

FORMAL OPINION NO 2005-117

[REVISED 2014]

Trust Accounts: Funds Held in IOLTA or Non-IOLTA Account, Types of Depository Institutions

Facts:

Lawyer represents Defendant in litigation. In aid of settlement negotiations, Defendant forwards a substantial sum to Lawyer so that Lawyer will be in a position to effect payment promptly if a settlement is reached in the future. Defendant would like to see to it that the maximum possible rate of return is earned on the funds while the funds are held by Lawyer.

Question:

What limits exist on the type of institution or type of account in which Lawyer can place Defendant's funds?

Conclusion:

See discussion.

Discussion:

Oregon RPC 1.15-1(a) provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be

kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Oregon RPC 1.15-2 provides, in pertinent part:

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest (“net interest”) shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

(b) All client funds shall be deposited in the lawyer’s or law firm’s IOLTA account unless a particular client’s funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

(c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client’s benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:

(1) a separate account for each particular client or client matter; or

(2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client’s funds and the payment thereof, net of any bank service charges, to each client.

(d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:

(1) the amount of the funds to be deposited;

(2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) the rates of interest at financial institutions where the funds are to be deposited;

(4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client’s benefit, including service charges imposed by financial institutions, the cost of the

lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client's benefit;

(5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and

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

(e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.

(f) If a lawyer or law firm determine that a particular client's funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for the lesser of either: any interest earned by the client's funds and remitted to the Oregon Law Foundation; or the interest the client's funds would have earned had those funds been placed in an interest bearing account for the benefit of the client at the same bank.

(1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.

(2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client's funds in question. The refund shall be remitted to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

(g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer's firm.

(h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:

(1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;

(2) is insured by the Federal Deposit Insurance Corporation or an analogous federal government agency;

(3) has entered into an agreement with the Oregon Law Foundation:

(i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and

(ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and

(4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.

Because the amount of money involved is substantial and is expected to be held for enough time that it could earn net interest, Defendant's funds must be placed in an interest-bearing trust account in one of the institutions identified in Oregon RPC 1.15-2(h), with the interest accruing to the benefit of the client. Oregon RPC 1.15-2(c).

Nothing in Oregon RPC 1.15-2 prohibits Defendant from waiving the right to interest earned on funds held by Lawyer and authorizing the payment of the interest to the Oregon Law Foundation. There may be tax implications in Defendant's waiver of interest income and the corollary charitable contribution. Lawyer should inform Defendant of that possibility and recommend that Defendant seek independent tax advice before deciding how to proceed. If Lawyer chooses to advise Defendant on this point, Lawyer may have a self-interest conflict under Oregon RPC 1.7(a)(2) in giving such advice and, if so, must obtain Defendant's informed consent pursuant to Oregon RPC 1.7(b). If those steps are fol-

lowed, Lawyer may, with Defendant's agreement, deposit Defendant's funds into Lawyer's IOLTA trust account.¹

Approved by Board of Governors, April 2014.

¹ Although the client is not required to give "informed consent" to the waiver, we believe that Oregon RPC 1.4(b) applies to this situation: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 12.1 to § 12.3-5 (IOLTA accounts), § 12.3-6(b) (funds to be used in implementing a settlement or business transaction), § 12.3-6(d) (exceptions and limitations to rules regarding funds in trust accounts), § 12.3-7(b) (payment of attorney fees and disbursements from trust account), § 12.3-7(c) (payment of client bills to third parties), § 12.3-8 (tracking individual client trust funds) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 44–45 (2000) (supplemented periodically); and ABA Model RPC 1.15. See also Washington Advisory Op No 193 (1996) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).

