustee of a trust or as personal representative of an estate, the lawyer should maintain a separate trust or escrow account for each such fiduciary role and should not intermingle those funds with client trust funds or with other similar fiduciary accounts.

G. Signatory Authority over Trust Accounts

Only lawyers admitted in Indiana should have signatory authority over a trust account. [Admis. Disc. R. 23](#), sec. 29(a)(6), contemplates that a lawyer may designate an agent as a trust account signatory. It should only be in limited and highly controlled situations that a lawyer delegates signature authority over a trust account to a non-lawyer. In the event there is such a delegation, the lawyer must institute and maintain thorough internal controls to insure against the mishandling of funds. The lawyer must receive the monthly bank statement directly from the bank without it passing through the hands of the non-lawyer who is responsible for the day-to-day management of the trust account and carefully review the bank statement. Also, someone who has no signatory authority over the account must be responsible for periodic account reconciliations. See Rule 7(B)(2), Trust Account Overdraft Reporting Rules. Surety bonding for all employees who have control over the trust account should be obtained. Comprehensive staff training for all staff having functions relating to the management of a trust or other fiduciary account is essential.

H. Where Should Lawyers Maintain Client Trust Accounts?

The trust account must be at a financial institution located within the state of Indiana unless there is specific consent from all account beneficiaries to hold funds in an out-of-state bank. [Prof. Cond. R. 1.15\(a\)](#).

A lawyer must maintain his or her trust account only in a financial institution approved by the Disciplinary Commission. Approval is contingent upon the institution agreeing to provide notice to the Disciplinary Commission of all overdrafts on lawyer trust accounts. [Admis. Disc. R. 23](#), § 29(b) through (g). A current list of approved financial institutions is available on the Disciplinary Commission's website at: <http://www.in.gov/judiciary/discipline/docs/trust-account-depositories.pdf>.

IV. Whose funds are these?

A good rule of thumb is to ask the question: "At this point in time, who owns these funds?" If the answer to that question is that the client or a third party owns the funds, the funds belong in trust. If the answer is the lawyer owns the funds, the funds do not belong in trust.

A. What funds must go into the trust account?

1. Advanced Expenses: Funds paid by the client to the lawyer to defray anticipated costs that will arise during the course of representation, e.g., filing fees, deposition costs, expert witness fees, belong in trust until disbursed to pay for those costs. [Prof. Cond. R. 1.15\(c\)](#).

2. Advanced Fees: Fee retainers that are in the nature of deposits to secure payment of fees to be earned by the lawyer in the future on an hourly basis must be deposited into the trust account, not the operating account. *Matter of Kendall*, 804 N.E.2d 1152, 1158 (Ind. 2004). See also, [Prof. Cond. R. 1.15\(c\)](#). These funds should be held in trust until fees are earned through hourly work or by whatever method is agreed upon with the client and the client is billed. Sufficient funds to satisfy the bill may be issued from the trust account to the lawyer or law firm by way of a properly documented trust check once the client has received a proper billing and the bill is shown to have been satisfied by a transfer from trust. In the event the client disputes the charges, the disputed fees should be immediately returned to trust until the dispute is resolved.

By contrast, a flat fee, as is common in many criminal representations, need not be deposited into the trust account. *Kendall* at 1157. Flat fees are, generally, deemed to be earned when paid, and so flat fees should be deposited into the operating account. However, this does not relieve the lawyer of an obligation to promptly refund unearned fees and expenses upon being discharged by the client before the completion of the legal matter. See [Prof. Cond. R. 1.16\(d\)](#); *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). Upon being discharged before representation is complete, the lawyer's entitlement to fees is not pursuant to the fee contract, but is to be determined on a *quantum meruit* basis. *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind. 1999); *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315 (Ind.App. 1990). Nonrefundable retainers, while not prohibited under proper circumstances, or other types of minimum fee arrangements that create financial disincentives for a client to discharge counsel are of questionable validity. *In re Thonert*, 682 N.E.2d 522 (Ind. 1997). For a more in-depth discussion of nonrefundable retainers, see Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1 (1993).

3. Funds Belonging to Lawyer and Client: All funds in which the client, the lawyer, or third parties each claim an interest must be initially deposited into trust until such time as there is a division of interests in the funds. A good example is a personal injury settlement in the form of a check or insurance company draft made payable to the joint order of the client and the lawyer. These funds should be deposited to and held in trust until such time as a written disbursement statement is presented to and approved by the client showing all proposed disbursements and the net proceeds payable to the client. See [Prof. Cond. R. 1.5\(c\)](#).
4. Receipt of Aggregated Non-Trust and Trust Funds: Funds paid to the lawyer by a client in a single check or credit card transaction some of which belong in trust and some of which do not belong in trust should be initially deposited in trust and a trust account check written to promptly disburse the non-trust monies. Initial deposit of such a check or credit card transaction into an operating account should be avoided as it places those funds at risk, even if for a brief period of time.
5. Disputed Funds: All funds in which more than one person (including the lawyer) claim an interest should be held in trust until such time as there is a division of interests between or among the claimants. When a lawyer holds funds against which there is a valid security interest by a third party (e.g., subrogation lien, properly executed medical letter of protection), the lawyer should not issue the funds to the client, even though the client demands it, unless the competing, third party claim against the funds has been resolved. See, e.g., *In the Matters of Allen and Young*, 802 N.E.2d 922 (Ind. 2004). The lawyer may need to obtain assistance to mediate the dispute between the client and the third party or file an interpleader action to determine the respective rights and interests of the client and the

third party. On the other hand, if there is not a properly perfected security interest against the settlement, the lawyer should not disburse settlement funds to the client's creditors absent the express consent of the client.

6. Handling of Cash Belonging in Trust: Cash properly belonging in trust must not be held in a safe deposit box, a safe or any other supposedly "secure" place. A lawyer may not hold client funds in the form of cash without depositing them into trust. There is no audit trail or documented accountability for cash. Payments of cash to a lawyer for deposit into trust should be documented through the issuance of a receipt to the payor, with a copy retained by the lawyer, and promptly deposited.
- B. What funds may go into the trust account?

Money to Defray Bank Service Charges: The lawyer may be able to arrange with a financial institution to not charge administration fees on a trust account. Even under this circumstance, it may be necessary for the lawyer to maintain \$1.00 of personal funds in the account in order to keep it from being closed out during times when the account would otherwise have a zero balance. For non-IOLTA accounts, if there are monthly bank charges against a trust account holding pooled client funds, the lawyer should not allow them to be debited against the client funds that happen to be in the trust account on the day when the charges are debited. The bank may be willing to debit the trust account bank charges from another account containing the lawyer's personal or business funds. If such arrangements are not available, this is one exception to the general rule that the lawyer's own funds should never be held in trust. [Prof. Cond. R. 1.15\(c\)](#) recognizes this by allowing a lawyer to "deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account." In order to honor the proscription against maintaining a balance of lawyer funds that is not nominal, we recommend not holding in the trust account at any given time more than the estimated amount of funds necessary to defray bank charges for a three-month period. The balance of lawyer funds should be replenished approximately once every three months.

If a trust account is an IOLTA account, bank charges will usually be set off against interest. In the event the bank charges exceed the amount of interest earned on the account, those excess charges are not to be debited from the trust account principal, but are to be billed to the Indiana Bar Foundation.

There should be a subsidiary ledger reflecting the fact that the trust account contains funds belonging to the lawyer and that the purpose is to cover bank fees and charges or to maintain a nominal balance in order to keep the account open. Bank charges that are assessed against the account should be deducted from the balance on the lawyer's subsidiary ledger. Those funds should be replenished when they run too low to cover anticipated bank charges.

- C. What funds must not go into the trust account?

1. Funds Belonging Exclusively to the Lawyer: Funds owned by the lawyer in which clients or third parties own no interest must not go into the lawyer's client trust account. The lawyer should never maintain a "cushion" of the lawyer's own funds in order to avoid overdrafts. Absent bank error, for which the lawyer has no responsibility, a properly managed trust account should never result in an overdraft.

2. Withdrawing Earned Fees from Trust Account: When there has been a division of interests in funds as among the lawyer, the client and any third parties, the lawyer's earned fees should be promptly withdrawn from trust. Maintaining earned fees in trust constitutes improper commingling. Generally, the best time to disburse earned fees is contemporaneously with disbursing net proceeds to the client.
3. Employee Payroll Taxes: Withheld employee payroll taxes must not be put into an attorney trust account. These are not funds being held in the lawyer's capacity as an attorney, but rather are being held pursuant to an employer-employee relationship. For business reasons, a lawyer/employer may wish to hold withheld taxes in a separate account, but it should not be the client trust account.

V. Handling Disbursements from Trust

- A. Trust account disbursements should only be done by way of a fully documented transaction, i.e., a check made payable to a named payee or a bank wire transfer.
- B. A trust check should never be made payable to cash or bearer.
- C. Withdrawals from a trust account should never be made by way of a cash withdrawal from an automated teller machine.
- D. Cash should never be received back at the time of making a trust account deposit. Rather, the entire check should be deposited into trust, and checks should be written for authorized disbursements.
- E. Earned attorney fees should be paid out of trust in the form of a trust check written payable to the order of the lawyer or law firm and documented as being for earned fees. A trust check should never be issued directly to one of the lawyer's or law firm's personal creditors, even if it constitutes the disbursement of funds from trust that the lawyer has earned as fees. Rather, the entire amount of earned fees should be disbursed by check out of the trust account, deposited into the operating account, and checks written from the operating account to the lawyer's creditors.
- F. Similarly, costs incurred by the lawyer on behalf of the client should be paid directly out of the trust account with a trust check payable to the order of the vendor of the goods or services. If the lawyer advances costs on behalf of the client, the check should be written out of the operating account because the advance is being made with the lawyer's funds.

VI. Conversion and Theft of Client and Third Party Funds

- A. A lawyer's unauthorized use of client and/or third party funds will lead to serious disciplinary problems. A lawyer who is holding client or third party funds in his or her trust account must not invade those funds for any unauthorized purpose. A lawyer's unauthorized use of client or third party funds is a crime.
- B. [Ind. Professional Conduct Rule 8.4](#) (b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. [I.C. 35-43-4-3](#) defines the crime of conversion as: "A person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion" [I.C. 35-43-](#)

[4-2](#) defines the crime of theft as: “A person who knowingly or intentionally exerts unauthorized control over property of another person, with the intent to deprive the other person of any part of its value or use, commits theft” A lawyer who commits the crime of theft or conversion commits an act of dishonesty in violation of [Ind. Professional Conduct Rule 8.4\(c\)](#). See, e.g., *Matter of Towell*, 699 N.E.2d 1138, 1141 (Ind. 1998); *Matter of Wilson*, 715 N.E.2d 838, 841 (Ind. 1999).

- C. Remember that a lawyer in possession of money belonging to a client or third party should never use those funds for his or her own benefit, for the benefit of another client, or for the benefit of anyone else. If a lawyer uses money belonging to a client or a third party for his own benefit, the benefit of another client, or anyone else, that lawyer commits the crime of conversion or theft. When a lawyer has possession of money belonging to a client or third party, he or she should never treat the money as his or her own. This money belongs in trust or should be paid to the appropriate party. Any other use of these funds, without authorization of the party who owns the funds, is a criminal act.

VII. Fundamental Concepts in Trust Account Management

- A. Although client funds are often maintained in a pooled trust account, they must be treated as though each client's funds are held in a separate account.
 - 1. The funds of one client can **never** be used to cover disbursements out of trust on behalf of another client.
 - 2. The tool for maintaining the separate identity of each individual client's funds is a subsidiary ledger for each client who has funds in the trust account. Each client's subsidiary ledger must reflect all receipts and disbursements from the trust account on behalf of that client. It will indicate at all times the balance of funds held in the trust account on behalf of that client. Receipts to trust should not be recorded on the client ledger until they have been actually deposited. Disbursements from trust should not be made unless the client ledger has been checked to confirm that funds are available to support the disbursement. Some software accounting programs will not allow a disbursement from a client sub-account, even though there are sufficient funds to cover the disbursement in the trust account, unless there are sufficient funds on deposit attributable to that client sub-account. This is an excellent safeguard to avoid “robbing Peter to pay Paul.”
- B. Funds should never be paid out of trust on behalf of a client until the funds on which a trust check is written have been collected through banking channels. In other words, at the time funds are disbursed there should be minimal risk of a charge back to the trust account in the event a deposited instrument is not honored by the payor bank. Most banks will make deposited funds available for withdrawal on the first business day following the business day⁵ on which the funds are deposited. This, of course, does not mean that a credited deposit will not be charged back to the account in the event the depository bank receives notice from the payor bank that the instrument has not been honored. Should a disbursement be made from the trust account in reliance on the deposit of funds that may

⁵Typically, business transacted after a defined point in time in the afternoon (typically 2:30 p.m.) will be considered a next business-day transaction by the bank.

yet be dishonored, the lawyer runs the risk that, upon a dishonored deposit being charged back to the trust account, other clients' funds will have been used to cover the disbursement. If there are not enough funds belonging to other clients in the trust account to cover the charge back, the account will go into overdraft status.⁶ The best way to minimize the risks of a deposited item being dishonored and charged back to the trust account is to wait a prudent period of time before disbursing funds in reliance upon the deposited funds being good. An appropriate waiting period would be to follow the waiting periods defined by the Federal Reserve Board in Regulation CC for availability of funds. These waiting periods are set out below, but questions should be resolved by the lawyer consulting his or her banker or Regulation CC, 12 C.F.R. Part 229.

1. Funds available on the same business day as the business day of deposit:
 - (a) Electronic direct deposits.
2. Funds available on the first business day after the business day of deposit:
 - (a) U.S. Treasury checks payable to depositor.
 - (b) Wire transfers.
 - (c) Checks drawn on the depository bank.
 - (d) Cash deposited in person with a bank employee.

⁶It is not always possible to be 100% certain that deposited funds have been collected. One reason for this is that the banking system works in such a way that a depository bank is not notified when a deposited item has been honored by the payor bank. Rather, the depository bank will only receive notice from the payor bank if the instrument has been dishonored. Thus, the lawyer cannot contact his or her own bank and confirm that a deposited item has been collected. The only thing the depository bank will be able to report is that there has not been a notice of dishonor up to that point in time. The lawyer can always contact the payor bank and ask to confirm whether the item has been paid. For a more detailed discussion of the collection of bank deposits, see Robert D. Cooter & Edward L. Rubin, *Orders and Incentives As Regulatory Methods: The Expedited Funds Availability Act of 1987*, 35 *UCLA L. Rev.* 1115 (1988). See also, 12 CFR Part 229 (2004) (known generally as "Regulation CC--Availability of Funds and Collection of Checks"). At the extreme, if a deposited instrument has been forged, it could be several weeks before the victim of the forgery discovers it, the depository bank receives notice and charges the deposit back to the trust account. In the end, there is always some unavoidable, but miniscule degree of risk associated with the disbursement of funds upon the deposit of a check into a trust account. Use of conservative and prudent trust account management practices by the lawyer will minimize such risks. In the event a dishonor occurs that could not have been reasonably anticipated, resulting in the charge back of a deposit to a trust account, the lawyer will be faced with a confusing situation that will need to be promptly rectified in order to assure that other clients' funds have not been put at risk; however, culpability through the lawyer discipline system should not be one of the problems facing the lawyer at that point. Failure to use prudent trust account management practices, however, may be treated differently.

- (e) State and local government checks payable to the depositor and deposited in person with a bank employee.
 - (f) Cashier's, certified, and teller's checks payable to the depositor and deposited in person with a bank employee.
 - (g) Federal Reserve Bank checks, Federal Loan Bank checks, and U.S. postal money orders payable to the depositor and deposited in person with a bank employee.
3. Funds available on the second business day after the business day of deposit:
- (a) All instruments listed in paragraph 2(d) through (g) above that were deposited by some method other than delivery in person to an employee of the depository bank, e.g., deposit through an ATM or overnight deposit drop.
 - (b) All other local checks. A local check is a check written on a paying bank that is located in the same Federal Reserve check-processing region as the bank branch where the check is deposited. Your banker will be able to assist you in identifying local checks.
4. Funds available on the fifth business day after the business day of deposit:
- (a) All other non-local checks. A non-local check is a check written on a paying bank that is located in a different check-processing region from the bank branch where the check is deposited.
5. Exceptions. The foregoing are general guidelines, and certain exceptions are applicable. The lawyer should check with his or her banker if there is any doubt about what availability period applies. Exceptional circumstances include:
- (a) When your bank believes a deposited check will not be paid.
 - (b) When the lawyer deposits checks totaling more than \$5,000 on any one day.
 - (c) When the lawyer re-deposits a check that has previously been returned unpaid.
 - (d) When the lawyer has overdrawn his or her account repeatedly in the previous six months.
 - (e) The bank has an emergency, such as failure of communications or computer equipment.
- C. The lawyer should never issue a post-dated trust check on the assumption that it will be presented on a future date after deposited funds have been collected. The reason for this is that the deposited instrument might be dishonored and the deposit not credited to the trust account or charged back against the trust account balance. Thus, unless the lawyer can get the post-dated trust check returned or is able to stop payment on it, it may be debited against other clients' funds in the trust account or may be dishonored due to insufficient funds in the trust account.

- D. New Jersey has recognized a very narrow exception to the prohibition against disbursing deposited funds from trust until they are collected in cases where the deposited instrument is in the form of a certified, bank or cashier's check and the funds are received in connection with a real estate or commercial property closing. See New Jersey Advisory Opinion 454, 105 N.J.L.J. 441 (May 15, 1980), as amended at 114 N.J.L.J. 110 (August 2, 1984). A reprint of these ethics advisory opinions is attached as ATTACHMENT G. New Jersey Advisory Opinion 454 was cited favorably by the New Jersey Supreme Court in *In re Moras*, 131 N.J. 164 (1993). Indiana has no direct authority on point.
- E. Always maintain an audit trail.
1. An audit trail consists of source documents that reflect all transactions into and out of a trust account. Source documents include:
 - (a) Copy of the deposit ticket, deposit receipt or bank credit memorandum;
 - (b) Bank statement showing the credit of deposited funds;
 - (c) Checkbook stub or checkbook register;
 - (d) Check or bank debit memorandum;
 - (e) Bank statement showing the debit of disbursed funds.
 2. Deposit tickets should be annotated to identify each deposited item (whether cash or instrument), the client's name (or file number) and the source of the funds. No unidentified cash deposits should be made into trust.
 3. Checks should be annotated to identify the client's name (or file number) and the purpose of the check. No check should ever be written on a trust account without the memorandum line being filled out to clearly identify the purpose of the check.
 4. The deposit ticket and the check should be annotated well enough to direct the lawyer to the client matter file corresponding to the receipt or disbursement. In turn, the client matter file or other accounting files should contain adequate documentation to fully explain all deposits or disbursements.
- F. Records pertaining to the handling of client trust funds must be maintained for a period of five years following termination of representation. [Prof. Cond. R. 1.15\(a\)](#); [Admis. Disc. R. 23](#), sec. 29(a)(2) (effective January 1, 1997).

VIII. Mechanics of Trust Account Maintenance

The following is an outline of the steps lawyers should take maintain their client trust account. This outline is not a comprehensive discussion on the law of client trust accounts; it is intended as a guide for how a lawyer should handle trust account transactions.

- A. Handling Deposits: When a lawyer receives funds in which a client or third party have an interest, the lawyer should immediately contact the client or third party to obtain the necessary endorsements. Then, the lawyer should deposit the client or third party funds into

his trust account. The lawyer should make an entry in the checkbook registry, the trust receipt book, and the client's subsidiary ledger. The lawyer should keep the following documents to record this transaction: deposit ticket (keep a copy), checkbook register, entry in trust receipts book, and entry in client's subsidiary ledger.

1. Receipt of funds.
2. Promptly notify client and obtain necessary endorsements.
3. Deposit into trust account.
 - (a) Deposit slip prepared.
 - (b) Funds deposited.
 - (c) Checkbook register entry is made.
 - (d) Duplicate deposit slip is maintained.
4. Entry is made into trust receipts book (see example at ATTACHMENT H).
5. Entry is made into client's subsidiary ledger (see example at ATTACHMENT I).

B. Handling Disbursements: After the funds have been collected by the bank (See, section VII (B) supra), the lawyer should promptly disburse the funds to the client and/or third party with the consent of the client. If the client refuses to consent to disburse funds owed to a third party, the lawyer should hold these funds in trust until the dispute between the client and the third party has been resolved. The lawyer should have the client consent to disburse the funds in writing. In case of a disbursement of funds from a contingent fee matter, the lawyer is required to provide the client with a written settlement statement showing the remittance to the client (See, [Prof. Cond. R. 1.5\(c\)](#)). After obtaining the consent of the client, the lawyer should prepare, sign, and issue the appropriate check(s). The lawyer should make an entry in the checkbook registry, trust disbursements book, and the client's subsidiary ledger. The lawyer should keep the following documents to record this transaction: check(s) (keep a copy), checkbook register, entry in trust disbursements book, and entry in client's subsidiary ledger.

1. Documentation supporting disbursement is received or created.
2. Disbursement is made promptly after receipt of funds, once deposited funds are collected and the client has consented to the same.
 - (a) Check is prepared and signed by lawyer.
 - (b) Check is issued.
 - (c) Checkbook register entry is made.
3. Entry is made into trust disbursements book (see example at ATTACHMENT J).
4. Entry is made into client's subsidiary ledger (see example at ATTACHMENT I).

- C. Monthly Reconciliation and Trial Balances: Lawyers should do a monthly reconciliation of their trust account records. This monthly reconciliation is a three-way check to verify the accuracy of trust account records (See ATTACHMENTS K and L for examples).
1. Step 1: The balance of all trust receipts and disbursements is reconciled to the total of all individual client ledger balances.
 2. Step 2: The total of all individual client ledger balances is reconciled to the checkbook register balance.
 3. Step 3: The checkbook register balance (as adjusted for outstanding checks and deposits in transit) is reconciled to the balance on the monthly trust account bank statement.

IX. Other Issues in Trust Account Management

A. Interest on Trust Accounts.

1. Unless it is an IOLTA account, a pooled trust account should not be interest bearing. If a non-IOLTA trust account does earn interest, the interest belongs *pro rata* to the clients or third parties whose funds earned the interest, and not to the lawyer. *In re Pub. Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990). Thus, if the account is interest bearing, the lawyer will have the affirmative obligation to sub-account for the interest so that each person who had funds in trust during any part of the month in which interest is paid is credited with a *pro rata* share of the interest. The administrative costs of sub-accounting for the interest will typically outweigh the benefit to the account beneficiaries. Thus, rather than incur these administrative costs, pooled trust accounts are typically held in non-interest bearing accounts.
2. It may be cost beneficial for trust funds to be held at interest in a separate trust account for clients whose funds are being held in trust for a long period of time or where a substantial amount of client money is being held, even for a shorter period of time. These situations should be handled on a case-by-case basis in consultation with each individual client.
3. In no event should the lawyer treat any interest earned on trust funds as the lawyer's own funds. To do so would constitute conversion of those funds.
4. On October 22, 1997, the Indiana Supreme Court issued rules to implement an Interest on Lawyer's Trust Accounts ("IOLTA") program effective February 1, 1998. These rules are at found [Indiana Rule of Professional Conduct 1.15](#)(f) through (i). For a discussion of IOLTA, see materials in ATTACHMENT E. Generally speaking, by participating in the IOLTA program, a lawyer is allowed to earn interest on his or her pooled trust account so long as the interest proceeds, generally after setting off bank administrative charges against interest, are paid in to the IOLTA program, which is administered by the Indiana State Bar Foundation. The Indiana IOLTA program applies universally to all lawyers who operate trust accounts in their law practices, thereby making participation mandatory.

B. Trust Account Overdraft Reporting

1. Effective July 1, 1997, all Indiana lawyer trust accounts were required to be maintained in financial institutions that have been approved by the Disciplinary Commission for that purpose. [Admis. Disc. R. 23](#), §29(a)(1). A bank will be approved as a depository for lawyer trust accounts upon entering into an agreement with the Disciplinary Commission to report to the Commission all overdrafts on any trust account. An overdraft occurs whenever any properly payable instrument is presented against a trust account containing insufficient funds, irrespective of whether or not the instrument is honored. [Admis. Disc. R. 23](#), §29(b). Thus, if the lawyer maintains a line-of-credit or some other back-up source of funds to cover overdrafts (a practice that should not be followed), there will still be an overdraft that will be reported to the Disciplinary Commission if the line of credit needs to be accessed to cover a shortfall. There will also be an overdraft report even though the bank exercises the business judgment to honor a check and allow the account to have a negative balance.
2. It is not the bank's obligation to guess whether or not an account is subject to overdraft reporting. Rather, it is the lawyer's obligation to provide notice to the bank of any accounts that are properly subject to overdraft reporting. Each lawyer associated in practice who shares a trust account has a joint and several responsibility to see to it that the bank receives the proper notice. See, *Matter of Anonymous*, 734 N.E.2d 583 (Ind. 2000). An account is subject to overdraft reporting if it includes funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. [Admis. Disc. R. 23](#), §29(a)(1). Thus, if a lawyer is acting purely in a fiduciary capacity that is not related to a legal representation, the fiduciary account is not subject to overdraft reporting. However, if the lawyer is acting in a legal representation capacity and also serves in another fiduciary capacity, the account is subject to overdraft reporting.
3. Upon receipt of a notice of overdraft, the Disciplinary Commission will send notice to the lawyer that a written and documented explanation of the overdraft is required within a period of ten (10) business days. After review of the explanation and such other materials as may be requested by the Commission, the inquiry will either be closed with a notice to the lawyer providing the reason for closure, or the inquiry will be referred to the members of the Disciplinary Commission to consider whether or not the circumstances of the overdraft should result in a formal investigation into possible lawyer misconduct. Attached as ATTACHMENT M is a report of the results of bank overdraft reports for the period from July 1, 1997 through June 30, 2006.

C. Unclaimed Trust Funds

1. Every effort should be made to promptly forward trust funds to their rightful owner. If a lawyer does not have a good reason to keep funds in trust, those funds should be promptly disbursed to their rightful owners so that the lawyer is relieved of the obligation to safeguard and account for the funds. It may happen occasionally that the lawyer loses track of a client and cannot pay funds from the trust account to the client. In these instances, the lawyer should proceed pursuant to the terms of [IC 32-34-1-1](#), *et seq.*, the Unclaimed Property Act.

INDIANA RULES OF PROFESSIONAL CONDUCT

RULE 1.15. SAFEKEEPING PROPERTY (without comments)

(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 five years after termination of the representation.

(b) A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account.

(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.

(d) Upon receiving funds or other property in which the 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) Except as provided in paragraph (g) of this rule, a lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time so that they could not earn income for the client in excess of the costs incurred to secure such income (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

- (1) Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income. A lawyer or law firm shall establish a separate interest-bearing trust account for clients' funds which are neither nominal in amount nor to be held for a short period of time and which could earn income for the client in excess of costs for a particular client or client's matter. All of the interest on such account, net of any transaction costs, shall be paid to the

client, and no earnings from such account shall be made available to a lawyer or law firm.

- (2) No earnings from such an IOLTA account shall be made available to a lawyer or law firm.
- (3) The IOLTA account shall include all clients' funds which are nominal in amount or to be held for a short period of time.
- (4) An IOLTA account may be established with any financial institution (i) authorized by federal or state law to do business in Indiana, (ii) insured by the Federal Deposit Insurance Corporation or its equivalent, and (iii) approved as a depository for trust accounts pursuant to [Indiana Admission and Discipline Rules, Rule 23](#), Section 29. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay and without risk to principal by reason of said withdrawal.
- (5) Participating financial institutions shall maintain IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, 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. All interest earned net of fees or charges shall be remitted to the Indiana Bar Foundation (the "Foundation"), which is designated in paragraph (i) of this rule to organize and administer the IOLTA program, and the depository institution submits reports thereon as set forth below.
- (6) Lawyers or law firms depositing client funds in an IOLTA account established pursuant to this rule shall, on forms approved by the Foundation, direct the depository institution:
 - (A) to remit all interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, solely to the Foundation. The depository institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the depository institution must provide, for each individual IOLTA account, the

information to the lawyer or law firm and to the Foundation required by subparagraphs (f)(6)(B) and (f)(6)(C) of this rule;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and such other information as is reasonably required by the Foundation;

(C) to transmit to the depositing lawyer or law firm a periodic account statement for the IOLTA account reflecting the amount of interest paid to the Foundation, the rate of interest applied, the average account balance for the period for which the interest was earned, and such other information as is reasonably required by the Foundation; and

(D) to waive any reasonable service charge that exceeds the interest earned on any IOLTA account during a reporting period ("excess charge"), or bill the excess charge to the Foundation.

(7) Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.

(8) The IOLTA program will issue refunds when interest has been remitted in error, whether the error is the bank's or the lawyer's. Requests for refunds must be submitted in writing by the bank, the lawyer, or the law firm on a timely basis, accompanied by documentation that confirms the amount of interest paid to the IOLTA program. As needed for auditing purposes, the IOLTA program may request additional documentation to support the request. The refund will be remitted to the appropriate financial institution for transmittal at the lawyer's direction after appropriate accounting and reporting. In no event will the refund exceed the amount of interest actually received by the IOLTA program.

(9) All interest transmitted to the Foundation shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by the Foundation and approved at least annually by the Supreme Court of Indiana, for the following purposes:

ATTACHMENT A

- (A) to pay or provide for all costs, expenses and fees associated with the administration of the IOLTA program;
- (B) to establish appropriate reserves;
- (C) to assist or establish approved pro bono programs as provided in [Rule 6.5](#);
- (D) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

(10) The information contained in the statements forwarded to the Foundation under subparagraph (f)(6) of this rule shall remain confidential and the provisions of [Rule 1.6](#) (Confidentiality of Information), are not hereby abrogated; therefore, the Foundation shall not release any information contained in any such statement other than as a compilation of data from such statements, except as directed in writing by the Supreme Court.

(11) The Foundation shall have full authority to and shall, from time to time, prepare and submit to the Supreme Court for approval, forms, procedures, instructions and guidelines necessary and appropriate to implement the provisions set forth in this rule and, after approval thereof by the Court, shall promulgate same.

(g) Every lawyer admitted to practice in this State shall annually certify to this Court, pursuant to [Ind. Admis. Disc. R. 23](#)(21), that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm so that they could not earn income for the client in excess of the costs incurred to secure such income are held in an IOLTA account, or that the lawyer is exempt because:

(1) the lawyer or law firm's client trust account has been exempted and removed from the IOLTA program by the Foundation pursuant to subparagraph (f)(7) of this rule; or

(2) the lawyer:

(A) is not engaged in the private practice of law;

(B) does not have an office within the State of Indiana;

(C) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

(D) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;

(E) has been exempted by an order of general or special application of this Court which is cited in the certification; or

(F) compliance with paragraph (f) would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographic distance between the lawyer's principal office and the closest depository institution which is participating in the IOLTA program, or on other compelling and necessitous factors.

(h) In the exercise of a lawyer's good faith judgment in determining whether funds of a client can earn income in excess of costs a lawyer 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 deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures;

(3) the capability of a financial institution, a lawyer or a law firm to calculate and pay income to individual clients;

(4) any other circumstances that affect the ability of the client's funds to earn a net return for the client; and

(3) the nature of the transaction(s) involved.

The determination of whether a client's funds are nominal or short-term so that they could not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(i) The Foundation is hereby designated as the entity to organize and administer the IOLTA program established by paragraph (f) of this rule in accordance with the following provisions:

(1) The Board of Directors of the Foundation (the "Board") shall have general supervisory authority over the administration of the IOLTA program, subject to the continuing jurisdiction of the Supreme Court.

ATTACHMENT A

- (2) The Board shall receive the net earnings from IOLTA accounts established in accordance with paragraph (f) of this rule and shall make appropriate temporary investments of IOLTA program funds pending disbursement of such funds.
- (3) The Board shall, by grants, appropriations and other appropriate measures, make disbursements from the IOLTA program funds, including current and accumulated net earnings, in accordance with the plan of distribution approved by the Supreme Court from time to time referenced in subparagraph (f)(8) of this rule.
- (4) The Board shall maintain proper records of all IOLTA program receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant selected by the Board. The Board shall annually cause to be presented to the Supreme Court a reviewed or audited financial statement of its IOLTA program receipts and expenditures for the prior year. The report shall not identify any clients of lawyers or law firms or reveal confidential information. The statement shall be filed with the Clerk of the Supreme Court and a summary thereof shall be published in the next available issue of one or more state-wide publications for attorneys, such as *Res Gestae* and [*The Indiana Lawyer*](#).
- (5) The president and other members of the Board shall administer the IOLTA program without compensation, but may be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties, and shall be indemnified by the Foundation against any liability or expense arising directly or indirectly out of the good faith performance of their duties.
- (6) The Board shall monitor attorney compliance with the provisions of this rule and periodically report to the Supreme Court those attorneys not in compliance with the provisions of [Rule 1.15](#).
- (7) In the event the IOLTA program or its administration by the Foundation is terminated, all assets of the IOLTA program, including any program funds then on hand, shall be transferred in accordance with the Order of the Supreme Court terminating the IOLTA program or its administration by the Foundation; provided, such transfer shall be to an entity which will not violate the requirements the Foundation must observe regarding transfer of its assets in order to retain its tax-exempt status under the Internal Revenue Code of 1986, as amended, or similar future provisions of law.

Amended Oct. 22, 1997, effective Feb. 1, 1998. Amended and effective Sept. 30, 1998. Amended and effective Oct. 29, 1999; amended Sep. 30, 2004, effective Jan. 1, 2005; amended February 9, 2005, effective July 1, 2005.

ATTACHMENT A

ADMISSION AND DISCIPLINE RULE 23

DISCIPLINARY COMMISSION AND PROCEEDINGS

Section 29. Maintenance Of Trust Funds In Approved Financial Institutions; Overdraft Notification.

(a) Clearly Identified Trust Accounts In Approved Financial Institutions And Related Recordkeeping Requirements.

(1) Attorneys shall deposit all funds held in trust in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts" and shall inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Commission.

(2) Every attorney shall maintain and preserve for a period of at least five (5) years, after final disposition of the underlying matter, the records of trust accounts, including checkbooks, canceled checks, check stubs, written withdrawal authorizations, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property held in trust.

(3) The "ledger" required by this rule shall set forth a separate record of each trust, client or beneficiary, the source of all funds deposited in that account, the names of all persons for whom the funds are, or were, held, the amount of such funds, the description and the amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed.

(4) All receipts shall be deposited intact, funds shall not be commingled with other funds of the attorney or firm, and records or deposits shall be sufficiently detailed to identify each item.

(5) Withdrawals shall be based upon a written withdrawal authorization stating the amount of the withdrawal, the purpose of the withdrawal, and the payee. The authorization shall contain the signed approval of an attorney. Withdrawals shall be made only by check payable to a named payee and not to "cash", or by wire transfer. Wire transfers shall be authorized by written withdrawal authorization and evidenced by a document from the financial institution indicating the date of the transfer, the payee and the amount.

(6) Only an attorney admitted to practice law in this jurisdiction or his or her designee shall be an authorized signatory on the account.

(7) Records required by this rule may be maintained by electronic, photographic, computer or other media provided they otherwise comply with this rule and provided further that printed copies can be produced.

(8) Upon dissolution of any partnership of attorneys or of any professional corporation of attorneys, the partners or shareholders shall make appropriate written arrangements for the maintenance of the records specified under this rule.

(9) Upon the disposition of a law practice, appropriate written arrangements for the maintenance of the records specified in this rule shall be made.

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ADMISSION AND DISCIPLINE RULE 23.

**DISCIPLINARY COMMISSION AND
PROCEEDINGS**

**Section 29. Maintenance Of Trust Funds In Approved Financial Institutions;
Overdraft Notification.**

* * *

- (b) *Overdraft Notification Agreement Required.* A financial institution shall be approved as a depository for trust accounts if it files with the Commission an agreement, in a form provided by the Commission, to report to the Commission whenever any properly payable instrument is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Commission shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not agree so to report. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days' notice in writing to the Commission.
- (c) *Overdraft Reports.* The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:
 - (1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.
 - (2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.
- (d) *Timing of Reports.* Reports under subsection (c) shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds.
- (e) *Consent By Attorneys.* Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.
- (f) *Costs.* Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable cost of producing the reports and records required by this rule.
- (g) *Definitions.* For purposes of this rule:
 - (1) "Financial institution" means a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by attorneys.

- (2) "Properly payable" means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.
- (3) "Notice of dishonor" means the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.
- (4) "Trust account" means any account maintained by an attorney admitted to practice law in the State of Indiana for the purpose of keeping funds belonging to clients or third parties separate from the attorney's own funds as required by [Indiana Rule of Professional Conduct 1.15\(a\)](#). It also means any account maintained by an attorney for funds held in trust in connection with a representation in any other fiduciary capacity, including as trustee, agent, guardian, executor, or otherwise.

ADMISSION AND DISCIPLINE RULE 23.

**DISCIPLINARY COMMISSION AND
PROCEEDINGS**

Section 30. Audit of Trust Accounts

(a) *Generally.* Whenever the Executive Secretary has probable cause to believe that a trust account of an attorney contains, should contain, or has contained funds belonging to a client that have not been properly maintained or properly handled pursuant to Section 28, the Executive Secretary shall request the approval of the Commission to audit the accuracy and integrity of all trust accounts maintained by the attorney. In the event that the Commission approves, the Executive Secretary shall proceed to audit the accounts.

(b) *Confidentiality.* Investigations, examinations, and audits shall be conducted so as to preserve the private and confidential nature of the attorney's records insofar as is consistent with these rules.

**INDIANA SUPREME COURT DISCIPLINARY COMMISSION
RULES GOVERNING
ATTORNEY TRUST ACCOUNT OVERDRAFT REPORTING**

INTRODUCTION

The following rules and procedures, issued pursuant to the authority granted to the Indiana Supreme Court Disciplinary Commission by the Supreme Court of the State of Indiana in [Admission and Discipline Rule 23](#), Sections 24 and 29(b), govern the administration of an attorney trust account overdraft reporting program in the State of Indiana.

Rule 1. Definitions

As used herein:

- A. "Financial institution" means a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by attorneys.
- B. "Trust account" means any account maintained by an attorney admitted to practice law in the State of Indiana for the purpose of keeping funds belonging to clients or third parties separate from the attorney's own funds as required by [Indiana Rule of Professional Conduct 1.15\(a\)](#). It also means any account maintained by an attorney for funds held in trust in connection with a representation in any other fiduciary capacity, including as trustee, agent, guardian, executor, or otherwise.
- C. "IOLTA (Interest on Lawyer Trust Account)" means an attorney trust account in a financial institution pursuant to [Professional Conduct Rule 1.15\(f\)](#).
- D. "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 the State of Indiana.

Adopted Dec. 23, 1996, effective July 1, 1997; amended effective Apr. 20, 2005.

Rule 2. Approval of Financial Institutions

- A. [Indiana Admission and Discipline Rule 23](#), Section 29(a)(1) requires that attorneys maintain trust accounts only in financial institutions that are approved by the Disciplinary Commission. A financial institution shall be approved by the Disciplinary Commission as a depository for trust accounts if it files with the Disciplinary Commission a written agreement, in the form attached hereto as Exhibit A, whereby it agrees to report to the Disciplinary Commission whenever it has actual notice that any properly payable instrument is presented against a trust account containing insufficient funds, irrespective of whether or not the instrument is honored.
- B. The written agreement of any financial institution is binding upon all branches of the financial institution.

- C. The Disciplinary Commission will maintain a public listing of all approved financial institutions and will publish the same each year in the December issue of Res Gestae, the monthly journal of the Indiana State Bar Association. The names of approved financial institutions will be available at other times by written or telephone inquiry to the Disciplinary Commission.
- D. The written agreement of any financial institution will continue in full force and effect and be binding upon the financial institution until such time as the financial institution gives thirty (30) days notice of cancellation in writing to the Disciplinary Commission, or until such time as its approval is revoked by the Disciplinary Commission.

Adopted Dec. 23, 1996, effective July 1, 1997.

Rule 3. Disapproval and Revocation of Approval of Financial Institutions

- A. A financial institution shall not be approved in the first instance as a depository for trust accounts unless it submits to the Disciplinary Commission an agreement in the form attached hereto as Exhibit A that is binding upon all of its branches and signed by an officer with authority to act on behalf of the institution. The refusal of the Disciplinary Commission to approve a financial institution due to its failure or refusal to submit an executed written agreement in the form attached as **Exhibit A** is not appealable or otherwise subject to challenge.
- B. The approval of a financial institution shall be revoked and the institution shall be removed by the Disciplinary Commission from the list of approved financial institutions if it engages in a pattern of neglect or acts in bad faith in not complying with its obligations under the written agreement.
- C. The Executive Secretary shall communicate any decision to revoke the approval of a financial institution in writing by certified mail to the institution in care of the officer who signed the written agreement. The notice of revocation shall include a specific statement of facts setting forth the reasons in support of the revocation decision. Thereafter, the financial institution shall have a period of thirty (30) days from the date of receipt of the notice of revocation to file a written request with the Executive Secretary seeking reconsideration of the revocation decision. In the event an institution timely seeks reconsideration, the Disciplinary Commission shall appoint one of its members to act as hearing officer to take evidence. The Executive Secretary or designee shall act to defend the revocation decision. The hearing officer, after taking evidence, shall report findings and conclusions for review by the full Disciplinary Commission, whose decision in the matter shall be final. The approved status of a financial institution shall continue until such time as the reconsideration process is final.
- D. Once the approval of a financial institution has been revoked, the institution shall not thereafter be approved as a depository for trust accounts until such time as the institution petitions the Disciplinary Commission for approval and includes within the petition a plan for curing any deficiencies that caused its earlier revocation and for periodically reporting compliance with the plan in the future.

Adopted Dec. 23, 1996, effective July 1, 1997.

ATTACHMENT E

Rule 4. Duty to Notify Financial Institutions of Trust Accounts

- A. Every attorney shall notify each financial institution in which he or she maintains any trust account, as defined above, that the account is subject to the provisions of overdraft reporting. For each trust account, a lawyer or law firm shall maintain a copy of each such notice throughout the period of time that the account is open and for a period of five (5) years following closure of the account.
- 1) For IOLTA accounts as required by [Professional Conduct Rule 1.15\(f\)](#), notice by the attorney to the financial institution that the account is an IOLTA account shall constitute notice to the financial institution that the account is subject to overdraft reporting to the Disciplinary Commission.
 - 2) For non-IOLTA trust accounts as permitted by [Professional Conduct Rule 1.15\(h\)](#), every attorney shall notify each financial institution that the account is subject to overdraft reporting to the Disciplinary Commission by submitting a notice in the form attached as **Exhibit B** for each such account to the financial institution in which the account is maintained.
- B. In the case of a law firm that maintains one or more trust accounts in the name of the firm, only one notice from a member of the firm need be provided for each such trust account. However, every member of the firm is responsible for insuring that notice of each firm trust account is given to each financial institution wherein an account is maintained.

Adopted Dec. 23, 1996, effective July 1, 1997; amended effective Apr. 20, 2005.

Rule 5. Duty of Financial Institutions

- A. Each financial institution shall report to the Indiana Supreme Court Disciplinary Commission any properly payable attorney IOLTA or non-IOLTA trust account instrument presented against insufficient funds as set forth in [Indiana Admission and Discipline Rule 23](#), Section 29(b) through (g) and these rules irrespective of whether the instrument is honored.
- B. No financial institution shall be responsible for forwarding a report of any overdraft on an account about which it has not received notice pursuant to Rule 4(A)(1) or (2), above, from the depositor attorney that it is a trust account subject to overdraft reporting.

Adopted effective Apr. 4, 2005.

Rule 6. Processing of Overdraft Reports by the Commission

- A. Whenever the Disciplinary Commission receives an overdraft notice from a financial institution, the Executive Secretary shall send a letter to the depositor attorney seeking a documented explanation of the overdraft within ten (10) business days. This letter is a demand for information, noncompliance with which is a violation of [Professional Conduct Rule 8.1\(b\)](#). If bank error is claimed by the attorney, a written statement from a bank officer must be submitted with the explanation. If office error is claimed by the attorney, affidavits from the appropriate office personnel must be submitted with the explanation.

- B. If the depositor attorney does not provide a timely explanation or if the explanation provided does not document the existence of bank error or isolated office inadvertence, the Executive Secretary shall present the matter to the full Disciplinary Commission to consider the issuance of a grievance pursuant to [Indiana Admission and Discipline Rule 23](#), Section 10(a). Thereafter, the procedures of [Admission and Discipline Rule 23](#) for the processing of grievances shall apply.

Adopted Dec. 23, 1996, effective July 1, 1997; amended effective Apr. 4, 2005.

Rule 7. Miscellaneous Matters

- A. Any attorney who is admitted to practice law in another jurisdiction having attorney trust account overdraft notification rules that are substantially similar to the Indiana rules governing attorney trust account overdraft notification may apply to the Disciplinary Commission for exemption from compliance with these rules to the extent that the attorney maintains trust funds belonging to Indiana clients in a trust account in a foreign jurisdiction that is subject to overdraft reporting under the rules of that jurisdiction. Any such application for exemption shall be in writing and shall include:
- 1) a copy of the rules from the other jurisdiction governing attorney trust account overdraft notification;
 - 2) a copy of the agreement between the applicable financial institution and the agency in the foreign jurisdiction that administers the overdraft notification program verifying that the financial institution participates in the foreign jurisdiction's attorney trust account notification program;
 - 3) a list of the names of all financial institutions, account names, and account numbers of all trust accounts maintained by the attorney in the foreign jurisdiction; and
 - 4) a certification under oath by the attorney that each such foreign trust account has been properly identified to the foreign financial institution as an attorney trust account subject to overdraft reporting.
- Any attorney seeking exemption under the terms of this provision is under a continuing obligation to immediately report any changes in the information provided to the Disciplinary Commission.
- B. [Admission and Discipline Rule 23](#), Section 29(a)(6) contemplates that a designee who is not admitted to practice law in Indiana may be an authorized signatory on a trust account. In the event an attorney or law firm delegates trust account signature authority to any person who is not admitted to practice law in Indiana, such delegation shall be accompanied by specific safeguards, including at a minimum the following:
- 1) All periodic account activity statements from the financial institution shall be delivered unopened to and reviewed by an attorney having supervisory authority over the non-attorney signatory; and
 - 2) Responsibility for conducting periodic reconciliations between internal trust account records and periodic trust account activity statements from the financial institution shall be vested in a person who has no signature authority over the trust account.

- C. All communications from financial institutions to the Disciplinary Commission shall be directed to: Executive Secretary, [Indiana Supreme Court Disciplinary Commission](#), 30 South Meridian Street, Suite 850, Indianapolis, Indiana 46204.

Adopted Dec. 23, 1996, effective July 1, 1997; amended Dec. 4, 1998, effective Jan. 1, 1999; amended effective Apr. 20, 2005

ATTORNEY TRUST ACCOUNT NOTIFICATION

Name of Attorney

Attorney Number

Name of Law Firm

Business Address

City

State

Zip Code

Name of Financial Institution

Business Address

City

State

Zip Code

Name of Account

Account Number

_____ New

_____ Existing

Type of Account:

_____ Trust

_____ Guardian

_____ Escrow

_____ Estate

_____ Other _____

(Please Describe)

The undersigned hereby certifies that he/she is an attorney licensed to practice law in the State of Indiana and that the information indicated above provided to his/her financial institution is accurate. This information is provided to permit the financial institution to report all overdraft or insufficient funds occurrences to the Indiana Supreme Court Disciplinary Commission pursuant to Indiana Admission and Discipline Rule 23, Section 29.

Date: _____

Signature

IOLTA (Interest on Lawyers Trust Accounts) Program Questions & Answers

Background

Many Indiana lawyers maintain trust accounts in which funds are held on behalf of clients for distribution at a later date. In some cases, these fund balances are large and are held for long periods of time, but, more than likely, the balances are small and/ or are held for a short period of time. Traditionally, it has not been permissible for these types of short term or nominal balance trust accounts to earn interest.

In 1998, the Indiana Supreme Court amended [Rule of Professional Conduct 1.15](#), thereby creating the Interest on Lawyer Trust Account (IOLTA) program in Indiana. In 2005, the Indiana Supreme Court further amended [Rule 1.15](#), requiring attorneys to convert all trust accounts containing deposits that are of short duration and/or of a relatively small balance so that they could not earn income for the client in excess of the costs incurred to secure the income into IOLTA accounts. The resulting interest is paid to the Indiana Bar Foundation to be distributed for charitable purposes as delineated in [Rule 1.15](#). The funds will be used primarily to support pro bono civil legal services for persons of limited means. Other distributions could include:

- the establishment of pro bono programs;
- to provide for equal access to civil justice to persons of limited means;
- to provide law-related education programs for the public;
- to assist in research about the legal system;
- to improve the administration of justice; and
- to fund other public service programs specifically approved by the Indiana Supreme Court.

Q: What Is IOLTA?

A: IOLTA is a relatively recent addition to the legal profession, and an even more recent addition to Indiana. IOLTA requires attorneys to place typically commingled nominal and/or short-term client trust funds that could not earn income for the client in excess of the costs incurred to secure such income into interest bearing trust accounts.

Financial institutions periodically remit the interest earned on these funds to a designated administrative body, which in Indiana is the Indiana Bar Foundation.

Q: How will money collected under IOLTA be spent?

A: A component of the IOLTA Program is the establishment of an approved pro bono program in each of Indiana's 14 judicial districts. In some areas, local bar associations have established programs. These may serve as the bases for those districts' plans. Funding from IOLTA helps develop these pro bono legal service programs for the poor. Each district funds programs tailored to meet the specific needs of the district. The Indiana Pro Bono Commission, created by the Indiana Supreme Court as a program of the Indiana Bar Foundation, serves to coordinate the efforts of the state's pro bono programs.

The local programs serve as liaisons between the lawyers providing pro bono services and the indigent individuals that need those services. Lawyers will continue to provide legal services to their pro bono clients, as in the past, but IOLTA funds streamline this process, by providing for such things as litigation costs, mediation costs, on-line legal research costs, and other services based on the special needs of the district, enabling services to be delivered more efficiently and helping to permit pro bono attorneys to focus on providing legal services, rather than some of the other issues which may arise in pro bono representation.

Q: Is the IOLTA program unique to Indiana ?

A: No, Indiana was the last state to adopt an IOLTA program. The programs range from VOLUNTARY (which gives an attorney a choice to participate), to OPT-OUT to UNIVERSAL (mandatory). Indiana began with the opt-out program but now follows a Universal program. As a result of the 2003 United States Supreme Court decision upholding mandatory IOLTA programs, several other states are also converting their programs from opt-out to universal.

Q: How does Indiana 's Universal program work?

A: The program requires lawyers that hold Indiana client funds in trust accounts to convert their "pooled" nominal and/or

short term non-interest bearing client trust accounts into interest-bearing IOLTA accounts. Under the current Universal program, lawyers are unable to “opt-out”, or formally decline to do this, as they were able to do in previous years. The current rule requires that any client funds held in trust by lawyers must earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: Do other states have universal programs?

A: More than half of the states have universal programs, and that number is expected to increase.

Q: Specifically, what must lawyers do to comply with the IOLTA Program?

A: Each August, an attorney will receive his or her Annual Registration Fee form from the Clerk of the Indiana Supreme Court. The attorney must fully complete the appropriate section on this form to indicate whether he or she has an active IOLTA account, or is exempt from participating.

For large (more than ten attorneys) law firms that are participating in IOLTA, a separate sheet may be attached to the firm’s fee forms indicating the name of the bank holding the firm’s IOLTA account and the name of the trust account at the bank, instead of completing this information on each individual fee form.

Lawyers that wish to enroll in the program need only complete a *Notice to Financial Institution Form*. This form is available from the Foundation upon request, or at the Foundation’s web site (www.inbf.org/Pages/iolta_forms.html). Upon completion of the form, attorneys should send the form to the Foundation, rather than directly to the bank. The Foundation will forward the completed form to a designated individual at the attorney’s bank.

Provisions are made either to open a new IOLTA account or convert an existing trust account to an IOLTA account. In the case of a new IOLTA account, to streamline the process, an attorney may wish to go to his or her local bank

and establish a non-interest bearing account for conversion, prior to completing the Notice form. All IOLTA accounts must be federally insured interest bearing negotiable order of withdrawal (“NOW”) accounts or comparable demand deposit accounts.

Q: If I already maintain an IOLTA account does the new universal program affect me?

A: Generally speaking if you or your firm already maintains an IOLTA account in Indiana, then you will not be required to do much more in order to comply. The only additional things you may need to do involve IOLTA accounts which are affiliated with multiple attorneys as is common at many law firms. If you are affiliated with a law firm or other organization that maintains IOLTA accounts, you will now need to enclose a list of those attorneys affiliated with the firm’s or organization’s IOLTA accounts with your annual attorney registration statement from the Clerk of the Indiana Supreme Court. This will ensure that compliance with the IOLTA rule can be accurately recorded. In addition, you will need to ensure that all client funds held in trust earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: What happens if an attorney refuses to comply with the universal program?

A: The Indiana Bar Foundation will confirm that each attorney has correctly completed his or her annual registration fee form and is either matched with an existing IOLTA account or is exempt from participating in the IOLTA program. The Foundation has been directed to provide the Disciplinary Commission of the Indiana Supreme Court the names of those attorneys who do not fall into one of those two categories.

Q: What if I do not have a commingled non interest-bearing client trust account?

A: Lawyers who do not hold client funds in trust are exempt from the provisions of this Rule. Those lawyers simply signify this on their Annual Registration Fee forms by

checking the appropriate box(es).

Q: How will the universal IOLTA Program affect current trust fund practices?

A: This program will impose no new burdens upon lawyers. Lawyers have always exercised their discretion in determining whether a client's trust deposit was of sufficient size or duration to justify placement in a separate interest-bearing account, with the interest payable to the client. Lawyers will retain this discretion and continue to make these fiduciary decisions under the IOLTA Program. The lawyer's determination of whether a client's funds are nominal or short term so that they could not earn income in excess of costs rests in the sound judgment of the lawyer or law firm, and no lawyer will be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

Q: May lawyers still deposit individual client funds into accounts which pay interest that can be passed on to the client?

A: Yes. In fact, lawyers are expected to establish separate, interest-bearing accounts for individual client's funds when the sum is large enough and/or the duration is long enough to justify the cost of opening, administering and closing the account. Any interest accrued becomes the property of the client. If clients request their money be placed in a separate trust account, the lawyer is ethically bound to fulfill the clients' request. If the client funds are not large enough or the duration is not long enough to earn income net of the costs associated with the account, then the funds must be placed into an IOLTA account.

Q: Will there be a lot of lawyer time and money involved in participating in IOLTA?

A: Minimal administrative time and no money. The mechanics of converting to an IOLTA account are simple. All the attorney or law firm must do is complete a Notice to Financial Institution form and forward the form to the Foundation. There is no change to the operation of the trust account, and the firm is no longer responsible for regular administrative expenses on the account.

Q: What is the status of the U.S. Supreme Court review of IOLTA?

A: In March, 2003, the United States Supreme Court ruled 5 to 4 in favor of the constitutionality of mandatory IOLTA programs. The Court indicated that the taking of client property is constitutional if the taking is used for public purposes, and if the affected individuals are compensated appropriately. The Court ruled that IOLTA is clearly beneficial to the public good, in that hundreds of millions of IOLTA dollars each year are targeted for legal service programs throughout the country. Further, interest is earned on IOLTA accounts simply because they are IOLTA accounts; without IOLTA, these trust funds would be incapable of earning any net interest. Therefore, the affected clients lose nothing. The Court concluded that, as such, IOLTA programs throughout the country should proceed as they did prior to its ruling.

Q: Who notifies the banks?

A: The Indiana Bar Foundation notifies the lawyer's bank of the lawyer's intent to participate in IOLTA. In order to establish an IOLTA account, a lawyer or law firm should forward a copy of the *Notice to Financial Institution Form* to the Foundation, which will, in turn, forward a copy to the appropriate financial institution. This form specifically authorizes the financial institution to disclose to the Foundation necessary information necessary for the IOLTA account to be established, including, but not limited to, information designated by [Indiana Rules of Professional Conduct Rule 1.15](#).

Q: How will my local bank learn about IOLTA?

A: At this point in time, most banks throughout Indiana are familiar with IOLTA. The Foundation will encourage banks not currently participating in the program to participate, especially if the Foundation has on hand completed Notice to Financial Institution forms to forward to the bank upon the bank's agreement to participate. The Foundation will distribute materials to these banking centers so that lawyers and law firms who ask questions can be assisted. These

financial institutions will also be encouraged to designate one IOLTA contact person who will serve as the liaison between that financial institution and the Foundation.

Q: I have a long-standing relationship with a bank that refuses to participate in IOLTA. Must I change to a bank that is participating?

A: It is the current policy of the Foundation that if after repeated efforts, the Foundation fails to enroll a bank to participate in IOLTA, lawyers and law firms that have a relationship with that bank will be exempted from participation. The lawyers should advise the Foundation of this situation in writing. We encourage lawyers to voluntarily consider switching to a participating bank and enrolling in the IOLTA program.

Q: It is extremely impractical for me to establish an IOLTA account. What should I do?

A: Describe your situation to the Indiana Bar Foundation in writing. Exemptions from participation may be granted, depending on the situation.

Q: Who pays the service charges or fees for the IOLTA account?

A: Monthly bank service charges are paid from the interest earned by the IOLTA account, ordinarily up to the amount of interest earned on that account. The majority of banks currently waive all fees in excess of interest earned. In the event that the banks bill the Foundation for fees in excess of interest earned on an account, the Foundation may affirmatively exempt that account from participating. Under no circumstances should the account principal be changed by IOLTA involvement, nor should the lawyer be billed for regular IOLTA-produced expenses. The attorney will still be responsible for any transactional fees associated with their IOLTA account.

Q: Must attorneys have new checks printed for IOLTA accounts?

A: No. Attorneys may continue to use their checks as they did prior to converting the account into an IOLTA account.

Q: Which banks may lawyers use?

A: Any bank that participates in the Trust Account Overdraft Notification Program required under the Indiana Rules of Professional Conduct may be used. All banks with at least one IOLTA account are approved for trust account overdraft reporting. Please contact the Foundation if you are unsure as to whether or not your bank qualifies.

Q: Must lawyers negotiate fees and charges on IOLTA accounts with the bank?

A: The Indiana Bar Foundation or its designees handles interest rate and fee discussions with the bank.

Q: Which tax identification number is used?

A: The financial institution is instructed to use the tax identification number of the Foundation, not the tax identification number of the lawyer or law firm. As such, the lawyer or law firm should never receive a 1099 form for IOLTA interest. This method of account identification will allow the earned interest to be recorded annually in the name of the Foundation and not in the name of the lawyer/law firm. The name on the account, however, is to be that of the lawyer or law firm.

Q: What about 1099 forms?

A: Financial institutions have been notified that the Foundation is a not-for-profit corporation, exempt from federal income tax. As a result, no 1099 forms are required for the IOLTA accounts and no W-9 form mailing is required. The financial institutions have been advised that rulings have been obtained by the Foundation from the appropriate federal regulatory agencies authorizing "NOW" or similar type accounts to be used for IOLTA accounts.

Q: Will data on individual IOLTA accounts be made public?

A: No. The information contained in financial statements to

lawyers and the Foundation shall remain confidential. ([Rule 1.15](#) (f) (10)). The Foundation may release only a compilation of data from such statements, which does not include any identifying information.

If you have any further questions about the IOLTA program please contact the Indiana Bar Foundation office at (317) 269-2415 or (800) 279-8772.

Last Updated February 16, 2005

NEW JERSEY ADVISORY OPINION 454, 105 N.J.L.J. 441 (May 15, 1980)

Attorney's Trust Account--Immediate Drawing Upon Depositing Client's Check

We are asked whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client. This practice usually arises in the context of a title closing, but there are, of course, many other circumstances in which this procedure is followed.

Rule 1:21-6(a)(1) and *DR9-102* require than an attorney maintain a separate account for funds of his clients entrusted to his care. He must maintain an appropriate book in which the funds belonging to each client are separately identified. It goes without saying that the funds deposited for a particular client must be used for the benefit of that client and for no other purpose. Many attorneys have substantial sums in their trust account at all times, sums which belong to several clients. Some part of these monies are "collected funds," *i.e.*, funds which represent checks deposited in the account which have had ample time to clear and have thus been properly credited to the attorney's trust account. Depending usually on the distance the drawee bank is from the attorney's bank, it may take from five to ten business days for a check to clear, or from one to two calendar weeks. It is obvious, therefore, that a check drawn on the attorney's trust account for client A the same day client A's check is deposited in this account is drawn on funds which belong to other clients of the attorney.

We are aware of the fact that the foregoing practice is one of long standing in probably universal use not only in New Jersey but elsewhere. We also believe that most attorneys who follow this practice do so only where the checks involved are bank, cashier's or certified checks. Because this procedure is so widespread in title closings, to condemn it as unethical may lead to severe disruption in the handling of title closings and other matters. We suggest first, however, that there are other ways to handle these closings, none of which is entirely satisfactory. Three possibilities come to mind: (1) escrow closings in which no funds are disbursed and no closing completed until all funds have cleared; (2) pre-arrangement by the attorneys involved so that the necessary closing figures are known far enough in advance for the parties to provide funds in such a manner as to obviate the necessity of using the trust account (undoubtedly this would require cooperation of the bank-mortgagee which may be asked to provide mortgage funds in several checks); (3) establishment of an account by the attorney of his own funds which can be used to accommodate a client when there is no other solution. Recognizing the problems which would arise were the present practice disapproved in its entirety, it is our opinion that where one of the foregoing solutions is not feasible, the use of bank certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk.

The practice which is sanctioned by this opinion has the effect of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is closing. The reduction thus resulting in available trust funds is eliminated shortly thereafter when the bank, certified or cashier's check clears. The justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost non-existent risk that such bank, certified or cashier's checks will not clear along with the overriding commercial need of all clients that such a practice be continued. Because the practice is so well known and widespread, it is fair to assume that clients have implicitly consented to the negligible risk involved in drawing against such

checks which have not yet cleared. Of course, any client who explicitly requests that trust funds deposited for his benefit not be subjected to the practice is entitled to have his funds segregated. A consequence of such segregation would be that that client, if involved in a transaction where closing depends upon the issuance of trust checks that have not yet cleared, would have to make special arrangements similar to one of those suggested earlier in this opinion. In other words, a client who does not want to take the negligible risks involved in the unsegregated fund will not receive the substantial benefit of the practice discussed in this opinion. Approval of the practice referred to herein is limited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfers of property or interests in property whether they be real estate, personal property or a combination of both, including sales of businesses where it is either essentially or commercially desirable that trustee checks be issued against certified, bank or cashier's checks that have not cleared. Drawing on trust funds for other purposes, such as the disbursement of the settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

We wish to make it clear that the practice we are approving relates only to the use of bank, cashier's or certified checks. We consider the practice of drawing against personal checks to cover miscellaneous items at closing or for any other purpose, regardless of the amount, to be unethical. While these amounts may be small in relation to the size of some trust accounts, the checks creates a substantial risk of loss of trust funds deposited in the account for other clients, a risk not in any way justified by necessities of the situation. Accordingly, such practice is disapproved.

**AMENDMENT TO NEW JERSEY ADVISORY OPINION 454,
114 N.J.L.J. 110 (August 2, 1984)**

The Advisory Committee on Professional Ethics has received numerous inquiries concerning its holding in the above matter because the use of checks of savings and loan associations, state or federally-chartered, in connection with real estate or commercial closing transactions was not sanctioned. After careful review of the problems which have arisen because of this exclusion, the Committee has decided that the use of such checks should be approved. Therefore, the first sentence of the last paragraph of *Opinion* 454 is expanded to read as follows:

We wish to make it clear that the practice we are approving relates only to the use of bank, savings and loan (state or federal), cashiers' or certified checks.

**REASONS FOR CLOSURE OF TRUST ACCOUNT OVERDRAFT INQUIRIES
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