

IN THE SUPREME COURT OF PENNSYLVANIA

In re: Amendments to Rule 221 of the : No. 67
Pennsylvania Rules of Disciplinary :
Enforcement and Rule 1.15 of the :
Pennsylvania Rules of Professional :
Conduct : Disciplinary Rules Docket No. 1

ORDER

PER CURIAM:

AND NOW, this 4th day of September, 2008, Rule 1.15 of the Pennsylvania Rules of Professional Conduct is amended to read as set forth in Annex A hereto and Rule 221 of the Pennsylvania Rules of Disciplinary Enforcement is amended to read as set forth in Annex B hereto.

This Order shall be processed in accordance with Rule 103(b) of the Pennsylvania Rules of Judicial Administration, shall take effect upon publication of this Order in the *Pennsylvania Bulletin* and shall govern matters thereafter commenced and, insofar as just and practicable, matters then pending.

Note: Material to be added is underlined.
Material to be deleted is bracketed.

Rule 221. Funds of clients and third persons. Mandatory overdraft notification.

(a) For purposes of this rule, [a] the following definitions apply:

(1) *Eligible Institution.* An Eligible Institution is a Financial Institution which has been approved as a depository of Trust Accounts pursuant to section (h), *infra*.

(2) *Financial Institution.* A Financial Institution is an entity which is authorized by federal or state law and licensed to do business in the Commonwealth of Pennsylvania as one of the following: a bank, bank and trust company, trust company, credit union, savings bank, savings and loan association or foreign banking corporation, the deposits of which are insured by an agency of the federal government, or as an investment adviser registered under the Investment Advisers Act of 1940 or with the Pennsylvania Securities Commission, an investment company registered under the Investment Company Act of 1940, or a broker dealer registered under the Securities Exchange Act of 1934.

(3) *Fiduciary Funds.* Fiduciary Funds are Rule 1.15 Funds which an attorney holds as a Fiduciary, as defined in Rule 1.15(a)(2) of the Pennsylvania Rules of Professional Conduct. Fiduciary Funds may be either Qualified Funds or Non-Qualified Funds.

(4) *Rule 1.15 Funds.* Rule 1.15 Funds are funds which an attorney receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the attorney's status as such. When the term "property" appears with "Rule 1.15 Funds," it means property of a client or third person which the attorney receives in any of the foregoing capacities.

(5) *Trust Account.* A Trust Account [**of an attorney**] is an account in an Eligible Institution in which an attorney [, in accordance with **Rule 1.15 of the Pennsylvania Rules of Professional Conduct, deposits**] holds Rule 1.15 Funds [**funds received from a client or a third person in connection with a client-lawyer relationship, excluding funds which the attorney receives while acting as fiduciary for an estate, trust, guardianship or conservatorship**]. A Trust Account must be maintained either as an IOLTA Account or as a Non-IOLTA Account, as

defined in Rule 1.15(a)(5) and (7) of the Pennsylvania Rules of Professional Conduct.

(b) An attorney shall maintain a Trust Account with respect to his/her practice in this Commonwealth only in [a financial institution] an Eligible Institution approved by the Supreme Court of Pennsylvania for the maintenance of such accounts. Subject to the provisions set forth herein, the Disciplinary Board shall establish regulations governing approval and termination of approval for [financial institutions] Eligible Institutions, shall make appropriate recommendations to the Supreme Court of Pennsylvania concerning approval and termination, and shall periodically publish a list of [approved financial institutions] Eligible Institutions.

[(c) A financial institution shall be approved as a depository for Trust Accounts of attorneys if it shall file with the Disciplinary Board an agreement (in a form provided by the Board) to make a prompt report to the Lawyers Fund for Client Security Board whenever any check or similar instrument is presented against a Trust Account when such account contains insufficient funds to pay the instrument, regardless of

- (1) whether the instrument is honored, or
- (2) whether funds are subsequently deposited that cover the overdraft or the dishonored instrument is made good.

(d) For purposes of this Rule, a Trust Account shall not be deemed to contain insufficient funds to pay a check or similar instrument solely because it contains insufficient collected funds to pay the instrument, and no report shall be required in the case of an instrument presented against uncollected or partially uncollected funds. This provision shall not be deemed an endorsement of the practice of drawing checks against uncollected funds.

(e) The term "financial institution" means banks, bank and trust companies, trust companies, savings and loan associations, credit unions, savings banks or foreign banking corporations, whether incorporated, chartered, organized or licensed under the laws of the Commonwealth of Pennsylvania or the United States, doing business in Pennsylvania and insured by the Federal Deposit Insurance Corporation, the National Credit Union Administration or an alternative share insurer.]

(c) All Fiduciary Funds shall be placed in a Trust Account (which, if the Fiduciary Funds are also Qualified Funds as defined in Rule 1.15(a)(9) of the Pennsylvania Rules of Professional Conduct, must be an IOLTA Account) or in another investment or account which is authorized by the law applicable to the entrustment or the terms of the instrument governing the Fiduciary Funds.

[(f)] (d) The responsibility for identifying an account as a Trust Account shall be that of the attorney in whose name the account is held.

[(g) The] (e) An attorney shall maintain the following books and records [**shall be maintained**] for each Trust Account and for any other account in which Rule 1.15 Funds are held:

(1) [**bank statements and check registers (which shall include the payee, date, amount and the client matter involved);**]

[(2)] all transaction records [**returned**] provided to the attorney by the [**financial institution**] Financial Institution, [**including**] such as periodic statements, canceled checks in whatever form, deposited items and records of electronic transactions; and

[(3) **records of deposits and a ledger separately listing each deposited item and the client or third person for whom the deposit is being made.**]

(2) check register or separately maintained ledger, which shall include the payee, date and amount of each check, withdrawal and transfer, the payor, date, and amount of each deposit, and the matter involved for each transaction.

[(h)] (f) The records required by this rule may be maintained in electronic or [**other form if they can be retrieved in printed**] hard copy form. [**Electronic records must be regularly backed up by an appropriate storage device.**] If records are kept only in electronic form, then such records shall be backed up at least monthly on a separate electronic storage device.

[(i)] (g) The records required by this rule may be subject to subpoena and must be produced in connection with an investigation or hearing pursuant to these rules. Failure to produce such records may result in the initiation of proceedings pursuant to Enforcement Rule 208(f) (relating to emergency temporary suspension orders and related relief), which permits disciplinary counsel to commence a proceeding for the temporary suspension of a respondent-attorney who refuses to comply with a valid subpoena.

[(j)] For purposes of this rule, funds deposited in an account prior to the close of business on the calendar date of presentation of an instrument shall be considered to be in the account at the close of business on that date notwithstanding the financial institution's treatment of such funds, for other purposes, as being received at the opening of the next banking day pursuant to 13 Pa.C.S. §4107(b) (relating to items or deposits received after cutoff hour).

(k) For purposes of the rule, a check or draft against a Trust Account shall be deemed to be presented at the close of business on the date of presentation.

(l) No report need be made when the financial institution determines that the instrument presented against insufficient funds had been issued in reliance on a deposited instrument that was ultimately dishonored. This provision shall not be deemed an endorsement of the practice of drawing checks against uncollected funds.

(m) A failure on the part of a financial institution to make a report called for by this rule may be cause for termination of approval by the Supreme Court, but such failure shall not, absent gross negligence, give rise to a cause of action, by any person who is proximately caused harm thereby.]

(h) An Eligible Institution shall be approved as a depository for Trust Accounts of attorneys if it shall be in compliance with applicable provisions of Rule 1.15 of the Pennsylvania Rules of Professional Conduct and the Regulations of the IOLTA Board and shall file with the Disciplinary Board an agreement (in a form provided by the Board) to make a prompt report to the Lawyers Fund for Client Security Board whenever any check or similar instrument is presented against a Trust Account when such account contains insufficient funds to pay the instrument, regardless of

(1) whether the instrument is honored, or

(2) whether funds are subsequently deposited that cover the overdraft or the dishonored instrument is made good.

(i) For purposes of this rule:

(1) A Trust Account shall not be deemed to contain insufficient funds to pay a check or similar instrument solely because it contains insufficient collected funds to pay the instrument, and no report shall be required in the case of an instrument presented against uncollected or partially uncollected funds. This provision shall not be deemed an endorsement of the practice of drawing checks against uncollected funds.

(2) Funds deposited in an account prior to the close of business on the calendar date of presentation of an instrument shall be considered to be in the account at the close of business on that date notwithstanding the treatment of such funds by the Eligible Institution, for other purposes, as being received at the opening of the next banking day pursuant to 13 Pa.C.S. §4108(b) (relating to items or deposits received after cutoff hour).

(3) A check or draft against a Trust Account shall be deemed to be presented at the close of business on the date of presentation.

(j) No report need be made when the Eligible Institution determines that the instrument presented against insufficient funds had been issued in reliance on a deposited instrument that was ultimately dishonored. This provision shall not be deemed an endorsement of the practice of drawing checks against uncollected funds.

(k) A failure on the part of an Eligible Institution to make a report called for by this rule may be cause for termination of approval by the Supreme Court, but such failure shall not, absent gross negligence, give rise to a cause of action, by any person who is proximately caused harm thereby.

[(n) Financial institutions] (l) Eligible Institutions shall be immune from suit for the filing of any reports required by this rule or believed in good faith to be required by this rule.

[(o) A financial institution] (m) An Eligible Institution shall be free to impose a reasonable service charge upon the attorney in whose name the account is held for the filing of the report required by this rule.

[(p)] (n) A report filed pursuant to this rule shall not, in and of itself, be considered a disciplinary complaint.

[(q)] (o) A designated representative of the Lawyers Fund for Client Security Board shall conduct a preliminary inquiry and shall, where appropriate, refer the matter to the Office of Disciplinary Counsel for further investigation. Neither a report filed with the Lawyers Fund for Client Security Board pursuant to this rule nor a referral of such report to the Office of Disciplinary Counsel shall, in and of itself, be considered a disciplinary complaint.

[(r)] (p) Reports required to be made under this rule shall be made to the Lawyers Fund for Client Security Board within five business days of the presentation of the instrument.

When the Supreme Court of Pennsylvania amended Pa. RPC 1.15 in 1996, it also suspended the Act of April 29, 1988 (P.L. 373, No. 59) known as the Interest on Lawyers' Trust Accounts Act (RDE 601), which had provided statutory authority for the establishment and operation of a voluntary form of IOLTA in Pennsylvania from 1988 through 1996.

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