

TRUST ACCOUNTING: 101 (FAQs)

By Travis Pickens, OBA Ethics Counsel

The following are some of the questions my office frequently answers for lawyers regarding trust accounts and related accounting.

What does IOLTA stand for? “Interest on Lawyer’s Trust Accounts”

Which rule of Professional Conduct sets out the duties relating to trust accounts? ORPC 1.15.

Which banks offer IOLTA trust accounts? Ask your own bank first. If they do not offer these accounts, call the Oklahoma Bar Foundation (405-416-7070) and ask them to recommend one in your area. If you office in a town that does not have a participating bank or the bank routinely charges more in fees than any interest generated, or it is otherwise not feasible, you may be excused from the duty to have a trust account. You should consult with the OBF in making this determination.

What money goes into the trust account? Unearned legal fees, unincurred expenses, and third-party monies in connection with the representation. This typically means, for example, retainers (until the monies are earned), flat fees (until the monies are earned), filing fees, deposition and expert witness expenses. Settlement proceeds on a check to you and your client(s) or others may also go into the trust account for distribution.

Must every lawyer have an IOLTA trust account? No. Only lawyers that hold client or third-party funds regarding a representation must have trust accounts. If you bill for your legal fees after the work is already done, i.e. the fees are already *earned*, you should simply deposit the money into your operating account. In this case, a trust account is not necessary (if you did have a trust account, depositing earned fees into your trust account is prohibited because the money is *yours* at that point and such a deposit would be commingling funds).

May a lawyer assign certain tasks for trust accounting to non-lawyers? Yes, but the lawyer remains ultimately responsible and must educate the others, supervise the work and monitor the account. Ultimate responsibility for the trust account is a nondelegable duty.

May a lay person be a co-signatory on the account? Yes, but as the old joke goes “Can anyone be a signatory on the trust account?” “Yes, anyone you trust your license to.”

What is the best short summary of a lawyer’s principal duties regarding the trust account? At any time, be able to show what amounts are in the account, for each client, and the small amount of your own money on deposit to cover minimum balance requirements and bank fees and service charges. Contact your bank and find out what charges are anticipated for a year, and document that in your file. You can deposit enough of your own money to cover those expenses .

May I “park” money in my trust account even for a short time for tax purposes, i.e. to defer taking the money until the next tax year? No, *earned* fees in your trust account, from a settlement for example, should be transferred into your operating account promptly. Otherwise, to leave earned money in a trust account is commingling because it is your money.

What should I do if I hold money in my trust account and the client and/or third party (with a legitimate interest in the money) disagree as to how it should be paid out? You should give notice to every party that has an interest in the money and pay out any undisputed amounts. Then, hold the

disputed amount until one of two things happens, 1) you reach an agreement among all interested parties, or 2) a court or arbitrator directs you how to distribute the money. You should act promptly to resolve the dispute, and may use a mediator, arbitrators or file a motion or action with the court to make the determination. The client or a third-party for whom you held funds may request a full accounting of the monies.

May a lawyer use funds designated for another purpose, e.g. expert witness fees, to pay his or her own bill? Not without prior written consent from the client, and even then it may be impermissible if the client has contracted with the expert separately to reserve funds for payment. Otherwise, it could be deemed a simple conversion of funds, i.e. using or interfering with funds used for a different purpose.

May a lawyer take “advances” on money from the trust account? No, because the money has not been earned. A lawyer may not take money unless it has been earned. Otherwise, it is arguably simple conversion at best and misappropriation (“theft”) at worst.

How should a “flat” fee be treated? Generally, a flat fee should be treated as a retainer. It should be deposited into the trust account until work is performed. It may be withdrawn in stages, but there should be work that is done to justify the withdrawal of that portion. Cover the payment schedule in your fee agreement. It does not need to be tied to hours worked, but it must be reasonable. This procedure is often misunderstood. It all goes back to the fact that fees must be *earned* to be taken. If no work has been done, then they have not been earned. Only money that has been earned should be deposited into your operating account.

When a lawyer mistakenly withdraws money from the trust account prior to the fees being earned, what should s/he do? Replace the money immediately and make accounting entries on both ends of the transaction that document what occurred in the event you are later asked to explain.

What should a lawyer do in the event a client disappears, or there is an amount in the trust account of uncertain ownership . First, determine whether the Oklahoma Unclaimed Property Fund is entitled to the money. The Unclaimed Property Division may be contacted at 405-521-4273, or Unclaimed@treasurer.ok.gov . If not, the money may be paid to the Oklahoma Bar Foundation. Include a cover letter that explains, if known, which client(s) the money may be attributable to, a last known address, and your efforts to contact them. The Foundation will hold the money earning interest. If that client ever reappears the OBF will refund the principal amount originally deposited and you may return it to the client.

Is any particular accounting program required? No. Everything from a loose-leaf notebook to a fancy computer program can be acceptable so long as the funds are properly accounted for.

What happens if the amount to be held is for a long period of time or is a non-nominal amount? You should advise the client that the funds may be placed in an account that pays the interest to the client, if the funds to be invested could be utilized to provide a positive net return to the client. In making this determination, analyze the interest earned versus the related bank, tax, fees and legal costs that may be applicable. Also determine the ability of the bank to calculate and pay interest to individual clients).

How long must a lawyer hold records related to account funds (and other property of the client)? At least five years after termination of the representation. Generally, all financial records should be kept, including but not necessarily limited to: the fee agreement, bank statements, billing records (e.g. time sheets), billing statements, payment records, deposit and withdrawal records, trust account “ledgers”

and reconciliations, settlement statements and accountings, and related correspondence. You should be able to reconstruct, account and justify for all amounts that flow through your account(s).

What happens if an instrument is presented to the bank that would be an overdraft of the trust account? By agreeing to be an IOLTA provider, the bank has contractually agreed that it will automatically notify the Office of General counsel. The OGC will send you a letter that requests an explanation. Almost all of the time the explanation is legitimate and understandable and a disciplinary file is not opened, but better to keep careful records and avoid this awkward inconvenience altogether. If the OGC receives multiple notices (i.e. a pattern has developed) it can also decide to assign an investigator based upon this suspicious pattern.