

New Trust Account Rules Effective July 1, 2013: What You Need to Know

By Melinda J. Bentley

INTRODUCTION

For years, we all have known that the safekeeping property duties are set forth in Rule 4-1.15, but have you ever tried to find a specific provision in that Rule? That Rule contains not just those specific duties, but record keeping requirements, definitions, client file retention rules, and much more.

Effective July 1, 2013, this Rule will be broken down into four separate rules that take a more organized approach to finding these specific requirements, as well as noting responsibilities that come with the era of more electronic banking. But be aware that with this new organizational system will also come some new duties. This article will provide you with an overview of these new requirements, and direct you to resources to help you transition to these new Rules.

NEW ORGANIZATIONAL SYSTEM

The new Rules may be found on the Supreme Court of Missouri's website in an order dated October 30, 2012.¹

You should first understand how the new Rules are generally organized:

- Rule 4-1.145 – contains definitions for safekeeping property and IOLTA accounts;
- Rule 4-1.15 – covers the duty provisions for the safekeeping of property;
- Rule 4-1.155 – includes the provisions for maintaining IOLTA accounts; and
- Rule 4-1.22 – outlines the duties for retention of client files.

Due to the length of these Rules, this article will focus primarily on the provisions of new Rule 4-1.15, though highlights of each new rule will be given.

RULE 4-1.145 – DEFINITIONS: THE HIGHLIGHTS

The definitions governing trust accounts remain largely unchanged, but since we have the opportunity to review these new rules, it is always good to refresh our recollections about some of the primary definitions.

First, what is a “client trust account?” According to new Rule 4-1.145(a)(3), it is “an account denominated as such or by words of similar import in which a lawyer or law firm holds funds on behalf of a client or third person and on which withdrawals or transfers can be made on demand, subject only to any notice period that the financial institution is required to observe by law or regulation. Every client trust account shall be either an IOLTA account, a non-IOLTA trust account, or an exempt trust account.”

Second, what is an “IOLTA account?” According to new Rule 4-1.145(a)(9), it is “a pooled client trust account held at an eligible and approved institution that is comprised of client and third person funds that cannot otherwise earn income for the client or third person in excess of the costs incurred for such income...” The definition goes on to include the types of approved accounts that can be IOLTA accounts.

Finally, what is a “non-IOLTA account?” According to new Rule 4-1.145(a)(11), it is either “(a) a separate client trust account for the deposit of the funds of a particular client or third person, the net earnings of which will be paid to the client or third person who owns the deposited funds; or (b) a pooled trust account with sub accounting ... that will provide for computation of the net interest or dividend earned by the funds of each client or third person and also will provide for the payment thereof to the client or third person.”

Of course, there are a number of other defined terms, but these are a few of the primary ones you should keep in mind as you review these new rules.

RULE 4-1.15 – SAFEKEEPING REQUIREMENTS WITH NEW DUTIES AND RECORD KEEPING REQUIREMENTS, TOO!

The duty to hold property of clients or third persons separate from the lawyer's own property is one of the basic fiduciary duties lawyers have in their daily practices.² These accounts are to be properly identified as such with a designation of "Client Trust Account" or "words of similar import" in their title.³ The importance of these safekeeping provisions is highlighted by the mandatory overdraft reporting that attaches to these special accounts.⁴ Funds that go into the client trust account include settlements, escrow type funds, advance payment of fees or expenses, contingent fees before a final statement has been presented to the client, funds that are in dispute, and other funds belonging to a client or third person. Earned fees that are not in dispute by a client or third person go into the operating account, not the trust account.

New Duties:

The signatory authority has been clarified in new Rule 4-1.15(a)(3), noting that only a lawyer admitted to practice in Missouri, or a person directly under the supervision of such a lawyer, shall serve as a person with signatory authority for a client trust account. That duty of supervision is further highlighted in Comment [2] of that Rule, which notes that lawyers have a non-delegable duty to "protect and preserve" client funds, so lawyers must take extra care to properly supervise any person who may assist with maintaining a client trust account, as the lawyer is ultimately responsible for that duty. Remember that Rule 4-5.3 requires lawyers to supervise their non-lawyer assistants, and that lawyers may be held responsible for the conduct of these non-lawyer assistants.

Additionally, you should be aware that there are no split deposits that are permitted under the Rules, as 4-1.15(a)(4) provides that "receipts shall be deposited intact, and records of deposit shall be sufficiently detailed to identify each item."

Similarly, Rule 4-1.15(a)(5) notes that "[w]ithdrawal shall be made only by check payable to a named payee, and not to cash, or by authorized electronic transfer." Again, this requirement of withdrawals going to a named payee will allow you to have a clear record of where funds are going and why.

An area where lawyers may encounter problems is failure to wait for funds to be collected by the financial institution before making a disbursement. Rule 4-1.15(a)(6)

now requires that lawyers wait "until a reasonable period of time has passed for the funds to be actually collected by the financial institution in which the trust account is held."⁵ Comment [5] notes that lawyers need to wait until the funds become "good funds," meaning actually collected by the financial institution before making a disbursement. "Cleared funds" are insufficient, as the bank has not yet fully collected the deposited amount. You should consult with your financial institution to determine when the funds are actually "good funds" before making a disbursement, as this will help you avoid scams or suffering a loss due to a bad check.

Finally, reconciliations of accounts are required by Rule 4-1.15(a)(7) to be "... performed reasonably promptly each time an official statement from the financial institution is provided or available." In most cases, financial institutions make such statements on at least a monthly basis, so make sure you are performing your reconciliations in accordance with the frequency of receiving such an official statement. For reasons that will be made clearer in the next section, lawyers should consider performing a *minimum* four-way reconciliation among the following items: (1) receipts and disbursements journals; (2) ledgers; (3) bank statements or similar documents; and (4) other reasonably related documentation contained in Rule 4-1.15(f) and the examples given in Comment [19]. Additional reconciliation steps may be required depending on the situation.

New, In Part, Recordkeeping Requirements:

Perhaps the biggest changes you will need to be aware of are in the new (in part) recordkeeping requirements under 4-1.15(f). At the outset, this section outlines three overarching duties specific to recordkeeping. First is the provision that trust account records must be retained for five years after the termination of the representation or after the last disbursement, whichever is later. This timeframe is consistent with the prior requirements.

Second, there is a recognition of the electronic nature of recordkeeping, by stating: "Records may be maintained by electronic, photographic, or other media provided that they otherwise comply with Rules 4-1.145 to 4-1.155 and that printed copies can be produced." Advisory Committee Formal Opinion 127 addresses issues related to scanning client files generally, and may be consulted to help you consider issues related to use of electronic media, though it does not specifically address client trust accounts.

Finally, Rule 4-1.15(f) notes that when a law firm dissolves or is sold, the partners or the seller shall make

“... reasonable arrangements for the maintenance of client trust account records.”

You will want to pay special attention to Rules 4-1.15(f) (1) through (11), as those provisions set forth what *minimum* complete trust account records must contain. While readers should consult the full text for complete record requirements, a summary of those are as follows:

- Receipts and disbursements journals of deposits and withdrawals that include the date, source and description of each deposit, and the date, payee and purpose for each disbursement;⁶
- Ledger records for each account, including the source of all funds deposited, for whom the funds are being held, amount of funds, descriptions for withdrawals, and names of persons or entities to whom funds are disbursed;⁷
- Compensation agreements with clients, including documents such as fee agreements, engagement letters, or retainer agreements;⁸
- Accountings to clients or third persons;⁹
- Bills to clients;¹⁰
- Records showing disbursements to clients;¹¹
- Physical or electronic checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks.¹²
- Electronic transfer records that include name of the person authorizing the transfer, date of transfer, name of recipient, and confirmation from financial institution showing account number, date, and time of transfer.¹³
- Reconciliations;¹⁴
- Portions of the client file reasonably related to the client trust account transactions;¹⁵ and
- Records of credit card transactions, consistent with law and data security standards.¹⁶

Keep in mind that these are only minimum record keeping requirements, and Comment [19] notes that additional documentation may be necessary for a complete understanding of the trust account transactions, so you should be keeping “‘reasonably related documents.’” A best practice may be to think about whether a document is reasonably related and necessary to understand the transaction; if so, then it should be kept as part of the records.

RULE 4-1.155 – PROVISIONS FOR MAINTAINING IOLTA ACCOUNTS

This Rule, while new in its numbering, contains provisions from the old 4-1.15 that are largely unchanged. Rule 4-1.155(a) provides the requirements for how IOLTA accounts must be maintained, including in (a)(3) how to determine when funds should be put into an IOLTA account, and when they should be placed in a non-IOLTA account. Rule 4-1.155(b) focuses on how fees or charges associated with trust accounts must be allocated. Finally, Rule 4-1.155(c) makes provisions for when a financial institution may be revoked or not approved.

RULE 4-1.22 – FILE RETENTION

This Rule is former Rule 4-1.15(m) on file retention. It contains the same provisions, although it is broken out into a new rule number. New Rule 4-1.22 requires that client files must be stored securely for 10 years after completion or termination of the representation, unless the client and lawyer make an agreement otherwise. After 10 years, the file may be destroyed in a manner that preserves confidentiality, so long as there is not a legal malpractice claim, criminal or other governmental investigation, disciplinary complaint, or other litigation related to that representation.¹⁷ Remember that items of intrinsic value shall never be destroyed, and they must be securely stored by the lawyer or delivered to the State’s unclaimed property agency.¹⁸ For additional information on safekeeping client files, please also consult Advisory Committee Formal Opinions 115 and 127.

RESOURCES AVAILABLE, AND QUESTIONS WELCOMED

I encourage each of you to review these new rules in full, as this article is simply an overview of selected items of import and interest. Some resources will be posted on the website www.mo-legal-ethics.org, which will include:

- A comparison chart between the current and new trust account rules; and
- A second comparison chart on the minimum record keeping requirements.

As always, you are welcome to contact the Legal Ethics Counsel office to seek an informal advisory opinion about your specific future conduct under Rule 4, including these new trust account rules. Additionally, the Missouri Lawyers Trust Account Foundation, www.moiolta.org, can

assist you with the mechanics of opening or maintaining a trust account with your financial institution.

ENDNOTES

1 Supreme Court of Missouri website, <http://www.courts.mo.gov/sup/index.nfs/d45a7635d4bfdb8f8625662000032638/7912f0aec6a155df86257aa7006d2bce?OpenDocument>, last visited April 12, 2013.

2 See new Rule 4-1.15(a), effective July 1, 2013.

3 *Id.*

4 See new Rule 4-1.15(a)(2), effective July 1, 2013.

5 See new Rule 4-1.15(a)(6)(B), effective July 1, 2013.

6 See new Rule 4-1.15(f)(1), effective July 1, 2013.

7 See new Rule 4-1.15(f)(2), effective July 1, 2013.

8 See new Rule 4-1.15(f)(3), effective July 1, 2013.

9 See new Rule 4-1.15(f)(4), effective July 1, 2013.

10 See new Rule 4-1.15(f)(5), effective July 1, 2013.

11 See new Rule 4-1.15(f)(6), effective July 1, 2013.

12 See new Rule 4-1.15(f)(7), effective July 1, 2013.

13 See new Rule 4-1.15(f)(8), effective July 1, 2013.

14 See new Rule 4-1.15(f)(9), effective July 1, 2013.

15 See new Rule 4-1.15(f)(10), effective July 1, 2013.

16 See new Rule 4-1.15(f)(11), effective July 1, 2013.

17 See new Rule 4-1.122(a)-(d), effective July 1, 2013.

18 *Id.*



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