TRUST ACCOUNTING HANDBOOK FOR GEORGIA REAL ESTATE CLOSING ATTORNEYS

By: Ethics Committee,

Real Property Law Section

of the

State Bar of Georgia

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INTRODUCTION

Millions of dollars flow through the hands of lawyers while serving clients—making the handling of client funds one of the most significant fiduciary obligations of lawyers to their clients. The State Bar of Georgia established trust accounting standards in Rule 1.15 of the Georgia Rules of Professional Conduct. And, official opinions of the State Bar of Georgia as to escrow accounting are included in certain Formal Advisory Opinions. These resources are included in this Handbook. This Handbook will discuss the best practices for segregating, safekeeping, and record keeping for client funds. It contains legal information not legal advice. It is designed to answer commonly asked questions and is not an attempt to cover every situation or every rule related to attorney's trust accounts in Georgia. This handbook is published on October 1, 2013.

It is the responsibility of attorneys to make sure that they are following the most current version of the Rules of Professional Conduct. It is the responsibility of attorneys to research and check for updates to any references to rules or statutes in this Handbook from the date of publication forward. Nothing in this Handbook is intended to address any specific inquiry, nor is it a substitute for independent legal research in original sources or for obtaining advice of legal counsel with respect to legal issues.

The practice procedures recommended by this Report should in no way be construed as standards for determining issues of liability. This handbook is not intended to give rise to a cause of action nor to create a presumption that a legal duty has been breached. This handbook is designed to provide guidance to lawyers. This cannot be used to create civil liability nor is it designed to be a basis for civil liability. No Court, or party before any Court, shall cite this work as the basis of any civil liability or in support (a partial or full support) of any claim for or of civil liability.

FURTHER RESOURCES

Ethics Rules and Opinions -- State Bar of Georgia:

THE STATE BAR'S RULES AND RELATED FORMAL ADVISORY OPINIONS REGULATING TRUST ACCOUNTS ARE INCLUDED HEREIN. THE COMPLETE GEORGIA RULES OF PROFESSIONAL CONDUCT AND FORMAL ADVISORY OPINIONS CAN BE FOUND AT THE WEBSITE OF THE STATE BAR OF GEORGIA AT www.gabar.org FOR FURTHER ETHICS GUIDANCE.

Ethics Hotline:

IF YOU HAVE AN ETHICS QUESTION TO WHICH YOU CANNOT FIND AN ANSWER AFTER READING THIS INFORMATION, PLEASE CONTACT THE ETHICS HOTLINE AT 1-800-682-9806 BEFORE TAKING ANY ACTION.

IOLTA Bar Foundation:

IF YOU HAVE A QUESTION CONCERNING THE GEORGIA BAR FOUNDATION'S IOLTA PROGRAM, PLEASE CONTACT THE FOUNDATION AT 404-588-2240 or go to the Foundation's website at http://www.gabar.org/aboutthebar/lawrelatedorganizations/iolta/iolta.cfm**.**

Trust Accounting/Bookkeeping Information:

IF YOU HAVE A QUESTION CONCERNING THE MECHANICS OF TRUST ACCOUNT SETUP OR BOOKKEEPING, PLEASE CONTACT THE LAW PRACTICE MANAGEMENT PROGRAM, STATE BAR OF GEORGIA, AT 1-800-334-6865 EXT. 770 or 404-527-8773 or go the Program's website at http://www.gabar.org/committeesprogramssections/programs/lpm/index.cfm**.**

Section 1:

Ethics Rules-

Georgia Rules of Professional Conduct

GEORGIA RULES OF PROFESSIONAL CONDUCT

A. Rule 1.15(I) SAFEKEEPING PROPERTY - GENERAL

B. Rule 1.15(II) SAFEKEEPING PROPERTY- TRUST ACCOUNT AND IOLTA

C. Rule 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT NOTIFICATION; EXAMINATION OF RECORDS.

A. RULE 1.15(I) SAFEKEEPING PROPERTY - GENERAL

Ethics & Discipline / Current Rules / Part IV (After January 1 / 2001) - Georgia Rules of Professional Conduct (also includes Disciplinary Proceedings and Advisory Opinion rules) / CHAPTER 1 GEORGIA RULES OF PROFESSIONAL CONDUCT AND ENFORCEMENT THEREOF

a. A lawyer shall hold funds or other property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own funds or other property. Funds shall be kept in a separate account maintained in an approved institution as defined by Rule 1.15(III)(c)(1). 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 six years after termination of the representation.

b. For the purposes of this Rule, a lawyer may not disregard a third person's interest in funds or other property in the lawyer's possession if:

    1. the interest is known to the lawyer, and

    2. the interest is based upon one of the following:

        i. A statutory lien;

        ii. A final judgment addressing disposition of those funds or property; or

        iii. A written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

    The lawyer may disregard the third person's claimed interest if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.

c. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly

deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

d. When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and a client or a third person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[3A] In those cases where it is not possible to ascertain who is entitled to disputed funds or other property held by the lawyer, the lawyer may hold such disputed funds for a reasonable period of time while the interested parties attempt to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds or property.

[4] A "clients' security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

B. RULE 1.15(II) SAFEKEEPING PROPERTY- TRUST ACCOUNT AND IOLTA

(a) Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account.

(b) No personal funds shall ever be deposited in a lawyer's trust account, except that unearned attorney's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the

account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney's fees debited against the account of a specific client and recorded as such.

(c) All client's funds shall be placed in either an interest-bearing account with the interest being paid to the client or an interest-bearing (IOLTA) account with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

(1) With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined in Rule 1.15(III)(c)(1), with the interest to be paid to the client. No 7earnings from such an account shall be made available to a lawyer or law firm.

(2) With respect to funds which are nominal in amount or are to be held for a short period of time, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) in compliance with the following provisions:

(i) No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

(ii) The account shall include all clients' funds which are nominal in amount or which are to be held for a short period of time.

(iii) An interest-bearing trust account may be established with any approved institution as defined in Rule 1.15(III)(c)(1). Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

(iv) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minimum, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

(v) Lawyers or law firms shall direct the depository institution:

(A) to remit to the Georgia Bar Foundation interest or dividends, net of any charges or fees on that account, on the average monthly balance in that account, or as otherwise computed in accordance with a financial institution's standard accounting practice, at least quarterly. Any bank fees or charges in excess of the interest earned on that account for any month shall be paid by the lawyer or law firm in whose names such account appears, if required by the bank;

(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, the average monthly balance against which the interest rate is applied, the service charges or fees applied, and the net interest remittance;

(C) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, the average account balance of the period for which the report is made, and such other information provided to non-lawyer customers with similar accounts.

(3) No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

(4) Whether the funds are designated short-term or nominal or not, a lawyer or law firm may elect to remit all interest earned, or interest earned net of charges, to the client or clients.

The maximum penalty for a violation of Rule 1.15(II)(a) and Rule 1.15(II)(b) is disbarment. The maximum penalty for a violation of Rule 1.15(II)(c) is a public reprimand.

Comment:

[1] The personal money permitted to be kept in the lawyer's trust account by this Rule shall not be used for any purpose other than to cover the bank fees and if used for any other purpose the lawyer shall have violated this Rule. If the lawyer wishes to reduce the amount of personal money in the trust account, the change must be properly noted in the lawyer's financial records and the monies transferred to the lawyer's business account.

[2] Nothing in this Rule shall prohibit a lawyer from removing from the trust account fees which have been earned on a regular basis which coincides with the lawyer's billing cycles rather than removing the fees earned on an hour-by-hour basis.

C. RULE 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT NOTIFICATION; EXAMINATION OF RECORDS

Ethics & Discipline / Current Rules / Part IV (After January 1 / 2001) - Georgia Rules of

Professional Conduct (also includes Disciplinary Proceedings and Advisory Opinion rules) /

CHAPTER 1 GEORGIA RULES OF PROFESSIONAL CONDUCT AND ENFORCEMENT

THEREOF

a. Required Bank Accounts: Every lawyer who practices law in Georgia and who receives money or other property on behalf of a client or in any other fiduciary capacity shall maintain, in an approved financial institution as defined by this Rule, a trust account or accounts, separate from any business and personal accounts. Funds received by the lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this account. The financial institution shall be in Georgia or in the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person.

b. Description of Accounts:

    1. A lawyer shall designate all trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, as an "Attorney Trust Account," "Attorney Escrow Account" "IOLTA Account" or "Attorney Fiduciary Account." The name of the attorney or law firm responsible for the account shall also appear on all deposit slips and checks drawn thereon.

    2. A lawyer shall designate all business accounts, as well as all deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," "Operating Account" or a "Regular Account."

    3. Nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account including fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, agent or in any other fiduciary capacity.

c. Procedure:

1. Approved Institutions:

    i. A lawyer shall maintain his or her trust account only in a financial institution approved by the State Bar, which shall annually publish a list of approved institutions. Such institutions shall be located within the State of Georgia, within the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or fiduciary. The institution shall be authorized by federal or state law to do business in the jurisdiction where located and shall be federally insured. A financial institution shall be approved as a depository for lawyer trust accounts if it abides by an agreement to report to the State Disciplinary Board whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days notice in writing to the State Disciplinary Board. The agreement shall be filed with the Office of General Counsel on a form approved by the State Disciplinary Board. The agreement shall provide that all reports made by the financial institution shall be in writing and shall include the same information customarily forwarded to the depositor when an instrument is presented against insufficient funds. If the financial institution is located outside of the State of Georgia, it shall also agree in writing to honor any properly issued State Bar of Georgia subpoena.

    ii. The State Disciplinary Board shall establish procedures for a lawyer or law firm to be excused from the requirements of this Rule if the lawyer or law firm has its principal office in a county where no bank, credit union, or savings and loan association will agree to comply with the provisions of this Rule.

2. Timing of Reports:

    i. The financial institution shall file a report with the Office of General Counsel of the State Bar of Georgia in every instance where a properly payable instrument is presented against a lawyer trust account containing insufficient funds and said instrument is not honored within three business days of presentation.

    ii. The report shall be filed with the Office of General Counsel within fifteen days of the date of the presentation of the instrument, even if the instrument is subsequently honored after the three business days provided in (2)(i) above.

3. Nothing shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule.

4. Every lawyer and law firm maintaining a trust account as provided by these Rules is hereby and shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall indemnify and hold harmless each financial institution for its compliance with the aforesaid reporting and production requirements.

d. Effect on Financial Institution of Compliance: The agreement by a financial institution to offer accounts pursuant to this Rule shall be a procedure to advise the State Disciplinary Board of conduct by attorneys and shall not be deemed to create a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of lawyers overdrawing attorney trust accounts.

e. Availability of Records: A lawyer shall not fail to produce any of the records required to be maintained by these Standards at the request of the Investigative Panel of the State

Disciplinary Board or the Supreme Court. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these Rules for the production of documents and evidence.

f. Audit for Cause: A lawyer shall not fail to submit to an Audit for Cause conducted by the State Disciplinary Board pursuant to Bar Rule 4-111.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] Each financial institution wishing to be approved as a depository of client trust funds must file an overdraft notification agreement with the State Disciplinary Board of the State Bar of Georgia. The State Bar of Georgia will publish a list of approved institutions at least annually.

[2] The overdraft agreement requires that all overdrafts be reported to the Office of General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust account, particularly in exchange for the institution's promise to delay or not to report an overdraft. The institution must notify the Office of General Counsel of all overdrafts even where the institution is certain that its own error caused the overdraft or that the matter could have been resolved between the institution and the lawyer within a reasonable period of time.

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Audits

[4] Every lawyer's financial records and trust account records are required records and therefore are properly subject to audit for cause. The audit provisions are intended to uncover errors and omissions before the public is harmed, to deter those lawyers who may be tempted to misuse client's funds and to educate and instruct lawyers as to proper trust accounting methods. Although the auditors will be employed by the Office of General Counsel of the State Bar of Georgia, it is intended that disciplinary proceedings will be brought only when the auditors have reasonable cause to believe discrepancies or irregularities exist. Otherwise, the auditors should only educate the lawyer and the lawyer's staff as to proper trust accounting methods.

[5] An audit for cause may be conducted at any time and without advance notice if the Office of General Counsel receives sufficient evidence that a lawyer poses a threat of harm to clients or the public. The Office of General Counsel must have the written approval of the Chairman of the Investigative Panel of the State Disciplinary Board and the President-elect of the State Bar of Georgia to conduct an audit for cause.

Section 2:

Formal Advisory Opinions

STATE BAR OF GEORGIA - SELECTED FORMAL ADVISORY OPINIONS

A. Formal Advisory Opinion 28 (Using Sight Drafts in Closing Matters)

B. Formal Advisory Opinion 91-2 (Advance Fee Payments)

C. Formal Advisory Opinion 94-2 (Lawyer Paying Funds to Others Over a Client's Objections)

D. Formal Advisory Opinion 98-2 (Unclaimed Funds)

E. Formal Advisory Opinion 04-1 (Lawyer participation in a non-lawyer entity)

A. Formal Advisory Opinion No. 28

The State Bar of Georgia has withdrawn FAO #28, issued in 1981, because of conflict with O.C.G.A. §44-14-13, effective July 1, 1990. However, since FAO #28 governed disbursements in general, whereas O.C.G.A. §44-14-13 governs only secured loans, this opinion is included herein as a historical and analytical reference. Its reasoning is still valuable to practitioners.

Guidelines for Attorneys Using Sight Drafts in Closing Matters
State Bar of Georgia
State Disciplinary Board
November 20, 1981

The State Disciplinary Board has been asked to consider what restrictions, if any, should be placed upon the common practice of closing attorneys disbursing against sight drafts, personal checks, and similar items other than cash or collected drafts. In addition to ethical aspects, there are certain practical problems involved in requiring cash, cashier's checks, or certified checks in real estate closings. The Board of Governors has requested advice from the State Disciplinary Board as to what position should be taken on this issue. The State Disciplinary Board has considered comments and suggestions received, have reviewed past correspondence regarding this matter, as well as certain memos and articles relating thereto.

The State Disciplinary Board finds that:
1. There would be possible disruption to the real estate closing practice if cash equivalent is required at each closing;
2. A real estate closing account is an account of accommodation and one of convenience;
3. The State Disciplinary Board concludes that engaging in this practice is a business question for each attorney and that any attorney who closes a real estate transaction on a sight draft or a similar item is personally responsible for any check written by such closing attorney on such a transaction. Such a closing attorney has not acted unethically unless it was known, or there was reason to know, that the sight draft or similar item would not be honored.

In all cases closed on sight drafts, documented drafts, or other uncollected funds, the attorney is bound to disclose to the parties that the disbursements are made subject to said sight drafts, or other drafts, being honored by the financial institution on which said draft, or other drafts, are drawn.

Note: See also Good Funds Legislation enacted by Georgia General Assembly during the 1990 session. O.C.G.A. § 44-14-13, effective July 1, 1990.

This Act requires funds which are disbursed by a settlement agent at the closing of a loan transaction secured by residential real property to constitute collected funds and further provides that the failure of a lender to issue a check or draft representing good funds in connection with the closing of a residential real estate transaction shall constitute an unfair or deceptive practice.

B. Formal Advisory Opinion No. 91-2

State Bar of Georgia
Issued by the Supreme Court of Georgia
On September 20, 1991
Formal Advisory Opinion No. 91-2

For references to Standard of Conduct 31, please see Rule 1.5(a).

This opinion also relies on the Canons of Ethics, specifically Ethical Considerations EC-2-19 and 2-23, that bear upon matters directly addressed by Comments 1 and 5 of Rule 1.5.

ADVANCE FEE PAYMENTS

A lawyer need not place any fees into a trust account absent special circumstances necessary to protect the interest of the client. Such circumstances may be the agreement of the parties, the size and amount of the fee, and the length of time contemplated for the undertaking.

QUESTION PRESENTED:

Whether a lawyer may deposit into a general operating account a retainer that represents payment of fees yet to be earned.

OPINION:

The question posed by correspondent is not clear. "Fees yet to be earned" are prepaid fees. "Prepaid fees" also include "fixed" or "flat fees," which are not earned until the task is completed. The terms "retainer" and "prepaid fees" have different meanings. For purposes of clarity, the terms are defined as here used.

A retainer is "...the fee which the client pays when he retains the attorney to act for him, and thereby prevents him from acting for his adversary." Black's Law Dictionary (5th ed. 1979). Thus, retainer fees are earned by the attorney by agreeing to be "on call" for the client and by not accepting employment from the client's adversaries. McNulty, George & Hall v. Pruden, 62 Ga. 135, 141 (1878).

A "flat" or "fixed" fee is one charged by an attorney to perform a task to completion, for example, to draw a contract, prepare a will, or represent the client in court, as in an uncontested divorce or a criminal case. Such a fee may be paid before or after the task is completed.

A "prepaid fee" is a fee paid by the client with the understanding that the attorney will earn the fee as he or she performs the task agreed upon.

Under these various definitions, one can reasonably take the position that "retainers" and "flat fees" may be placed in the general operating account when paid. Prepaid fees may be placed in a trust account until earned.

Terminology as to the various types of fee arrangements does not alter the fact that the lawyer is a fiduciary. Therefore, the lawyer's duties as to fees should be uniform and governed by the same rules regardless of the particular fee arrangement. Those duties are as follows:

1. To have a clear understanding with the client as to the details of the fee arrangement prior to undertaking the representation, preferably in writing.
2. To return to the client any unearned portion of a fee.
3. To accept the client's dismissal of him or her (with or without cause) without imposing any penalty on the client for the dismissal.
4. Comply with the provisions of Standard 31 as to reasonableness of the fee.

The law is well settled that a client can dismiss a lawyer for any reason or for no reason, and the lawyer has a duty to return any unearned portion of the fee. In the Matter of Collins, 246 Ga. 325, 271 S.E.2d 473 (1980).

The exercise of the right to discharge an attorney with or without cause does not

constitute a breach of contract because it is a basic term of the contract, implied by law into it by reason of the nature of the attorney-client relationship, that the client may terminate that contract at any time.

Henry, Walden & Davis v. Goodman, 294 Ark. 25, 741 S.W. 2d 233 (1987).

The client, of course, may not be penalized for exercising the right to dismiss the lawyer. Id. In view of these duties, a lawyer need not place any fees into a trust account absent special circumstances necessary to protect the interest of the client. Such circumstances may be the agreement of the parties, the size and amount of the fee, and the length of time contemplated for the undertaking. http://gabar.org/manage/pageversion.php?operation=insert&live=1137 - 1[1]

[1] A fee paid for retainer of the attorney, as narrowly defined in this opinion, illustrates the importance of an agreement or understanding in writing outlining, among other things: geographic area involved, duration, scope of proposed legal services, fees and expenses for legal services rendered, and due date of future retainer fees covered by the retainer agreement. The agreement should also contain specific terms as to refunds of any portion of the fee should the agreement be terminated prior to its expiration date. See Ethical Considerations 2-19 and 2-23.

C. Formal Advisory Opinion No. 94-2

State Bar of Georgia
Issued by the Supreme Court of Georgia
On September 9, 1994
Formal Advisory Opinion No. 94-2

For references to Standard of Conduct 45, please see Rules 1.15(I) and 1.2.

Ethical Considerations Applicable to a Lawyer Paying Funds to Others Over a Client's Objections.

In those cases where it is not possible to ascertain who is entitled to disputed funds held by the lawyer, the lawyer may hold such disputed funds in the lawyer's trust account for a reasonable period of time while endeavoring to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds into a court of competent jurisdiction.

In every case a lawyer has a duty to represent the client and the client's interest. The client's instructions should be followed whenever possible within the restrictions provided in the Standards, including, but not limited to, Standard 45, and applicable law.

Formal Advisory Opinion No. 98-2

State Bar of Georgia
Issued by the Supreme Court of Georgia
On June 1, 1998
Formal Advisory Opinion No. 98-2

This opinion relies on Standards of Conduct 61, 62, 63, and 65 that bear upon matters directly addressed by Rule 1.15(I).

QUESTION PRESENTED:

When a lawyer holding client funds and/or other funds in a fiduciary capacity is unable to locate the rightful recipient of such funds after exhausting all reasonable efforts, may that lawyer remove the unclaimed funds from the lawyer's escrow trust account and deliver the funds to the custody of the State of Georgia in accordance with the Disposition of Unclaimed Property Act?

SUMMARY ANSWER:

A lawyer holding client funds and/or other funds in a fiduciary capacity may remove unclaimed funds from the lawyer's escrow trust account and deliver the funds to the custody of the State of Georgia in accordance with the Disposition of Unclaimed Property Act only if the lawyer, prior to delivery, has exhausted all reasonable efforts to locate the rightful recipient.

OPINION:

Many members of the Bar have contacted the State Bar of Georgia for guidance on how to manage client funds and/or other funds held in a fiduciary capacity in the lawyer's escrow trust account when the lawyer is unable to locate the rightful recipient of the funds and the rightful recipient fails to claim the funds. More specifically, the lawyers have asked whether they could ethically remove the unclaimed funds from the lawyer's escrow trust account and disburse the funds in accordance with O.C.G.A. §§ 44-12-190 et seq., the Disposition of Unclaimed Property Act.

In those cases where a lawyer is holding client funds and/or other funds in a fiduciary capacity, the lawyer must do so in compliance with Standards 61, 62, 63 and 65. When the funds become payable or distributable, Standard 61 speaks to the lawyer's duty to deliver funds: "A lawyer shall promptly notify a client of the receipt of his funds, securities or other properties and shall promptly deliver such funds, securities or other properties to the client." Implicit both in this Standard, and the lawyer's responsibility to zealously represent the client, is the lawyer's duty to exhaust all reasonable efforts to locate the rightful recipient in order to ensure delivery.

When a lawyer holding funds attempts to deliver those funds in compliance with

Standard 61 but is unable to locate the rightful recipient, the lawyer has a duty to exhaust all reasonable efforts to locate the rightful recipient. After exhausting all reasonable efforts and the expiration of the five year period discussed in the Act, if the lawyer is still unable to locate the rightful recipient and the rightful recipient fails to claim the funds, the funds are no longer considered client funds or funds held in a fiduciary capacity, but rather, the funds are presumed to be abandoned as a matter of law, except as otherwise provided by the Act, and the lawyer may then deliver the unclaimed funds to the State of Georgia in accordance with O.C.G.A. §§ 44-12-190 et seq., the Disposition of Unclaimed Property Act. A lawyer who disburses the unclaimed funds as discussed above shall not be in violation of the Standards.

E. FORMAL ADVISORY OPINION NO. 04-1

Approved And Issued On February 13, 2006 Pursuant To Bar Rule 4-403 By Order Of The Supreme Court Of Georgia With Comments
Supreme Court Docket No. S05U1720

COMPLETE TEXT FROM THE ORDER OF THE SUPREME COURT OF GEORGIA

We grant a petition for discretionary review brought by the State Bar of Georgia to consider the proposed opinion of the Formal Advisory Board[1] (hereinafter "Board") that, if an attorney supervises the closing of a real estate transaction conducted by a non-lawyer entity, the attorney is a fiduciary with respect to the closing proceeds and the closing proceeds must be handled in accordance with the trust account and IOLTA provisions of Rule 1.15(II) of Bar Rule 4-102(d) of the Georgia Rules of Professional Conduct. Formal Advisory Opinion No. 04-1 (August 6, 2004). See State Bar Rule 4-403(d) (authorizing this Court to grant a petition for discretionary review).[2] For the reasons set forth below, we agree with the Board that a lawyer directing the closing of a real estate transaction holds money which belongs to another (either a client or a third-party) as an incident to that practice, and must keep that money in an IOLTA account. We further add that if the proceeds are not subject to the rules of IOLTA subsection (c)(2), then the funds must be deposited in an interest-bearing account for the client's benefit. Rule 1.15(II)(c)(1). Under no circumstances may the closing proceeds be commingled with funds belonging to the lawyer, the law office, or any entity other than as explicitly provided in the Rule.

The matter came before the Board pursuant to a request for an advisory opinion on the following question:

May a lawyer participate in a non-lawyer entity created by the lawyer for the purpose of conducting residential real estate closings where the closing proceeds received by the entity are deposited in a non-IOLTA interest bearing bank trust account rather than an IOLTA account?

The opinion first appeared in the June 2004 issue of the Georgia Bar Journal. In response, the Board received comments both in support of and in opposition to the opinion. The modified opinion appeared in the October 2004 Georgia Bar Journal, and the State Bar thereafter sought discretionary review.

The closing of a real estate transaction in this State constitutes the practice of law, and, if performed by someone other than a duly-licensed Georgia attorney, results in the prohibited unlicensed practice of law. In re UPL Advisory Opinion 2003-2, 277 Ga. 472 (588 SE2d 741) (2003). The attorney participating in the closing is a fiduciary with respect to the closing proceeds, which must be handled in accordance with the trust account and IOLTA provisions in Rule 1.15(II).[3] Specifically, when a lawyer holds client funds in trust, the lawyer must make an initial determination whether the funds are eligible for the IOLTA program. Closing proceeds from a real estate transaction which are nominal in amount or are to be held for a short period of time (i.e., funds that cannot otherwise generate net earnings for the client) must be deposited into an Interest on Lawyer's Trust Account (IOLTA Account). Funds that are not nominal in amount or funds, no matter what amount, that are not to be held for a short period of time, are ineligible for placement in an IOLTA account and must be placed in an interest-bearing account, with the net interest generated paid to the client. Rule 1.15(II)(c). See also Brown v. Legal Foundation of Washington, 538 U.S. 216 (155 LE2d 376, 123 SC 1406) (2003). Under either circumstance, Rule 1.15(II) instructs that a lawyer involved in a closing has a strict fiduciary duty to deposit a client's real estate closing proceeds in a separate IOLTA or non-IOLTA interest bearing trust account.

The Board's recognition that, under all circumstances, the interest generated on the client's closing funds is governed by Rule 1.15(II), ensures full compliance where real estate closings are involved. Accordingly, we adopt Formal Advisory Opinion 04-1 to the extent it is in accord with the rule that attorneys must place client closing proceeds that are nominal or held for a short period of time in an IOLTA account. We clarify that closing proceeds that are more than nominal in amount or that will be deposited for more than a short period of time must be placed in a non-IOLTA interest bearing account with interest payable to the client. Rule 1.15(II)(c)(1).

Formal Advisory Opinion approved, as modified. All the Justices concur.

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1. State Bar Rule 4-403(a) authorizes the Formal Advisory Opinion Board to draft proposed Formal Advisory Opinions concerning the proper interpretation of the Rules of Professional Conduct.

2. Formal Advisory Opinion Board opinions, which are approved or modified by this Court, are "binding on all members of the State Bar." State Bar Rule 4-403(e).

3. The sole issue addressed in the proposed opinion is whether an attorney may participate in a non-lawyer entity which the attorney created for the purpose of conducting residential real estate closings without depositing the closing proceeds in an IOLTA account.

FORMAL ADVISORY OPINION NO. 04-1

Question Presented:

May a lawyer participate in a non-lawyer entity created by the lawyer for the purpose of conducting residential real estate closings where the closing proceeds received by the entity are deposited in a non-IOLTA interest bearing bank trust account rather than an IOLTA account?

Summary Answer:

The closing of a real estate transaction constitutes the practice of law. If an attorney supervises the closing conducted by the non-lawyer entity, then the attorney is a fiduciary with respect to the closing proceeds and closing proceeds must be handled in accordance with Rule 1.15 (II). If the attorney does not supervise the closings, then, under the facts set forth above, the lawyer is assisting a non-lawyer in the unauthorized practice of law.

Opinion:

The closing of a real estate transaction in the state of Georgia constitutes the practice of law. See, *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 588 S.E. 2d 741 (Nov. 10, 2003), O.C.G.A. §15-19-50 and Formal Advisory Opinions Nos. 86-5 and 00-3. Thus, to the extent that a non-lawyer entity is conducting residential real estate closings not under the supervision of a lawyer, the non-lawyer entity is engaged in the practice of law. If an attorney supervises the residential closing[1], then that attorney is a fiduciary with respects to the closing proceeds. If the attorney participates in but does not supervise the closings, then the non-lawyer entity is engaged in the unauthorized practice of law. In such event, the attorney assisting the non-lawyer entity would be doing so in violation of Rule 5.5 of the Georgia Rules of Professional Conduct[2]

When a lawyer is supervising a real estate closing, the lawyer is professionally responsible for such closings. Any closing funds received by the lawyer or by persons or entities supervised by the lawyer are held by the lawyer as a fiduciary. The lawyer's responsibility with regard to such funds is addressed by Rule 1.15 (II) of the Georgia Rules of Professional Conduct which states in relevant part:

SAFEKEEPING PROPERTY - GENERAL

(a) Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available a trust account as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from such account.

* * * * *

(c) All client's funds shall be placed in either an interest-bearing account with the interest being paid to the client or an interest-bearing (IOLTA) account with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

(1) With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined by Rule 1.15(III)(c)(1), with the interest to be paid to the client. No earnings from such an account shall be made available to a lawyer or law firm.

(2) With respect to funds which are nominal in amount or are to be held for a short period of time, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) in compliance with the following provisions:

* * * * *

As set out in Subsection (c)(2) above, this Rule applies to all client funds which are nominal or are to be held for a short period of time. As closing proceeds are not nominal in amount, but are to be held for only a short period of time, they are subject to the IOLTA provisions. Therefore, the funds received in connection with the real estate closing conducted by the lawyer or the non-lawyer entity in the circumstances described above must be deposited into an IOLTA compliant account.

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1. Adequate supervision would require the lawyer to be present at the closing. See FAO 86-5, FAO 00-3, and FAO 04-1.

2. Rule 5.5 states in relevant part that:

UNAUTHORIZED PRACTICE OF LAW
A lawyer shall not:

* * * * * *

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The maximum penalty for a violation of this Rule is disbarment.

Section 3:

TIPS on Setting Up and Maintaining a Trust Account[1]

NOTE: THIS IS A GENERAL OVERVIEW DESIGNED TO ANSWER COMMONLY ASKED QUESTIONS. IT IS NOT EXHAUSTIVE AND IT DOES NOT ATTEMPT TO COVER EVERY SITUATION OR EVERY RULE RELATED TO ATTORNEYS' TRUST ACCOUNTS IN GEORGIA.

********PLEASE ALSO NOTE THAT WHILE ALL SUGGESTIONS GIVEN IN THIS DOCUMENT CONSTITUTE CURRENTLY ACCEPTABLE PRACTICE, THE SECTIONS REGARDING NSF CHECKS AND THE REQUIREMENT THAT ACCOUNTS BE SET UP IN AN APPROVED BANK RELY ON REVISIONS TO THE DISCIPLINARY STANDARDS THAT OFFICIALLY TOOK EFFECT JANUARY 1, 1996, AND THE NEW GEORGIA RULES OF PROFESSIONAL CONDUCT (the "Rules") WHICH TOOK EFFECT JANUARY 1, 2001.*********

TILE STATE BAR'S RULES REGULATING TRUST ACCOUNTS ARE INCLUDED IN SECTION 1 HEREOF TO PROVIDE FURTHER GUIDANCE. IF YOU HAVE AN ETHICS QUESTION TO WHICH YOU CANNOT FIND AN ANSWER AFTER READING THIS INFORMATION, PLEASE CONTACT THE ETHICS HOTLINE AT 1-800-682-9806 BEFORE TAKING ANY ACTION.

IF YOU HAVE A QUESTION CONCERNING THE MECHANICS OF TRUST ACCOUNT SETUP OR BOOKKEEPING, PLEASE CONTACT THE LAW PRACTICE MANAGEMENT PROGRAM AT 1-800-334-6865 EXT. 770.

IF YOU HAVE A QUESTION CONCERNING THE GEORGIA BAR FOUNDATION'S IOLTA PROGRAM, PLEASE CONTACT THE FOUNDATION AT 404-~~527-8765~~ 588-2240.

[1] This Section was adopted, adapted and or reprinted from the materials originally authored by the State Bar of Georgia, Law Practice Management Program.

This Section was prepared by the State Bar of Georgia's Law Practice Management Program as a service to members of the Bar. We gratefully acknowledge the assistance of the Office of the General Counsel of the State Bar of Georgia, the Georgia Bar Foundation, and the Institute of Continuing Legal Education in Georgia in its production.

A. About Trust Accounts

What is a trust account (escrow account)? What types of funds are placed in one?

A trust account is a separate bank account set up to hold any money you have received in trust on behalf of a client or a third party. Typical funds placed in a trust account include earnest monies or down payments on loan closings, settlement proceeds or damages payments that have not yet been disbursed to the client or creditors, advances that the client has given you against future costs of litigation, or advance payments for fees that you have not yet earned. Formal Advisory opinion 91-2 does not require a Georgia lawyer to keep unearned fees in the trust account but it is a good practice to do so. Lawyers in Georgia tend to use both the terms "attorney trust account" and "attorney escrow account", but we feel "trust account" is a better term since "escrow account" has a specific meaning related to real estate practice and may be confused with other types of accounts that can legitimately be set up by real estate and other professionals. See Rule 1.15 (III) b.

Does it have to be an interest-bearing account?

Yes. The interest may be payable to the client or payable to the Georgia Bar Foundation, depending on the type of trust account (IOLTA or non-IOLTA) that has been set up, but as of July 1, 1991 all accounts must be interest-bearing unless the attorney has been granted a specific exemption described below.

What is an IOLTA account?

An IOLTA **(Interest on Lawyers Trust Accounts)** account is a special type of trust account set up to hold all trust funds you receive that are nominal in amount or that will be held for a short time. The interest that accrues on this account is remitted automatically by your bank to the Georgia Bar Foundation to award in grants. Participation in the IOLTA program is mandatory; that is, if you receive any nominal funds or short-term deposits, you must place them in an IOLTA account unless you qualify for an exemption (explained below) or you decide that you will track the interest earned for each client in your pooled account and remit that interest to the client.

The Georgia Bar Foundation will sometimes grant a request for an exemption from IOLTA if:
1) The account doesn't generate enough interest (or will not in the future, if it's a new account) to cover service charges;
2) No bank in your county will set up an IOLTA account for you;
3) Having an IOLTA account will represent a significant cost to your firm.

If you feel that one of the above applies to you and want to request an exemption, make your request in writing to the Foundation and explain the reasoning behind it. You will receive a written answer from the Foundation, if your request is approved, the exemption is provided for a period of three years, after which it must be renewed. If the nature of your practice changes during the exemption period so that your average balance would consistently generate enough interest to offset charges; it's your responsibility to convert the account to an IOLTA account.

Please note that having an exemption from IOLTA does not mean that you have been given permission not to have a trust account; it simply means that your trust account does not have to be a pooled interest-bearing account complying with IOLTA rules. If you hold funds in trust for clients, you will always need to have a trust account.

What if they're not short-term or nominal?

In that case, you would generally set up an interest-bearing account for the benefit of that particular client, using the client's tax identification number and remitting the interest to the client. If you do place funds in anything other than a checking account, be careful that the money is safe (don't place trust funds in high-risk investments, no matter what your client agrees to), accessible (don't

place funds in a location where they are non-liquid or acquire withdrawal penalties), and complies with the rules regulating proper description of the account.

Who defines "short term" and "nominal"?

You do, based on your own judgment of what would be best for your client. Remember that you or your client will be responsible for all account charges for a non-IOLTA account, and consequently, with today's low interest rates, a deposit might have to be quite large to offset the cost of setting up and maintaining the account. You can take such things into consideration in deciding whether or not to set up a separate account, the lawyer's determination that these funds are nominal or short term is not a basis for discipline. See Rule 1.15 (II) c. 3.

Do all lawyers have to have trust accounts?

All attorneys who hold client funds or holds funds in any fiduciary capacity must have trust accounts. See Rule 1.15 (II). If you never receive client or other fiduciary money or property that you must keep safe -- if, for example, you are a government lawyer - then you may not need to set up a trust account. But if you ever have client or fiduciary funds, you must set up an account to hold them. You cannot argue that since you "rarely" receive money in trust, you have no need of a trust account.

Are there any situations where I or my firm can keep the interest earned on a trust account?

Absolutely not. Sorry about that.

What about property that isn't money?

If you keep property in trust for a client or in any other fiduciary capacity, like potential exhibits in litigation, securities, or personal property as surety for payment of your fees, you must also provide for its safekeeping. See Rule 1.15 (II) a. A safe deposit box is the best means of doing this.

B. Setting Up a Trust Account

How do I set up an account?

You will need to go to an "approved institution" to set up your trust account. See Rule 1.15 (III) c. 1. An approved institution is any bank, credit union, or savings and loan in Georgia that has agreed to abide by the Bar's reporting requirements

for NSF checks. The Bar ~~will~~ is required annually to publish a list of institutions that have met these requirements; it is available at http://www.gabar.org/attorneyresources/ioltaapprovedbanks.cfm. You may be able to set up an account at a non-approved bank only if there are no banks in your county that have agreed to comply. See Rule 1.15 (III) c. 1. ii. Note: it's usually a good idea to go to a main office and not a small branch office to set up your account. In the main, downtown offices you are more likely to find someone who is used to handling attorney trust accounts, if you are setting up an IOLTA account, we suggest you provide the bank with the Notice to Financial Institution attached to this pamphlet; this will give them the correct tax ID number (58-0552594) to place on the account. If you are setting up a non-IOLTA trust account, you will want to provide the bank with your client's tax ID number. Do not use your firm's tax ID number, as using your tax ID will result in the interest remaining in your account, being counted as firm income, and taxed accordingly.

If you have several accounts at the same bank, you may want to check your first statement to make sure that the IOLTA account has been set up properly, the account properly designated, and that the correct tax I.D. number is on the account. Rule 1.15(III)(b)(1) requires that all trust accounts include certain identifying language on the account name, deposit slip and checks. Make sure you understand the bank's policy for dealing with service charges on IOLTA accounts as well. Some banks will waive the fees or deduct them from interest paid to the Foundation; others charge fees to the attorney or charge the attorney for the difference between the earned interest and the amount of the fee. In addition, some banks will take the charges directly out of the trust account, while others assess the firm's operating account for the IOLTA charges so as not to affect the trust account balance.

If at all possible, try to arrange for your bank to withdraw any fees from an account other than the trust account. If the bank takes its charges out of your trust account, you will need to (1) have a small cushion of your own funds in the account to cover expenses and (2) check the amount and reconcile on a monthly basis. See Rule 1.15 (II) b. Having sufficient personal funds in your trust account to cover service charges or extraordinary expenses is not considered a violation of the rules against commingling funds.

Should I have all my bank accounts (office and trust accounts) at the same bank?

There are several factors you will want to take into consideration here. First of all, if you are a real estate attorney and do a lot of closings on behalf of a bank, the

bank will probably want you to place your IOLTA account there for the sake of convenience. (This can result in your having multiple IOLTA accounts—don't worry, that's OK.) You may also have a banking relationship of long standing with a particular institution and wish to keep all your business there.

That being said, there are still some practical reasons for not having your trust account and any personal or general business accounts at the same bank. The primary reason is the possibility of error. If you have multiple accounts, you, your staff, or the bank may occasionally confuse one for the other. You or your staff can also confuse a deposit slip for one account with a deposit slip for another or a checkbook from the trust account for one from the office account. And last, many banks have a policy of automatically withdrawing funds from any account with your name on it to cover shortages in another. For example, you could overdraw your office account and the bank, in an attempt to be helpful, might withdraw funds from your trust account to cover the overdraft. Usually, this is only a problem if you haven't labeled your trust account properly or if it's a non-IOLTA account, but you may want to discuss this with your bank if you have multiple accounts there.

Who should sign the account?

You can designate anyone you choose to be the signatory on your account; it does not have to be you, and it does not even have to be a lawyer. However, because of the weighty responsibility the lawyer has towards his or her client and that client's property, coupled with the likelihood of severe discipline if money is stolen from the account, it is not usually desirable to have anyone but the partner or managing partners sign the trust account checks. If you need to have an alternate signatory because you are frequently out of the office, then at least take the precaution of having all trust account statements delivered to your desk unopened each month.

C. Receiving and Disbursing from the Trust Account

What if the client gives me money and I lose it or my office is burglarized before I can deposit it?

You're responsible for your client's money from the moment you receive it. Take sensible precautions to avoid misplacing or misfiling checks or cash, and don't hold the money any longer than necessary before depositing it into your trust account.

If I am keeping advance payments from a client, at what point after I do the work can I move the money out of the trust account?

Although Formal Advisory Opinion 91-2 does not require Georgia lawyers to keep unearned fees in the trust account, it is a best practice to do so. If you keep unearned fees in escrow, you can and should move the money out of your trust account as soon as it is earned. See Rule 1.15 (III) b. Your client should be aware, hopefully from the signed fee agreement you have executed, that money will be withdrawn and transferred as it is earned. Each time you make a withdrawal, be sure to notify the client. You should send your client regular statements that indicate how much work has been performed and how much money transferred from the trust account to your office account, even when the client does not yet owe you money to replenish the amount in trust. That way, you will not have to worry about the client complaining at the end of the matter that he or she "had no idea it was going to cost that much" or "didn't realize it took that much work."

Also, remember that if you hold back money that you are entitled to (i.e., that you have already earned) in your trust account instead of transferring it to a location where it will be counted as firm or personal income, the I.R.S. might want to have a conversation with you about this. Too many lawyers "accidentally" forget to transfer funds until after the end of the year, thereby lowering their taxable income for that year.

What if I write a check from the trust account but it's never cashed?

This is an annoying situation that most attorneys have to deal with at one time or another. From time to time, a witness who receives an expense check, a photographer who has been reimbursed, or even a client who gets a check for the balance in trust at the end of the matter may not bother to cash the check. This most frequently happens for small reimbursements of under $100.00 or so.

There is no completely satisfactory way to deal with this problem. The money does not, of course, belong to you or to your firm, and so it cannot be transferred to your office accounts. You can always write the payments as something other than a check; something that is considered cashed on receipt like a money order or cashier's check, but this is expensive for you and requires a separate trip to the bank. (Never make ATM withdrawals from a trust account! Don't even get an ATM card for the account.) Generally, if you have money in the account and have made diligent inquiry for the owners, the money can be returned to the client if it was paid out on behalf of a third party, but it must be kept by you if it's the client's

money until it can be disposed of in accordance with the Disposition of Unclaimed Property Act. O.C.G.A. §44-12-190 et seq. (FA Opinion #98-2).

D. Maintaining Trust Account Records

What kind of records do I need to keep for my account?

The rules, and common sense, stipulate that you must always know your account balance and individual client balances in grouped or IOLTA accounts. See Rule 1.15 (II) b. This will necessitate your keeping at least two sets of records:
one which shows all transactions for your account, regardless of the client on whose behalf they were made, and which gives a running balance for the account; and another which shows all transactions on behalf of a particular client, with the individual client's balance.

Commonly these are referred to as your "general trust account ledger" and your "client ledger". You need both, because without the general or account ledger you don't know the grand total in your account, and without the client ledger you don't know the balance you hold for any given client.

Each time you make an entry in one of these ledgers, you should record the amount of the transaction, the date of the transaction, the client or matter on whose behalf the transaction is being made, a description of the transaction, and the check number if it's a disbursement. If you have a computerized trust accounting system, or a manual one-write system, you'll only need to make each entry once; otherwise, you'll need to record each entry twice, once on the general ledger and once on the client ledger.

When you make a deposit, you'll also need to fill out a full deposit slip, and if you're paid in cash, you'll need to fill out separate cash receipts slip and keep a copy. Please remember to take special care in cash transactions, since there is no distinguishing mark to let you know whose cash you have! And, of course, specific I.R.S. reporting and recordkeeping requirements may apply to large cash deposits.

Can I Use a Computer Program to Do my Accounting?

Yes. For most attorneys, this would be a very sensible decision that would considerably lessen the possibility of error, although if you have very few trust account transactions, it may not be worth the time and trouble. In choosing a

computer program, you should consider whether it will let you track all the information you need, and in the format in which you need it. For example, a program that did not provide a place for you to describe the transaction or input an identifying file number would not be adequate for your purposes. Also bear in mind that many general purpose accounting programs do not understand the concept of trust funds, especially accounts that may hold funds for many different clients. This can result in problems ranging from an inability to calculate an individual client balance within the trust account to a propensity to count trust account funds as firm income. Because of this, we recommend that attorneys use programs designed to handle law firm trust accounting, rather than off-the-shelf business accounting packages. The law practice management program can provide additional information about various software programs.

How Should I Handle Account Maintenance and Review?

Once you have your account properly set up, don't sabotage your efforts by letting account maintenance slide. Every month, when the statements come from the bank, you should reconcile the account balance or have your bookkeeper or accountant do it for you. Because you are handling someone else's money, not your own, this step should be assigned a high priority in your office procedures. Reviewing and reconciling the accounts on an irregular basis can let simple errors slip past and build until they are cause for a client grievance just as with your home accounts, one error can lead to another error, making it difficult if not impossible to trace the problem back to its source once more than a few more checks have been written.

When reconciling your balance, make note of missed numbers and ascertain the reason for them. Make sure that you review any service charges assessed on the account to determine if they are accurate and to check that your general ledger reflects them.

Do not throw out any records that you keep on your account, such as ledgers, bank statements, deposit slips, or cancelled checks. You are required to keep all this information for at least six years after the termination of your client's case (Bar Rule 1.15(I)(a). You may have reasons that relate to a particular matter for keeping the information even longer.

What if I Bounce a Check?

If you write a check from your trust account that does not clear due to insufficient funds, and it is not honored within three business days, the bank will send a report to the Bar notifying them of this fact. You will be given an opportunity to

explain the reason for the returned check, but if the Disciplinary Board decides that the circumstances constitute "sufficient evidence" of a threat of harm to your clients or the public, it may be able to audit your trust account (see the attached Rule 1.15 (III) f. and Bar Rule 4-111 as attached for details).

I just ordered 300 (500, 1000) new checks. Do I have to throw them all out if they don't have the proper wording?

Most people who called me with that question had left the word "Attorney" off the account title, although some had forgotten to include "trust" as well. According to the Office of the General Counsel, if the account title clearly includes the word "Attorney" *somewhere,* it is not necessary to have the word "Attorney Trust Account", etc. in sequence. Therefore, it would be acceptable to say "John Q. Jones, Attorney at Law, Trust Account." If you don't have proper wording on the checks, then it seems clear that using the checks as-is would be a violation of the new rules. But don't despair; you can still write in the correct missing words until your new checks are used up. See Bar Rule 1.15(III)(b)(1) for a complete list of acceptable designations.

How do I find out if my bank is an approved institution?

There are a variety of ways. I'd suggest starting out by asking the bank. If they don't seem to know, or if you suspect that the response you get can't be relied upon, there are other sources to consult. A list of approved banks may be found on the State Bar of Georgia website at http://www.gabar.org/attorneyresources/ioltaapprovedbanks.cfm.

You can also call the Bar **Law Practice Management Program** at 800-334-6865 ext. 737 or 404-527-8770.

I just found out that my bank ISN'T approved. What do I do?

Most of the time, if your bank is not an approved institution, it's not because of a serious policy or philosophy difference they're having with the State Bar of Georgia (the “Bar”). It's because the notice from the Bar explaining the rule change got mislaid somewhere along the way. So don't panic. Call the above number at the Bar to get a copy of the form the bank needs to fill out, and submit it to your bank personally, with an explanation of why it's necessary. Most of the time, that's all that is needed. But if for some reason your bank does have a problem with agreeing to notify the Bar in case of checks returned NSF, you will have to change banks unless you can demonstrate that there is no bank in your county that's willing to comply.

One of the checks my client gave me just bounced. Does this mean I'm going to be audited?

No. The wheels of the investigative process are set in motion when you bounce a check. No lawyer has any real control over whether the checks that he or she is given are good. It's true that if your bookkeeping procedures are poor -- if you write checks off of uncollected funds - then getting a bum check from a client may result in your writing bad checks in return. But that's something that you have control over. Don't write checks off of your deposits until you know that they have cleared the bank. That way, there won't be any problems.

OK, I understand about the rules that tighten up trust account procedures. But why does anybody care what my business accounts are called? That doesn't really seem fair!

I sympathize, but the proper wording is needed for several reasons. If a lawyer disappeared or was suddenly disabled and others had the task of sorting through the accounts, what would they make of an account titled "Smith & Jones, P.C."? How would they know it was not a trust account? Unnecessary interference with business accounts is easily avoided if they are properly labeled. And ambiguous or incomplete account titles invite mistakes by your staff and those of your bank. Bar Rule 1.15(III)(b)(2) includes a complete list of acceptable designations for lawyer business accounts.

I hate accounting and now I'm terrified I'm going to be audited, I'll just close out my trust account and make my clients pay for costs directly.

Now, now - calm down. For one thing, that's not really a practical solution. You'll always get checks settlement proceeds, real estate funds, etc. - that need to pass through your trust account. I personally have seen a number of lawyers get themselves into serious trouble through the financial contortions they went through trying to avoid their trust accounts. But the main reason for calm is that maintaining a trust account is not that hard. Keep one ledger (or list, or book, or whatever term makes you feel comfortable) that has all your trust account transactions with a running balance, so you know what the total in the account is at all times. Keep another that has a separate page, or card, for each client. Record all transactions on behalf of that client, with a running balance. Keep your deposit slips, canceled checks, and bank statements, and reconcile your account monthly to make sure nobody's made an arithmetic error. You would be surprised at what a painless way good trust account record keeping is of maintaining complete track of your financial involvement with a client desirable in any business.

If you have questions regarding bookkeeping or any other aspect of managing your practice, please call the Law Practice Management department of the State Bar of Georgia. This dues-supported program can offer you free, confidential advice over the telephone as well as low-cost consultations in your office anywhere in the state. IF YOU HAVE A QUESTION CONCERNING THE MECHANICS OF TRUST ACCOUNT SETUP OR BOOKKEEPING, PLEASE CONTACT THE LAW PRACTICE MANAGEMENT PROGRAM, STATE BAR OF GEORGIA, AT 1-800-334-6865 EXT. 770 or 404-527-877 or go the Program's website at http://www.gabar.org/committeesprogramssections/programs/lpm/index.cfm**.**

Natalie Kelly *is the current Director of the Law Practice Management Program.*

Section 4:

RECONCILIATION[2]

The State Bar of Georgia does not require three way reconciliation in the Rules addressing trust accounting standards. However, most title insurance underwriting agreements require real estate closing attorneys to timely reconcile their IOLTA escrow account each month or no later than 30 days of the date of the bank statement. Most audit checklists for title underwriters, including the American Land Title Association guidelines, require evidence of three-way reconciliation. Timely reconciliation and three-way reconciliation is important to the title insurer to identify problems before they become a loss, defalcation or claim, and to act as a deterrent to fraud for which the title insurance underwriter may be liable under the policy of title insurance or closing protection letter.

A. ABOUT RECONCILIATION

What does Reconciliation mean?

"Reconciliation" means checking three basic records (1) the bank statements, (2) the client register or escrow trial balance report, and (3) the general ledger/checkbook register against each other so you can find and correct any mistakes. The theory is that when all three records are checked against each other mistakes will show up since it is unlikely that the same mistakes will be made in three different records.

How often did I need to reconcile my account?

Reconciliations capture the data as of the date of the bank statement. This means that some activity may have cleared the bank and some activity may still be outstanding. When a bank statement is received, the account should be reconciled as soon as possible. Reconciling your account as soon as possible after receipt of bank statement allows you to reap the benefits that reconciliation provides such as protecting your firm, your customers and yourself from unnecessary risk of mistakes or theft.

Remember that your real estate trust accounts should be maintained separate from your other general practice trust accounts.

[2] Selected portions of this section were adopted, adapted and or reprinted from the materials originally authored by the following with their permission: The State Bar of North Carolina, Lawyer's Trust Account Handbook, Revised 05/2011 (For the current online version of the North Carolina Trust Account Handbook, please go to: http://www.ncbar.com/PDFs/Trust%20Account%20Handbook.pdf

What if I am not able to reconcile that often?

UCC regulations require an account holder to notify their bank within 15-30 days of any errors. O.C.G.A. §11-4-406. The bank may not be accountable for errors on the account if not reported within this time requirement. You should check with your bank to determine the time period required to report errors as established in your banking agreement. Monthly and quarterly reconciliations help you discover errors in a timely manner so they can be reported to and addressed by your financial institution. It is possible for a problem to exist even though a bank account has a positive balance. So, reconciliations are also an important law practice management tool. It can help you determine if employees are doing their jobs and whether payoffs are being made in a timely manner. A monthly review of the three-way reconciliation detail may disclose unusual activity or errors such as whether or not funds are adequate to cover liabilities.

Note: Your title Insurance underwriter may, without notice and at any time, audit your IOLTA escrow account and the general books of accounts under the terms of your underwriting agreement. Title insurer audits will check to see if reconciliations are current and Identify areas for offices and agents to improve their internal controls and efficiencies according to the following guidelines and standards:

- ALTA/state title insurance guidelines
- Federal/state regulatory requirements (RESPA, federal directives, etc.)
- Company guideline
- Industry best practices

The results of you title insurance audit may impact your agency relationship and your ability to issue title insurance on behalf of your Underwriter.

What if I just want to hire a bookkeeper or CPA to reconcile rather than doing it myself?

This is fine, but you are still personally responsible for accounting to your clients and to the Bar for the money in your client trust accounts. The State Bar will look to you if you bounce a client trust account check even if the error was made by your CPA. So, you should understand the process even if you never intend to do the reconciliation personally. It is a good practice for you or a designated lawyer in your firm to review and sign off on all accounting and reconciliation statements and worksheets even if you use a bookkeeper or CPA to handle the accounting of your client trust funds.

What if I just want to use a computer software program to maintain and reconcile my trust account?

Computer software can reduce the risk of mathematical error and provide the capacity to sort data and instantly acquire information about client funds on the screen. However, all computer programs require human input of data. While the risk of human error can be reduced by decreasing the need for multiple entries of

the same data, the risk cannot be totally eliminated through technology. The lawyer, who is the person most familiar with the client matter and the one most likely to recognize if an error occurs, must be vigilant in assuring that the client's money is protected and accounted for until disbursement. Finally, if you do use accounting software, you will want to make sure that you have a safe and reliable back-up for the information and that your system is backed up daily.

Why do I need to reconcile or maintain the required records when we disburse all funds received and zero out the file at the time of closing?
The answer is that what actually happens is not always what you plan to happen in the daily operations of your law practice. Listed below are several examples of what can actually happen in the day-to-day activities of a law firm.

- Checks that are recorded in the checkbook may become lost, voided, or misplaced prior to being recorded to a Client Register. Checks may also clear the bank account in error and cause a shortage. These errors may not be detected and recovery of such funds would not be made if the actual checks clearing the bank have not been compared to the checks recorded in the checkbook and on the Client Register.
- Unfortunately, deposits do get lost or misplaced in the period subsequent to your receipt of funds and prior to being deposited. Banks do process wire transfers into and out of wrong bank accounts. Transactions are processed by the financial institution for amounts different than the check or deposit slip. Shortages may not be detected timely if actual deposits credited by the bank are not compared to those entered in the checkbook and Client Register.
- When bank charges are not tracked or reimbursed, these fees accumulate and can lead to account shortages. Customers' funds should never be used to cover bank charges. But this is essentially what occurs if bank charges are not tracked and reimbursed from the operating account.

Even if you are disbursing files to zero, intervening factors may occur that could result in a shortage to the account. Often, the only problem is that the error was not detected at all, or on time.

B. THREE-WAY RECONCILIATION

What should be included in my monthly three-way reconciliation of my trust account?

A complete three-way reconciliation of the trust account must include the following reports at a minimum:

a. The Client Ledger or Escrow Trial Balance Reports is a listing of all open files with a balance at a specific point in time (usually month end). The listing shows the amount of funds held for each client. The cut-off date for this report should match the cut-off date of the bank statement. This report is important because it documents all of the customer-related

liability claimed against your trust account (the checking account balance). It also tells you whose money you are holding and whether the account has a positive or negative balance. The total of all client file balances must equal your checkbook register (2-way reconciliation).

b. Outstanding checks and deposits are those check that you have written which have not cleared your bank account, and those funds that you have received and have been posted to your checkbook and general ledger but do not appear on your bank statement. **This list of outstanding checks and deposits from your checkbook or general ledger will be added to your bank balance in order to bring the bank statement and your check book or ledgers into agreement**. This list should include the date the deposit and/or check was posted and the amount of the deposit and the related file numbers.
c. The bank statement for the period of reconciliation is needed in order to review for items of concern.
d. The Reconciliation Summary is a summation of the items set forth above and other adjustments that will bring the bank statement into balance or agreement with the trial balance totals and checkbook balance on a certain date. See Appendix A.

When reviewing my bank statement, what items of concern should I look for?

a. Overdraft or Negative Balances. If you see a negative daily balance or overdrafts, it may mean that funding checks are being returned NSF or deposited late or the file is underfunded or over-disbursed. A review of next day deposits may cover any negative balances. Further investigation may be required if there are unusual charges for returned items or overdrafts.
b. Review Deposits & In-Coming Wires. It is important to ensure that all deposit slips agree with deposits posted on client's ledger, particularly when cash is involved. The amount of each deposit and incoming wire on the bank statement should match your records. If the amount is different, pull the original deposit slip and file to determine where the error occurred. This may be caused by a bank error or it may be that the amount was input into the system incorrectly. Be sure and make the correction to the deposit amount in the system and clear the transaction and contact the bank to correct if necessary. It is important to investigate any unusual payees, large checks, unauthorized signatures and any visible alterations to deposit slips.
c. Reviewing Deposits in Transit. Deposits in transit ("DITs") should clear within five business days and wires should clear within two days. Any items that are dated more than two to five days prior to the end of the month need to be investigated to determine why the funds have not cleared the bank. It may be that the bank has deposited the funds into the wrong account or an improper deposit. If several deposits are lumped together on one deposit, the supporting documentation for that deposit needs to be reviewed. In addition, any DITs from one month that do not

clear the subsequent month need to be investigated. Remember - an old DIT is essentially a short file and needs to be reflected as such and reimbursed accordingly.

When reviewing my Client Ledger/Escrow Trial Balances, what items of concern should I look for?

The trial balance total should be positive. If it is negative, it is important to select and review files from the trial balance that may create the negative balance. Be sure and note the reasons for any overdrafts and what was done to correct the problem. It may be necessary to pull files with a negative balance to determine the cause of the problem and also to resolve it. Also, review trial balance for unusual numbers, file names or balances including small balances. These items should be reviewed monthly to ensure that all funds are disbursed as required. If a negative balance exists, the file was over-disbursed and needs to be researched. Maybe an outstanding check that should have been voided is causing the debit file. Maybe the lender or customers need to be contacted to recover the funds. Maybe the closer made an error and it needs to be reimbursed from operating. Debits that are not recovered timely need to be funded from operating. The appropriate party should be contacted to collect the funds.

What is the goal of three-way reconciliation?

The goal is to make sure that all items that show up on your trust account bank statement are accounted for in your accounting computer system and/or your Client ledgers and checkbook. A trust account is not properly reconciled until the three-way match is achieved between the bank statement, checkbook and client ledgers.

What do I need to begin my monthly three-way reconciliation?

Before you begin your monthly reconciliation, you must be sure that you have correct balances in all your client ledgers and general ledger/checkbook register for the previous month.

How do I prepare and document a monthly three way reconciliation?

The steps required for this type of reconciliation are similar to balancing a personal checking account. At the end of the month, the balance from the checkbook register and Client Ledger/ Escrow Trial Balance must be reconciled to the monthly bank statement (checkbook=trial balance=bank statement balance). Errors in the records must be corrected to keep escrow in balance. This includes bank errors which need to be corrected by the next statement after the bank is notified of the error.

Step 1. Checkbook Balance

To determine your Checkbook Balance, you should include only funds related to specific files. Do not include bank charges or unidentified funds.

- Run a tape of deposits you made during month or obtain the total from your computer.

- Run a tape of the disbursements you made during the month or obtain the total from the computer.

- Add to the previous month's ending book balance to the total deposits. Subtract from this amount the disbursement totals.

Date	**Description**	**Amount**
3/3/2012	Balance forward	$266,000
3/4/2012	Total Deposits	$375,000
3/31/2012	Total Deposits	$74,000
		$715,000
3/3/2012	Total Disbursements	($365,000)
3/15/2012	Total Disbursements	($200,000)
3/31/2012	Total Disbursements	($50,000)
3/31/2012	**Checkbook balance**	**$100,000**

Here, the new book balance will be the result of the previous months' book balance plus total deposits for the month minus total disbursements for the month. The book balance will be the balance at the close of business on the last day of the month.

Step 2. Client Ledger/ Escrow Trial balance as of 3/31/2012

This represents a list of all files that have a positive or negative balance as of the bank statement date. It represents all funds for which monies have been booked in your system for all Client accounts through a date certain.

Client #	**Client Name**	**Last Activity**	**Balance**
2012001	Alpha	3/31/2012	$1,000
2012002	Beta	3/31/2012	$25,000
2012003	Delta	3/31/2012	$70,000
2012004	Gamma	3/31/2012	$4,000
			$100,000

The checkbook and trial balance above are two way reconciled because they each have a balance of $100,000.00 as of March 31, 2012.

Step 3. Reconcile the Bank Statement as of 3/31/2012

The next step is to reconcile the bank statement as of March 31, 2012. Item 3 below is a condensed bank statement. A normal bank statement would list all the deposits and checks individually.

Consolidated Bank Statement

Balance as of last statement date	$266,000
Deposits 3/31/2012	$375,000
Disbursements:	
#5311-2234	($365,000)
#5303-223	($200,000)
Balance as of this statement	$76,000

Now we need to prepare the reconciled bank balance. This is obtained by taking the ending balance per the bank statement for the month being reconciled, adding in deposits in transit, and subtracting out the outstanding checks.

Adjusted Reconciled Bank Statement:	
Add: Deposits in transit as of	$74,000
Less Outstanding Checks:	($50,000)
Adjusted reconciled bank balance:	**$100,000**

Step 4. Three-Way Reconciliation Summary

Now we are ready to prepare our three-way reconciliation summary. This will allow you to observe any differences between the three balances and mark items for correction. The worksheet provided below can be used to prepare a three-way reconciliation summary as follows:

1. Enter the total client ledger balance as of the last day of the month onto a reconciliation sheet.

2. Enter the general ledger/checkbook register balance

3. Enter the ending balance on the reconciled bank statement as of the last day of the month.

4. Add the total outstanding deposits-in-transit.
   (These are deposits made to the account but not yet shown on the bank statement. These are added to the bank statement total.)

5. Subtract the total outstanding checks.
   (These are checks that have been drawn on the account but not yet shown on the bank statement. These will be subtracted from the bank statement amount.)

6. Subtract any bank service charges.

7. Calculate the adjusted balance.
   (Bank balance plus outstanding deposits minus outstanding checks)

SAMPLE THREE-WAY RECONCILIATION SHEET

Client Ledger Balances:

Client Name	**Last Activity**	**Balance**
Alpha	3/31/2012	$1,000
Beta	3/31/2012	$25,000
Delta	3/31/2012	$70,000
Gamma	3/31/2012	$4,000
		$100,000

Step 1: Enter total client ledger balances as of, 03/31/2012 ..... $100,000
Step 2: Enter general ledger/checkbook register balance $100,000
Step 3: Enter ending balance per bank statement, 03/31/2012 ..... $76,000
Step 4: Enter total outstanding deposits $74,000

(Deposits made to the account, yet not captured on bank statement. These will be ADDED to the bank statement amount.)

Step 5: Enter total outstanding checks ..... $(50,000)

(Checks that have been drawn from the account, yet not captured on bank statement. These will be SUBTRACTED from the bank statement amount.)

Step 6: Subtract any bank service charges $0.00

Step 7: Calculate adjusted balance $100,000
(Ending bank statement balance plus outstanding deposits minus outstanding checks)

Reconciliation: All three should match...
Total of all client ledgers $100,000
(Total from Step 1.)

Adjusted Bank Balance $100,000
(Total from Step 7.)

General ledger/checkbook register Balance $100,000
(Total from Step 2.)

In this example, the $100,000 adjusted reconciled bank balance agrees with the $100,000 on the consolidated checkbook register and the total client ledgers/ trial balance. Therefore, we have a three-way reconciliation. When completing the three-way reconciliation, it is a good idea to use an adding machine or other calculator that will produce a printed record of the calculation you performed. That way, if your records do not match, you can easily check to see if the reason is a mathematical mistake made while performing the reconciliation.

C. REVIEWING THE THREE-WAY RECONCILIATION

When reviewing my Three-Way Reconciliation worksheet, what items of concern should I look for?

Observe any differences between the three balances. If the three adjusted balances do not agree or if any balances are negative, be sure and make notes on reconciliation of any corrections that were made or may be need to be made. If you notice any unusual items, be sure and promptly investigate and make notes on any resolution.

When reviewing my Outstanding Check List, what items of concern should I look for?

Checks should clear within 10 business days. If checks are outstanding for more than 10 days, this could indicate payoff checks are not being mailed timely or the documents are not sent for recording or that a payoff is misplaced or voided. A monthly review of outstanding checks will ensure that liens, taxes, etc. are paid. It is much easier to follow up on these items immediately after the transaction has occurred as opposed to waiting and addressing them in the future.

If a check does not clear within 3-6 months, the payee should be contacted and the check reissued. Remember - you must report inactive escrow in accordance with state escheat laws. (See Formal Advisory Opinion 98-2)

Do I need to be concerned about reviewing dormant and special escrow account activity?

Dormant and special escrow accounts are sometimes the target of misappropriations because these funds are often held for several months prior to disbursement. The client may not be looking to receive these funds right away. These accounts require periodic review. Attention should be paid to balances of monthly disbursements from these accounts. It is a good idea that the employee who handles these accounts be required to obtain your signature for disbursement of any funds from these accounts. Also, review the list for files that have been inactive to ensure that funds are disbursed timely. Approval should be required on all dormant files over 6 months prior to disbursing. A trial balance should be prepared monthly and agreed to the corresponding reconciled book balance. Any discrepancies should be immediately investigated and reconciled.

Section 5:

Safeguard Funds: Controls and Procedures[3]

The security of a trust account is proportional to the interest and attention the lawyer devotes to the oversight and operation of the account. The following safeguards and procedures are suggested:

A. IMPORTANT OBJECTIVES

The time and attention that a lawyer devotes to the management and operation of the trust account has a direct impact on the security of a trust account. Good internal controls and procedures should help achieve several important objectives, like:

1. Improve customer service.

2. Protection of client funds.

3. Reduce risk of loss due to fraud or errors.

4. Manage accountability of employees and determine needs for additional training.

5. Demonstrate that ordinary care has been taken in the management of a lawyer's trust account.

B. ELEMENTS OF GOOD INTERNAL CONTROLS AND PROCEDURES

1. Adequate Personnel and Segregation of Duties.
An adequate number of trained and supervised personnel are an important element of a system of internal control. The responsibilities of posting, depositing, disbursing trust account funds, bookkeeping activities, reconciliation and cashiering activities should be performed by different employees. If this is not possible, you may want to have an independent party do so. Theft occurs more frequently when an unsupervised person has total responsibility for the IOLTA trust account, office operating, and/or payroll accounts. You should always review and sign off on all accounting and reconciliation statements and worksheets. This best practice should apply even if you use a bookkeeper or CPA to handle the accounting of your client trust funds.

[3] Selected portions of this section were adopted, adapted and or reprinted from the materials originally authored by the following with their permission: The State Bar of North Carolina, Lawyer's Trust Account Handbook, Revised 05/2011 (For the current online version of the North Carolina Trust Account Handbook, please go to: http://www.ncbar.com/PDFs/Trust%20Account%20Handbook.pdf.

It is a best practice to perform background and credit checks on all employees who have access to customer funds. This should be done routinely on all employees and should be part of the hiring process for anyone handling these funds. Ongoing training of employees on matters including underwriting, escrow administration and fraud prevention is also a part of proper management of escrow funds and escrow accounting.

2. Authorization of Transactions

An important element of a system of internal controls is procedures for the appropriate authorization of all transactions in and out of the trust account. Theft of funds occurs more frequently when an unsupervised employee has total responsibility for authorization of all bank transactions in and out of a specific account or series of accounts. Policies and procedures should establish authorization limits based upon the amount and type of transaction. The best practice is to establish and define appropriate authorization levels for all employees who authorize bank transactions and include management oversight in your process to maintain appropriate segregation of duties. It is a best practice to perform internal quality control review regularly and levels of authorization should be reviewed and updated annually. It is also important to use sound information technology practices to include appropriate access controls (e.g. passwords) and procedures for granting access. Employees, who leave your firm, should immediately be removed from the list of signatories on all bank accounts. Your procedures should include a process for terminating access to bank accounts and client data and to back up data on a periodic basis.

3. Adequate Documents and Records

Documents and records, such as escrow ledgers, escrow files, trial balances, and bank account reconciliations, are the evidence for transactions. Documents should be consistent, prepared in a timely manner, and easily understood. Documents supporting each transaction must be retained for an appropriate period of time. Rule 1.15(I)(a) requires a lawyer to keep "complete records of such account funds" for six years after termination of representation. This requires keeping the ledgers and bank statements. All records of such account funds can be kept electronically.

4. Physical Control over Escrow Assets and Records

Physical control over escrow assets and records is another important element in a system of internal controls and procedures for a lawyer's trust account. Special attention should be given to access and security of unused checks, escrow files, and un-deposited receipts. Prohibit or restrict removal of trust account records from the office in order to guard against theft, misplacement, or destruction of these records.

5. Management Review

The absence of minimum oversight and management review creates a situation in which there is a strong potential for a theft to go undetected. Therefore, periodic independent reviews are necessary to ensure compliance with office escrow policies and procedures and to ensure that discrepancies are promptly resolved. It is also important that a review of monthly reconciliations be done by someone unassociated with the receipt and disbursement of funds to ensure that office controls and procedures are being followed by employees tasked with the escrow function.

C. TIPS FOR SAFEGUARDING FUNDS FROM THEFT

The following safeguards are suggested:

1. Trust Account Deposits

- Incoming checks and cash receipts should be endorsed "for deposit only" immediately upon receipt before the checks are handled by persons who keep receivable ledgers and/or make deposits. Keep a stamp on the closing conference table and stamp checks yourself.

- Deposit each day's receipts intact and promptly. If cash or checks are not immediately deposited, it is a best practice to keep these in a locked cash box and/or a locked cabinet.

- Legal fees paid in cash are difficult to control. Office policy should require that a receipt must be given to any client who pays in cash, and the lawyer should regularly ask clients who pay in cash if they received a receipt. The numbers for receipts in the receipt book should also be examined periodically to determine if any receipts were removed or voided.

- To ensure disbursement only from collected funds, incoming wires should be verified with your bank before disbursement. It is a best practice to require an authorized signature to initiate any outgoing wire. Also, it is important to investigate any unusual wire transactions that you see in your review of the monthly bank statement. It may be possible to set up a system of email notifications with your bank.

2. Trust Account Checks

- It is a good practice to require two signatures on all disbursement checks in excess of a reasonable amount. This should be included when setting up your account with your bank. In addition, the controller of your books should not also be a check signer.

- The check signers should be presented with and investigate supporting documents before signing checks. Supporting documentation should be maintained for all disbursements, including written payoffs.

- Take your time when signing checks to be disbursed from or deposited to a trust account. For example, an employee had a lawyer endorse a check for deposit when the lawyer was in a hurry to get out of the office. The lawyer failed to note that the office deposit stamp was not on the bank of the check. The checks were deposited into the employee's personal accounts. This activity did not come to the attention of the lawyer until the clients complained about their bills.

- Examine signature(s) on trust account checks for forgery and question any change or attempted change of a payee's name on a check.

- Avoid signing sign blank checks or checks made out to cash or bearer.

- It is important to maintain tight security over your checks. Keep blank checks under a responsible person's control during the day and secured at night. Unused checks should be properly safeguarded to prevent accessibility by un-authorized persons. Reasonably restrict access to unissued checks to a limited number of authorized personnel.

- Use pre-numbered checks and periodically examine the sequential order of blank, void, and canceled checks. Question any unexplained breaks in numbers. Void checks should be defaced and retained.

- Examine the front and back of all cancelled checks so you can trace the money and the accounts the money is coming from and going to. It is important to review the check images for any suspicious disbursements, i.e., checks to the agency owner, employees, strange endorsements, etc. You may need to request your IOLTA bank to provide the front and back of cancelled checks if this is not currently a part of your IOLTA agreement with the bank. Also, examine the signatures on trust account checks for forgery.

- Ensure that all checks are accounted for when an employee resigns or is terminated. After resigning, one employee with access to trust account checks negotiated forged checks for over $80,000.

3. <u>Outstanding Checks</u>

- Review your monthly report or bank statements for any outstanding payoff checks which should have cleared the bank by the end of the month.
- Compare the number of canceled checks received from the bank to the number returned as indicated on the monthly bank statement.
- Outstanding checks more than 90 days old should be immediately researched and accounted for. Old outstanding checks can indicate that you are delinquent in paying premiums. Outstanding checks may also relate to fees that should be deposited into the operating account.

4. Controls and Procedures

- Reconcile the trust account promptly after receiving a bank statement.
- Resolve discrepancies in a trust account reconciliation as soon as possible.
- Make sure that deposit slips agree with deposits posted on client's ledger, particularly when cash is involved.
- Ensure deposits are made in a timely manner, daily if possible.
- A client's file should contain documentation supporting disbursements.
- Bank statements and correspondence regarding the trust account should be periodically opened and reviewed by someone other than the bookkeeper.
- Require supporting documentation (e.g., bank statements, canceled checks, deposit slips, correspondence, etc.) of accounting reports and reconciliations.
- Estate accounting should be verified. Old or inactive estates are prime targets for embezzlement.
- Personally investigate questionable activities pertaining to the trust account (e.g., lack of fee payments, missing correspondence, etc.).
- Check periodically with the post office to determine if anyone other than designated personnel has attempted to pick up the office mail. Embezzlers will pick up the mail to destroy or remove incriminating items.

5. Escrow Account Theft Red Flags

- Question significant life-style changes of an individual employee with access to the trust account. This could include a new car or new wardrobe or expensive travel. In addition, personal, professional, or financial problems, such as change in marital status, family illness, marital problems, and bankruptcy are often the causes for theft and embezzlement.

- Embezzlers tend to make draws on the office operating account first and later draw on the trust account. Bank accounts that are not reconciled monthly and reconciliations that are not reviewed by management create a strong potential for embezzlement to go undetected.

- Poor or careless bookkeeping may be used to conceal embezzlement. If the responsible individual procrastinates in correcting the condition, an independent party should reconcile the account(s). Also, beware of an employee who is overly possessive of the trust account.

D. CONCLUSION. The establishment and maintenance of sound accounting systems and related internal control procedures are essential to properly safeguard the assets of any law practice and your clients. These internal control guidelines should not be considered as "all-inclusive" and as such, the controls implemented should be tailored for the individual operation system. However, lawyers should exercise prudent judgment in the evaluation of the cost/benefit relationship of proposed controls. Sufficient controls should be implemented and monitored in order to provide reasonable assurance that assets are adequately safeguarded and that the escrow and operating accounting is proper.

SECTION 6:
FDIC INSURANCE

A. Coverage following recent Federal Legislation

The amount of FDIC coverage available to a single depositor in an FDIC insured bank or savings association is ~~to~~ $250,000. Dedicated trust accounts with interest paid to the client are still subject to the new FDIC coverage limit of $250,000 per depositor, per bank. However, since IOLTA accounts are fiduciary accounts, they are generally eligible for pass-through coverage on a per-client basis.

What are the FDIC disclosure requirements for insuring fiduciary accounts?
The FDIC has two disclosure requirements for fiduciary accounts. First, the fiduciary nature of the account must be disclosed in the bank's deposit account records (e.g., "Jane Doe as Custodian for Susie Doe" or "First Real Estate Title Company, Client Escrow Account"). Second, the name and ownership interest of each owner must be ascertainable from the deposit account records of the insured bank or from records maintained by the agent (or by some person or entity that has agreed to maintain records for the agent). It is the lawyer's responsibility to make sure the bank knows that an account is a fiduciary account so that the bank can properly title the account in its records.

To what extent are these funds insured by the FDIC?
Funds deposited by a fiduciary on behalf of a person or entity (the owner) are insured as the deposits of the owner if the disclosure requirements for fiduciary accounts are met. Banks typically do not maintain records of the ownership interest of each client whose funds are held in a trust account. Therefore, it is the lawyer's responsibility to maintain these records. If you are complying with the trust accounting and record keeping requirements in **Rule 1.15 of the Rules of Professional Conduct, you have already satisfied both of the FDIC "disclosure" requirements.**

For more information from the FDIC, call toll-free at: 1-877-ASK-FDIC (1-877-275-3342) from 8 am until 8 pm (Eastern Time); Hearing Impaired Line: **1-800-925-4618**

Calculate insurance coverage using the FDIC's online Electronic Deposit Insurance Estimator at: **www2.fdic.gov/edie**

To read more about FDIC insurance online at: **www.fdic.gov/deposit/deposits**

Appendix 1:

THREE-WAY RECONCILIATION SHEET

Client Ledger Balances:

Client Name	Last Activity	Balance

Step 1: Enter total client ledger balances as of, 03/31/2012 .....$_____

Step 2: Enter general ledger/checkbook register balance.....$_____

Step 3: Enter ending balance per bank statement, 03/31/2012.....$_____

Step 4: Enter total outstanding deposits..... $_____

(Deposits made to the account, yet not captured on bank statement. These will be ADDED to the bank statement amount.)

Step 5: Enter total outstanding checks .....$_____

(Checks that have been drawn from the account, yet not captured on bank statement. These will be SUBTRACTED from the bank statement amount.)

Step 6: Subtract any bank service charges..... $_____

Step 7: Calculate adjusted balance..... $_____
(Ending bank statement balance plus outstanding deposits minus outstanding checks)

Reconciliation: All three should match...
Total of all client ledgers..... $_____
(Total from Step 1.)
Adjusted Bank Balance..... $_____
(Total from Step 7.)

General ledger/checkbook register Balance..... $_____
(Total from Step 2.)

Appendix 2:

SAMPLE INDIVIDUAL CLIENT LEDGER (aka Escrow Trial Balance)

NAME: _____ **MATTER:** _____ **FILE NO.**

ADDRESS:_____ **PHONE:** _____ **ATTORNEY:**

DATE	NAME	Description	CK. NO.	TRUST		
				Payment	Deposit	Balance

One Ledger for Each Client per Matter

Appendix 3:

SAMPLE CHECKBOOK REGISTRY (aka General Ledger)

DATE	NAME	Description of Transaction (Payor/Payee)	CK. NO.	Payment	Deposit	Balance	REC
		Example: Cobb County Superior Court Recording Fee- (Client Name)				*Running Balance for Trust Account*	*Check Reconciliation Confirmation*