

A GUIDE TO SETTING UP AND USING YOUR LAWYER TRUST ACCOUNT

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Professional Liability Fund

CAROL J. BERNICK
CHIEF EXECUTIVE OFFICER

March 2016

Dear Oregon Lawyer:

This edition of *A Guide to Setting Up and Using Your Lawyer Trust Account* replaces the green-covered handbook of the same name previously published by the Professional Liability Fund in 2014.

This handbook was created to help you understand and fulfill your ethical obligation to protect the funds and property of your clients, pursuant to Rule 1.15 of the Oregon Rules of Professional Conduct.

A Guide to Setting Up and Using Your Lawyer Trust Account explains when to establish a trust account and what type to use, and it provides practical information about how to open and operate a trust account – including how to correctly reconcile the trust journal with the bank trust account statement.

Correctly protecting your clients' funds and property is critical to retaining your license to practice law in Oregon. The Professional Liability Fund has provided this handbook to aid you in your practice of law and to help ensure the protection of your clients' property. In addition, the Professional Liability Fund offers free and *confidential* practice management assistance through our Practice Management Advisor Program. Call the Professional Liability Fund and ask for a practice management advisor if you wish to take advantage of this service.

We hope this handbook will be of assistance to you and that you will utilize our practice management advisors.

Sincerely yours,

A handwritten signature in black ink that reads 'Barbara S. Fishleder'.

Barbara S. Fishleder
PLF Director of Personal and Practice Management Assistance
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I. INTRODUCTION

This handbook:

1. describes the rules for handling client funds and property;
2. provides a practical guide to creating and maintaining a trust account; and
3. gives guidance on handling client funds.

We hope this handbook will help you safeguard client funds, assure greater accountability, and reduce the number of complaints received each year relating to the maintenance of client funds. However, this handbook does not address all the intricate legal issues that might arise when handling complex legal matters involving client property.

II. THE IMPORTANCE OF THE LAWYER TRUST ACCOUNT

A. Ethical Obligations

The ethical obligations for those who set up lawyer trust accounts are rooted in the principle that a lawyer who holds funds of a client or third person in trust, even for a brief time or intermittently, has the duty as a fiduciary to safeguard and segregate those assets from the lawyer's personal and business assets. Oregon Rules of Professional Conduct (ORPC) 1.15-1 and ORPC 1.15-2 set forth the ethical duties and obligations of a lawyer who is holding client or third person funds. The duties set forth in ORPC 1.15-1 and ORPC 1.15-2 are intended to eliminate not only the *actual* loss of client funds but also their *risk* of loss while in the lawyer's possession.

Lawyers must account for every penny of these funds as long as the funds remain in their possession. ***This responsibility cannot be delegated, transferred, or excused by the ignorance, inattention, incompetence, or dishonesty of the lawyer or the lawyer's employees or associates.*** A lawyer may employ others to help carry out this duty but must provide adequate training and supervision to ensure that all ethical and legal obligations to account for those monies are being met. *In re Mannis*, 295 Or 594, 668 P2d 1224 (1983) (lawyer reprimanded although he was unaware employee was commingling funds).

The need to handle a client's funds with extreme care should be self-evident. Even so, cases continue to arise in which practicing lawyers, whether inadvertently or intentionally, mishandle their clients' money, thus subjecting those clients to the risk of economic hardship and seriously undermining public confidence in the legal profession. Mishandling client funds can also subject the lawyer to disciplinary action, which may result in the lawyer losing his or her license to practice law.

B. Disciplinary Action Resulting from Mismanagement of Client Funds or Property

The Oregon Supreme Court has consistently required strict compliance with the ethical rules governing client funds and property. The court has also developed a significant body of case law interpreting these rules. The rules distinguish between a charge of dishonesty by

misappropriation under ORPC 8.4(a)(3) and a charge of failing to maintain funds in a trust account under ORPC 1.15-1. As the court pointed out in *In re Phelps*, 306 Or 508, 760 P2d 1331 (1998), conduct leading to a charge of failing to maintain client funds in trust often precedes conduct leading to a charge of dishonesty by misappropriation, but the two are not the same. A lawyer may remove money from a trust account before intentionally appropriating the money for his or her own purposes (a violation of the prohibition against dishonesty), but removal of money from a trust account does not necessarily constitute an intentional misappropriation. The difference between the two is reflected in the sanction imposed. If the Oregon State Bar (OSB) proves a lawyer guilty of dishonesty by intentionally appropriating client funds to the lawyer's own use, the sanction is disbarment. Failing to maintain funds in a trust account does not require intent, and it carries a lesser sanction. See *In re Starr*, 326 Or 328, 952 P2d 1017 (1998).

The disciplinary rules also require that a lawyer *promptly* notify a client of receipt of client funds, securities, or other properties. Client property that is not cash or another form of money must be labeled and identified upon receipt and placed in a safe, a safe deposit box, or other place of safekeeping as soon as practicable. Lawyers must also maintain complete records of all funds, securities, and other property of a client coming into the lawyer's possession and must render appropriate accounts to the client regarding the property. Failure to provide a client with a proper accounting of his or her property will result in discipline. *In re Gildea*, 325 Or 281, 936 P2d 975 (1997) (lawyer suspended for, among other things, failing to inventory a client's personal property, failing to tender a proper accounting of funds inadvertently placed in his personal account rather than his trust account, and failing to maintain adequate records of client's funds). A lawyer's failure to *promptly* pay or deliver, at a client's request, the funds, securities, or other property in the lawyer's possession to which the client is entitled will also result in discipline. See *In re Arbuckle*, 308 Or 135, 775 P2d 832 (1988).

III. WHAT IS A LAWYER TRUST ACCOUNT?

ORPC 1.15-1 requires a lawyer to "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." Lawyers are required to identify trust accounts by the phrase "lawyer trust account." Lawyer trust accounts must be separate from the lawyer's business account. "A lawyer may deposit the lawyer's own funds into the lawyer trust account for the sole purpose of paying bank service charges or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes." ORPC 1.15-1(b). See OSB Legal Ethics Op No 2005-145 (The rule contains no exception that allows "cushions," and the placement of such funds in a lawyer trust account would therefore constitute impermissible commingling.)

Each lawyer trust account shall be an insured, interest-bearing trust account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. ORPC 1.15-1(a); ORPC 1.15-2(h)(2). Depositor accounts, including trust accounts, are insured by the FDIC up to the standard maximum deposit insurance amount (\$250,000), for each deposit insurance ownership category. If you are holding more than the insured limit in trust for any one client, you should allocate funds between multiple institutions and remind clients of the aggregate federal insurance

limits to assure that each client's funds are fully protected. *See* Sylvia Stevens, "Trust Accounts and the FDIC," *Oregon State Bar Bulletin* (October 2008).

Furthermore, a lawyer or law firm may only maintain a lawyer trust account at a financial institution that has entered into an agreement with the Oregon Law Foundation (OLF) to (1) remit interest earned on IOLTA funds; (2) provide remittance reports; and (3) notify Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored. ORPC 1.15-2(h)(3)-(4).

A lawyer trust account may be set up in several ways. *See* ORPC 1.15-2. These include (1) lawyer trust accounts in which earnings from the lawyer trust account, net any transaction costs, are remitted to the OLF; (2) pooled interest-bearing lawyer trust accounts with subaccounting that provides for computation of interest earned by each client's funds and a payment to clients of interest earned, net any bank service charges; and (3) separate interest-bearing lawyer trust accounts for each particular client or client matter. ORPC 1.15-1(a) requires that all lawyer trust accounts be maintained in compliance with ORPC 1.15-2. No earnings from a lawyer trust account shall be made available to the lawyer or the law firm. ORPC 1.15-2(g). All client funds must be deposited in the lawyer's or law firm's IOLTA account (explained below) unless a particular client's funds can earn net interest. ORPC 1.15-2(b).

In determining whether to establish a separate account for each particular client or client matter or a pooled interest-bearing lawyer trust account with subaccounting for each client, the lawyer or law firm shall consider "(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." ORPC 1.15-2(d).

A. IOLTA (Interest on Lawyer Trust Accounts) – Interest to Oregon Law Foundation

"IOLTA" is the name given to lawyer trust accounts that are for nominal or short-term client deposits and that remit interest earnings, net any transaction costs, to the OLF. The interest generated by this account is paid to the OLF. OLF distributes funds, through grants, to:

- ◆ support access to justice in Oregon by obtaining and distributing funds to provide legal services to persons of lesser means;
- ◆ promote diversity in the legal profession; and
- ◆ educate the public about the law.

To learn more about the OLF, visit the OLF website at www.oregonlawfoundation.org.

Typically, funds placed in an IOLTA account are retainers, advance deposits on fees and costs, or settlement funds. Although some of these deposits may be substantial, they usually do not remain in the trust account for very long.

Clients must be advised that any interest earned on these sums will be transferred to the OLF. You can display a notice in the office, provide brochures, include a statement on the client's bill, or use any other reasonable means of communication. Nothing in ORPC 1.15-2 prohibits a client from waiving the right to interest earned on funds held by the lawyer and authorizing payment of the interest to the OLF. This is a departure from former DR 9-101(D)(1). Because there may be tax implications in the client's waiver of interest income and corollary charitable contribution, the lawyer should inform the client of that possibility and recommend that the client seek independent tax advice before deciding how to proceed. If the lawyer chooses to advise the client on this point, the lawyer may have a self-interest conflict under ORPC 1.7(a)(2) in giving such advice and, if so, must obtain the client's informed consent pursuant to ORPC 1.7(b). *See* OSB Legal Ethics Op No 2005-117.

Lawyers have an affirmative duty to monitor the IOLTA account at reasonable intervals to determine whether circumstances have changed such that a particular client's funds did or can earn net interest. ORPC 1.15-2(e). If a lawyer or law firm determines that a particular client's funds did or can earn net interest, the lawyer must transfer the funds into a separate or pooled interest-bearing lawyer trust account. The lawyer or law firm is also required to request a refund for any interest earned by the client's funds that may have been remitted to the OLF. ORPC 1.15-2(f). A request for a refund must be made in writing to the OLF within a reasonable period after the interest was remitted to the OLF and must be accompanied by written verification from the financial institution of the interest amount. ORPC 1.15-2(f)(1). The OLF will not refund more than the amount of interest it received from the client's funds in question. Refunds are remitted to the financial institution for transmittal to the lawyer or law firm after appropriate accounting and reporting. ORPC 1.15-2(f)(2).

B. Pooled Accounts – Interest to Each Client

If a client's funds can earn net interest, the lawyer or law firm must deposit the funds in an interest-bearing trust account for the client's benefit. One type of interest-bearing account is the pooled lawyer trust account.

As the name implies, a pooled account is used for all client funds, with interest earned remitted to each client (net a prorated share of bank service charges). This requires separately tracking each client's interest and crediting the interest to that client's account. If you use this type of trust account, you must prorate the bank service charges among the clients with funds on deposit. You must also report the interest earned by each client to the Internal Revenue Service at the end of each year.

C. Separate Accounts for Particular Clients or Client Matters – Interest to Each Client

Another type of interest-bearing account is the separate lawyer trust account established for a particular client or client matter. This type of account should be set up under the lawyer's

Social Security or federal Taxpayer Identification number. Interest is reported under the lawyer's name on a Form 1099-INT issued by the bank. The lawyer must then issue a Form 1099-INT to the client to reflect the pass-through of interest. This type of account should be designated as "Lawyer Trust Account for Client XYZ."

D. Estate or Conservatorship Accounts

You must use separate bank accounts to maintain separate estate or conservatorship accounts. Appropriate accountings of the funds in these accounts must be made to the court, so it is important that they be kept separate from other client funds. The federal Taxpayer Identification or Social Security number of the estate or conservatorship is used for these accounts, and any interest generated is credited to the estate or conservatorship. All bank charges are the responsibility of the estate or conservatorship. These accounts are not considered "lawyer trust accounts" under ORPC 1.15-1 and ORPC 1.15-2.

IV. ESTABLISHING AN IOLTA LAWYER TRUST ACCOUNT

A. Setting Up the IOLTA Account

A lawyer trust account must be established in a financial institution in the jurisdiction where the lawyer's office is situated ORPC 1.15-1(a). If you are licensed to practice in more than one state through reciprocity, you must comply with the trust account regulations of each state. Any inconsistencies between the rules of the various jurisdictions are resolved by ORPC 8.5(b), which determines choice of law. When establishing a lawyer trust account, be sure to talk with someone at the financial institution who understands the several types of lawyer trust accounts.

Practice Tip: If you maintain a lawyer trust account in Washington, review the Professional Liability Fund (PLF) practice aid, "Trust Accounting Rules for Washington Practitioners" available on the PLF website, www.osbplf.org.

If you are going to have trust account interest remitted to the OLF, be sure that the financial institution has the proper forms to direct interest generated by the account to the OLF. (The OLF and Oregon banks have arrangements for payment of monthly maintenance fees and per-item charges. These fees should not be charged to the lawyer trust account.) Financial institutions differ on how they notify the lawyer of the amounts paid to the OLF, but all are required to send at least a quarterly statement showing the amount of interest. The Taxpayer Identification number for the OLF is used for the IOLTA account. The OLF is exempt from federal income tax, but any Form 1099s generated by the financial institution are submitted under the OLF's Taxpayer Identification number.

Practice Tip: Download the document entitled "Notice to Financial Institutions," available on the OLF website, www.oregonlawfoundation.org. Take it to the bank when setting up your IOLTA account. This is not mandatory, but some financial institutions request documentation before opening an IOLTA account and this form should help meet that requirement. It also serves to clarify what kind of account you are requesting.

Interest rates on lawyer trust accounts vary widely. Lawyers can help the OLF in its mission by establishing their IOLTA accounts at an OLF Leadership Bank that is committed to maximizing the rate of return on IOLTA accounts. For a current list of OLF Leadership Banks, visit the OLF website at www.oregonlawfoundation.org.

B. OSB Operating Regulations and Procedures

ORPC 1.15-2(a) provides that IOLTA accounts shall be operated in accordance with such “operating regulations and procedures as may be established by the OSB with the approval of the Oregon Supreme Court.” This provision represents one of several amendments to ORPC 1.15-2 since its original adoption. In commentary appearing in the 2005 OSB House of Delegates Agenda, it is noted, “[This] language is added to require compliance with any regulations adopted by the Bar for the operation of trust accounts. In 1989, the Supreme Court issued regulations for the operation of trust accounts, but they do not appear to have been widely distributed and were largely unknown among practitioners. There was also no readily available means for enforcing the regulations. Making clear in the rule that such regulations may be adopted will help to ensure that they are publicized and that members are subject to discipline for noncompliance.” Lawyers would be well advised to monitor developments in this area.

C. Annual Compliance

ORS 9.675 provides that every active member of the OSB shall “certify annually to the bar whether the member maintains any lawyer trust accounts in Oregon. If a member maintains one or more lawyer trust accounts, the member must disclose the financial institution in which each account is held and the account number for each account. The executive director of the Oregon State Bar shall prescribe a form and due date for the certification and disclosures required by this section.”

For instructions on completing the annual certification, visit the OSB website, www.osbar.org/IOLTA.

Lawyers who fail to file an annual certification will receive a written notice of default from the OSB Executive Director. Any lawyer who fails to cure a default within 60 days after the date the notice is given will be automatically suspended. ORS 9.675(2).

D. New Lawyer Trust Accounts

Lawyers opening a new IOLTA account are no longer required to complete a “Notice of Enrollment” form and submit it to the OLF within 30 days of establishing the account. When the requirement for annual certification was deleted from ORPC 1.15-2(m) and moved to ORS 9.675(2), the “Notice of Enrollment” requirement for new accounts was removed.

Aside from the mandatory annual OSB compliance, lawyers are not required to notify the OSB, OLF, or PLF when they set up a new trust account.

E. Mandatory Trust Account Overdraft Notification Program

All lawyer trust accounts are subject to the mandatory trust account overdraft notification program. ORPC 1.15-2(h)(4). If you receive notification from a financial institution that an instrument presented against your lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, you must promptly notify Disciplinary Counsel in writing. The written notice must include a full explanation of the cause of the overdraft and (1) the identity of the financial institution; (2) the identity of the lawyer or law firm; (3) the account number; and (4) either (i) the amount of the overdraft and the date it was created; or (ii) the amount of the returned instrument and the date it was returned. ORPC 1.15-2(l).

F. Bank Charges

Financial institutions that offer IOLTA accounts are instructed by the OLF that in no instance may the principal of a lawyer's or law firm's trust account be used to pay monthly maintenance fees, per-item check charges, items deposited charges, or per-deposit charges. These service charges are the responsibility of the OLF. ORPC 1.15-2(m). Any other fees or transaction costs are not "service charges" for the purposes of ORPC 1.15-2(h)(3) and must be paid by the lawyer or law firm. For instance, financial institutions may inadvertently charge check printing fees to a lawyer trust account, even though they have been specifically instructed to charge them to the lawyer's or firm's general or office account.

When a lawyer trust account is charged for any of the items listed below, the lawyer or law firm must immediately deposit a sum of money into the account to cover the costs. ORPC 1.15-1(b).

- ◆ NSF (non-sufficient funds) fees
- ◆ Stop payment charges
- ◆ Wire transfer fees
- ◆ Electronic transfer fees
- ◆ Check printing costs
- ◆ Deposit slip printing costs
- ◆ Endorsement stamp costs

These are all considered bank charges for which the lawyer or law firm is responsible and are *not* to be paid out of client trust funds. Whether a lawyer or law firm can pass on client-related bank charges to the client (*e.g.*, NSF fees for the client's bounced check or wire and electronic transfer fees) is debatable. ORPC 1.15-2(h)(3) mandates that such costs be covered by the lawyer or law firm. However, the rule does not address whether the client can be *ultimately* responsible, that is, whether a lawyer can then bill the client for these client-related bank charges incurred on the IOLTA account. At a minimum, the client must agree to pay for such costs at the outset of representation. You can incorporate appropriate language into the written fee agreement with the client.

V. TRUST ACCOUNTING CONCEPTS

A. Each Client Should Be Considered a Separate Account

An important aspect of trust accounting is being able to track each client's money separately to determine immediately the balance each client has in trust. To do this, maintain a separate record for each client that shows the amount of each deposit made to the trust account on behalf of that client, the amount of each disbursement, and the purpose for each. You can use individual ledger cards or a computer program.

B. Don't Spend What You Don't Have

You cannot disburse money from a client's trust account on uncollected funds. A lawyer who disburses money on behalf of a client whose funds have not cleared the bank is using money from the trust account that belongs to other clients. Under new banking rules adopted in 2004, certain instruments may clear within one or two banking days. Additionally, some banks make funds available for use the same day they are deposited. However, if a check or draft is returned due to insufficient funds, an improper endorsement, a stop payment order, or other reasons, and the lawyer has already paid out the money on those funds, the lawyer can be in serious trouble. It is better to be safe than sorry. Insist that the client give you cash or wait a prudent amount of time for the funds to clear. For an ordinary transaction with an established client or known third party, wait three banking days for locally written checks, five banking days for checks written within Oregon, but outside your local area, and ten or more banking days for out-of-state checks. To avoid the growing problem of check scams, wait at least ten banking days before disbursing funds in any of the following circumstances: (1) the transaction is with a new client or a client you are unsure about; (2) the amount of the check is very large; (especially compared with the extent of legal services provided, if the check is a retainer); (3) the check is from an unknown third party; or (4) any aspect of the transaction raises (or should raise) your suspicions. To verify that funds have cleared, ask *your bank* to contact the *issuing bank*. Keep in mind that drafts or other instruments may take longer than ten days to process.

For a thorough discussion of banking rules, check scams, and the amount of time that may be necessary for funds to clear, *See* Sylvia Stevens, "Waiting for 'Go' Dough: A primer on disbursing client funds," *Oregon State Bar Bulletin* (June 2006), Leonard DuBoff and Christy O. King, "Lawyers Beware: Avoiding the Scams," *Oregon State Bar Bulletin* (November 2008), Kimi Nam, "Check Scams Target Lawyers," *In Brief*, no. 106 (November 2008), Sheila Blackford, "Check Scams Becoming More Sophisticated," *In Brief*, no. 108 (November 2010), and Beverly Michaelis, "Scam Update: New Ways They Can Get Your Money," *In Brief*, no. 120 (January 2013).

C. Maintain an Audit Trail

ORPC 1.15-1(a) states that a lawyer shall maintain complete records of trust account funds and other property of clients or third persons that are in the lawyer's possession. "Complete" records include checkbooks, canceled checks, check stubs, vouchers, deposit slips, ledgers, journals, client billing statements, bank statements, closing statements, accountings, other statements of disbursement, and any other records reflecting trust account transactions.

Access your trust account online and retrieve canceled checks and bank statements monthly. Retain these PDFs. *Complete trust accounting records, including checks and bank statements, must be preserved for five years after termination of representation.*

Use caution when making telephone, electronic, or wire transfers to and from the trust account. These transfers usually do not generate a clear audit trail of whose money was transferred and for what purpose. As a result, the lawyer can make trust account errors.

D. There Is No Such Thing as a Negative Balance

There should never be a negative balance for either the trust account or the individual client's trust balance. Each client has either a positive or zero balance. Having a negative balance is a sign of negligence, at best, or theft, at worst.

E. Safety Measures

1. If possible, the lawyer should divide bookkeeping tasks among the lawyer's staff. The person who pays the bills should not be the person who reconciles the account. Staff should deliver the unopened bank statement to the principal lawyer or managing partner for review. The principal lawyer or managing partner should review both the statement and the canceled checks for forgeries or other irregularities. If you are a sole practitioner with staff, arrange to have the bank statement emailed to your home email address. Regularly reviewing the checks and the statements will also help to catch identity theft at an early stage.
2. Use duplicate numbered receipts for cash payments, and advise clients that it is *their* responsibility to keep those receipts. If possible, have at least one other person witness cash payments. Alternatively, ask the client to sign the receipt and acknowledge the amount paid. Write the receipt number on the deposit slip to identify who made the payment, and enter that number on the client's ledger when posting the transaction. If you enter more than one cash payment on a deposit slip, use a deposit ledger to itemize the deposits.
3. Do not rush when signing checks or approving electronic transactions. Verify that disbursements are supported by adequate documentation, including the applicable case name or number, before you sign or approve them. Take time to be sure disbursements are made using the proper account.
4. Require two signatures on large checks. (Many banks have disclaimed responsibility for cashing checks with fewer than the required signatures. Nevertheless, requiring two signatures is an important internal control.)
5. Do not allow anyone to issue or sign a check made payable to "cash."
6. Approve all client billings and reconcile receipt of payment.

7. Control access to checkbooks.
8. Order trust account checks in a different color from those used for the business account.
9. Weigh the risks and benefits of connecting a debit card to your trust account. Debit cards can be lost or misplaced, resulting in theft of client funds. They are also a convenient way to pay electronic filing or recording fees. To manage the risks associated with debit cards, *see* “Oregon eCourt Filing Fees and IOLTA,” available on the PLF website, www.osbplf.org.
10. Control access to online banking. If you are in a firm, use proper accounting controls and supervise staff who have access to online accounts. If you are a sole practitioner, do your online banking at home or take precautions to protect access to your account.
11. Consider fraud prevention services. *See* Beverly Michaelis, “Don’t Get Scammed! Fraud Prevention Tip,” *In Brief* no. 121 (September 2013).

For assistance in establishing proper accounting systems and controls, consult a certified public accountant. For assistance in protecting confidential personal and financial data stored on your office computer system, contact a qualified computer consultant.

VI. TRUST ACCOUNTING ESSENTIALS

A. Property Held in the Lawyer Trust Account

The lawyer trust account should be used for the following:

- ◆ Advanced fees or retainers for work to be completed and advances for costs to be paid on behalf of a client;
- ◆ Settlement funds and refund checks that belong in part to the lawyer, the client, or a third party;
- ◆ Funds that come into the lawyer’s possession during the representation of a client, in which both the client and a third person have an interest (e.g., escrow funds pending a real estate closing, money held pending the disposition of property in a dissolution proceeding);
- ◆ Funds of the lawyer deposited for the sole purpose of paying bank service charges or meeting minimum balance requirements. ORPC 1.15-1(b). *See* OSB Legal Ethics Op No 2005-145; and
- ◆ Overpayments by clients. If a client overpays a billing statement, the entire client payment must be deposited into the trust account. Only the amount due the lawyer or

law firm can be disbursed from trust in payment of the client's bill. Contact the client and get instructions on whether you should refund the overpayment or leave the money in the trust account to be applied against future fees and costs.

Lawyers must never keep their own personal funds, business funds, or investment money in the trust account. For this reason, flat fees that are designated as "earned upon receipt" should always be deposited into the lawyer's office or general account. Likewise, once fees have been earned from a client who has money in trust, that money must be transferred to the lawyer's office or general account.

The IRS may look at lawyers' trust accounts to determine whether lawyers are leaving funds in those accounts past the end of the fiscal or calendar year to avoid taxes. Leaving earned fees in the trust account can also constitute commingling.

B. Retention of Unclaimed Client Funds and Property

Periodically, lawyers find they have unclaimed client funds in a trust account or unclaimed property in their possession. This can occur when clients disappear or checks remain uncashed. Common situations include:

- ◆ A client may deposit a retainer with the lawyer and then never return to the office. When the lawyer tries to make contact, the client cannot be located.
- ◆ Witnesses or others may fail to cash small checks received for appearance fees or other services.
- ◆ A settlement check may be received that is payable to both the lawyer and the client, but the lawyer cannot find the client.

If unclaimed funds remain in the trust account, the lawyer must comply with the Uniform Disposition of Unclaimed Property Act (ORS 98.302-98.436). Unclaimed funds held in lawyer trust accounts must be *reported* to the Department of State Lands (DSL), but *paid over* to the OSB with a copy of the DSL reports. The reporting forms can be found on the DSL website at <http://www.oregon.gov/dsl/UP/pages/upforms.aspx>. Forms 1a and 2a must be completed and sent to the DSL with copies of the reports and the unclaimed funds forwarded to the OSB. In no circumstance may the lawyer take these unclaimed funds for his or her own purposes. OSB Legal Ethics Op No 2005-48.

When a check paid out of client funds is not cashed by the recipient, those funds revert to the client and should be reimbursed to the client. You must take reasonable steps to find the client and must maintain reasonable records sufficient to permit the client to make a claim for the return of the property for the period permitted by the Act. One way to avoid this problem is to monitor canceled checks. If a check has not cleared the trust account for two months, track it down immediately. Another solution may be to print "void after 90 days" on the face of the check. If you can't find the client after holding the sum for two years, you must report it to the DSL and deliver the funds to the OSB.

If a settlement check is made payable to both the lawyer and the client, the lawyer cannot sign the client's name on the endorsement without the client's authorization. *In re Maroney*, 324 Or 457 (1996) (lawyer disbarred, in part, for signing settlement check without client's knowledge or consent). If the lawyer has a signed fee agreement from the client authorizing the lawyer to take a certain percentage of the settlement for fees, plus costs advanced, the lawyer may return the check to the issuer and request that two checks be issued – one for the lawyer's fees and costs and one made payable to the client only. The lawyer must still comply with OSB Legal Ethics Op No 2005-48 and the Uniform Disposition of Unclaimed Property Act with respect to the client's portion of the settlement. *See also* OAR 141-045-0031 (3)(d). Instruct your clients to notify you if their address or phone number changes. If a client will be unavailable during critical periods, discuss whether the client should give you a power of attorney to negotiate, settle, and sign documents on the client's behalf.

Pursuant to ORS 98.332, funds held by a fiduciary are deemed abandoned if the owner has not accepted payment of the funds, corresponded in writing about the funds or otherwise indicated interest in the funds within two years after the funds are payable or distributable to the owner. Funds deemed abandoned as of June 30 of each year are to be reported to the DSL during the month of October of that same year, although earlier reporting may be allowed upon written request.

The money paid to the bar under the act is appropriated to the Legal Services program, which funds legal services to the poor statewide. Questions about forwarding abandoned funds can be addressed to the Executive Director of the OLF, www.oregonlawfoundation.org.

C. Trust Property Other Than Cash

Occasionally lawyers must hold property other than cash for a client (valuable papers, coins, stamps, or other types of collectibles). It is the lawyer's responsibility to ensure that these items are properly inventoried and safeguarded from theft, loss, and destruction. ORPC 1.15-1(a). Obtaining insurance coverage for client property is recommended, but not required.

Theft, loss, or destruction of client property *may be covered* under the data breach and cyber liability endorsement in the PLF Claims Made Excess Plan. If you experience this type of loss and your firm has excess coverage with the PLF, contact us at (503) 639-6911 or (800) 452-1639.

Additionally, lawyers must notify clients promptly of the receipt of funds, securities, or other properties; maintain complete records; and render appropriate accountings to clients. ORPC 1.15-1(d), *In re Gildea*, 325 Or 281, 290 (1997) (lawyer suspended for failing to render appropriate accountings to the client).

D. Maintain Records for Five Years

The lawyer or law office must maintain complete records in connection with the trust account and trust properties for five years after termination of the representation. ORPC 1.15-1(a). Such records include checkbooks, canceled checks, check stubs, vouchers, deposit slips, ledgers, journals, client billing statements, bank statements, closing statements,

accountings, other statements of disbursements rendered to clients, and any other records reflecting trust account transactions.

When you receive notice that your monthly bank statement is available, access your trust account online. Download your statement, along with PDFs of your canceled checks.

Keep these records separate and apart from the clients' files, and store or file them monthly and yearly. It is relatively easy to locate specific documents when records are filed in this manner.

VII. TRUST ACCOUNTING PROCEDURES

A. Opening the Trust Account

ORPC 1.15-2(h)(4) requires lawyers to establish their trust accounts in a financial institution that agrees to "report to the OSB Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored." The account must be identified by use of the phrase "Lawyer Trust Account." Many banks will allow lawyers to set up a trust account with no funds, or lawyers may open the account using money paid to them by a client for future fees or costs. If a minimum balance is required to open a trust account, the lawyer may deposit his or her own funds into the trust account, but only in an amount necessary for that purpose. ORPC 1.15-1(b).

Order trust checks in a different color from the general or office account checks, and keep the trust account checkbook and deposit slips in a different location from the general or office account checks and deposit slips. This will help prevent confusion when making deposits or disbursements.

B. Trust Account Records

Trust account records should consist of a trust account journal and a separate client ledger card for each client. *All* deposits and disbursements must be tracked in the trust account journal. This is similar to keeping a running total on the check stubs of how much is in the account. In addition, each client should have his or her own client ledger card. A client's ledger card shows all funds deposited for that client's benefit and all disbursements on behalf of the client against those funds.

The samples shown in the Index of Forms are from a manual accounting system and require that the entries made in the journal be duplicated on that client's ledger. Alternatively, journals and ledgers can be set up in a spreadsheet program or you may use accounting software to generate equivalent records. Accounting software is designed so that only one entry is needed to enter the information in the journal and assign it to a particular client. If you are using a software program, you should print hard copy or PDF reports each month showing individual client trust account activity and all transactions for the trust account. (*See* pages 30 and 31 for samples of QuickBooks® and Quicken® reports. *See* page 32 for an example of a chart of accounts that can be used with either.)

The sample client ledger card on the opposite page reflects these transactions for the client John Jones:

On January 4, 2016, Mr. Jones deposited a retainer of \$1,000 with lawyer Roberta Long. His trust balance on January 4 is \$1,000.

On January 14, 2016, lawyer Long filed a Petition of Dissolution on behalf of Mr. Jones. She used her business credit card to pay Jones' eCourt filing fee, which was posted to the ledger as a "cost advanced." She also arranged for service of process. The Jones client ledger reflects two cost disbursements relating to this activity. The first was a reimbursement to Long for the eCourt filing fee in the amount of \$200. The second was a check payable to the sheriff in the amount of \$20. These amounts were deducted from Mr. Jones' trust balance, leaving \$780. (\$1,000 less the two checks totaling \$220.)

On January 21, 2016, incoming documents were scanned for client Jones. This expense was posted to the "costs advanced" category of the Jones ledger, reflecting a balance due of \$5. No funds were disbursed out of the Jones trust account to cover these costs.

On January 31, 2016, three entries were added to the Jones ledger. The first entry reflects \$500 charged to the client for fees. The second entry is a disbursement from the trust account to lawyer Long in the amount of \$505 (\$500 for fees; \$5 for costs advanced on January 21). At this point, Mr. Jones has \$275 remaining in his trust account. The third entry reflects the \$500 deposit to the office account for the month's fees and \$5 for costs advanced. The effect is to credit Mr. Jones' account with the money transferred from trust, leaving the balance owed for fees and costs at \$0.

On February 4, 2016, a delivery fee was incurred on behalf of client Jones. This expense was posted to the "costs advanced" category of the Jones ledger, which then reflected a balance due of \$5. As with the scanning fee posted on January 21, no funds were disbursed out of the Jones trust account at this time.

On February 29, 2016, three entries were added to the Jones ledger. The first entry reflects a charge of \$300 for fees. The second entry is a disbursement to lawyer Long in the amount of \$275, the balance remaining in Jones' trust account. Jones now has insufficient funds in his account to pay lawyer Long in full. Jones owes Long \$30 (the difference between accumulated fees and costs of \$305 and Jones' trust account balance of \$275). When lawyer Long deposited the disbursement from Jones' trust account into the office account (the third entry on February 29), she applied the available \$275 to costs first, zeroing out the \$5 balance, then to her fees of \$300, leaving a balance due of \$30 in the fees category. Mr. Jones' balance owed was then \$30 as shown in the AR (accounts receivable) column. (*When trust funds are insufficient to cover both fees and costs, as they are in this case, the available trust balance is always applied to costs **first**, then to attorney fees.*)

CLIENT LEDGER CARD

NAME: JONES, JOHN MATTER: DISSOLUTION FILE NO. 673

ADDRESS: 123 MAIN STREET, ANYWHERE, OREGON 97000 PHONE: 503-999-0000 LAWYER: ROBERTA LONG

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance
1/04/16	Jones, John	Retainer	110								1,000.00	1,000.00
1/14/16	Office	eFiling Fee					200.00		200.00			
1/14/16	Costs – Roberta Long	eFiling Fee	5024					200.00	0.00	200.00		800.00
1/14/16	Sheriff	Service Fee	5025							20.00		780.00
1/21/16	Office	Scanning Fee					5.00		5.00			
1/31/16	Fees – Roberta Long	Statement Sent		500.00		500.00						
1/31/16	Roberta Long	Fees & Costs	5026							505.00		275.00
1/31/16	Dep. To Office Acct.	A.R.	5026		500.00	0.00		5.00	0.00			
2/04/16	Office	Delivery Fee					5.00		5.00			
2/29/16	Fees – Roberta Long	Statement Sent		300.00		300.00						
2/29/16	Roberta Long	Fees & Costs	5030							275.00		0.00
2/29/16	Dep. To Office. Acct.	A.R.	5030		270.00	30.00		5.00	0.00			

C. Depositing Trust Account Funds

Deposit trust funds promptly, using a duplicate deposit slip and listing the checks separately. To protect confidentiality, list the names of those whose checks are being deposited only on the duplicate, or attach photocopies of the checks to the deposit receipt.

Always make sure you are using the proper deposit slip. Be sure to use the safeguards recommended in Section V. E. above. If you deposit the funds into the wrong account, you might not notice the error immediately, which can lead to trust account overdrafts. If you discover that funds have been deposited in the wrong account, immediately transfer them to the proper account.

You cannot use funds deposited in the trust account until those funds have cleared the bank. Make disbursements according to the guidelines described in this handbook (*see* Section V. B. above), even if you held the funds for a while before depositing them. If a check is returned for insufficient funds, you want to know that as soon as possible. You cannot distribute money immediately on the client's behalf unless you receive cash.

When you receive funds from third parties for the client's benefit, such as settlement checks or drafts, promptly notify the client. ORPC 1.15-1(d). Checks or drafts made payable to the client and the lawyer must be endorsed by both the client and the lawyer before they may be deposited in the trust account. If the client will be unavailable during a critical period, discuss whether the client should give you a power of attorney to endorse the check or draft to ensure prompt presentation for payment. Absent such authorization, you cannot endorse the check or draft for the client.

Frequently, settlements are paid by draft. A draft has not cleared and is not available for disbursement until it has reached the payer's bank and has been approved for release of funds. Drafts can be dishonored by the paying bank for irregularities such as an incorrect endorsement.

D. Accepting Credit Cards

Accepting credit cards requires extra attention to bookkeeping, particularly when trust funds are involved. Most banks and private credit card processors charge set-up fees, monthly fees, and annual fees in addition to the convenience fee surcharged on each transaction. These fees must be accounted for ethically, in compliance with applicable substantive law, and in accordance with your client fee agreement.

Lawyers who accept credit card payments from clients should carefully review OSB Legal Ethics Op No 2005-172. Any credit card payments deposited to the trust account for services already rendered must be withdrawn as soon as possible from the trust account and transferred to the general or office account to avoid commingling earned fees with unearned fees. [*See* OSB Legal Ethics Op No 2005-172 and George Riemer, "Charge It? Credit Cards and Lawyer Trust Accounts," *Oregon State Bar Bulletin* 60, no. 9 (July 2000).]

If the bank requires that you designate a single merchant account for *all* credit card transactions and you accept credit card payments for earned and unearned fees, your merchant account should be a trust account. If you accept credit card payments for earned fees only, designate your business account as the merchant account. OSB Legal Ethics Op No 2005-172.

Credit card surcharges are a subject of special concern. In 2013, the U.S. District Court for the Eastern District of New York approved the “Payment Card Interchange Fee Settlement,” a class action suit among merchants, Visa, MasterCard, and other defendants involving allegations of excessive credit card surcharges. (For more information, visit the settlement website, <https://www.paymentcardsettlement.com/en>.)

Some Oregon law firms have taken the position that the “Payment Card Interchange Fee Settlement” (PCIFS) permits them to pass Visa and MasterCard surcharges through to clients. The PLF does not advise lawyers on substantive law. This includes interpreting the applicability of the PCIFS. Additionally, lawyers should take note of the following comment in OSB Legal Ethics Op No 2005-172: “Some jurisdictions suggest that a lawyer can pass the credit card transaction fee on to the client, if the client agrees. Interpretation of federal and state law on this issue is beyond the scope of this opinion, but we note that charging the client for the transaction fee may implicate Regulation Z of the Truth in Lending Act, 12 CFR pt 226, requiring that the lawyer make certain specific disclosures to the client and offer cash discounts to all clients.” The opinion cites CONSUMER LAW IN OREGON ch 14 (Oregon CLE 1996 & Supp 2000).

If you elect to pass credit card surcharges on to clients, proceed at your own risk. Keep the following in mind:

- ◆ An appeal of the “Payment Card Interchange Fee Settlement” is now pending before the Second Circuit Court of Appeals. For more information, visit the settlement website referred to above.
- ◆ Credit card surcharges are presently illegal in ten states. Some experts predict this number will grow.
- ◆ Conduct your own legal research regarding Regulation Z.
- ◆ Conduct your own legal research regarding the prerequisites and limitations that apply to surcharging under the “Payment Card Interchange Fee Settlement.”

For additional background on this issue, *see* Beverly Michaelis, “Passing on Credit Card Surcharges to Clients,” *Oregon Law Practice Management* (March 2016), available online at <http://oregonlawpracticemanagement.com/2016/03/14/passing-on-credit-card-surcharges-to-clients/>.

The safest practice when accepting credit card payments is to treat the merchant fee or surcharge as a business expense. Arrange for the merchant fee to be deducted from your general office account and the client funds to be deposited in your trust account. If the bank will not deduct fees from your general account, you have two options. First, permit the use of credit

cards **only** for earned fees that you can deposit immediately in the general account. Because banks will usually not deposit credit card payments into multiple accounts, it is important to limit acceptance of such payments to earned fees if you are using the general account. If you receive retainers or other unearned costs and fees by credit card, the trust account is the proper account for deposit of these payments. You then face the problem of accounting for the merchant fee. One correct but very cumbersome method is to calculate the merchant fee on each transaction and deposit that fee into the trust account on the same day the credit card payment is made. Another approach is to consider using a private credit card processor. Private credit card processors are often more flexible than banks, and will usually allow you to deduct merchant fees from the general account for **all** your transactions, regardless of which account receives your deposit. Many companies offer this service. Choose wisely. Evaluate each company's reputation, references, rates, and services. If possible, find a credit card processor experienced in serving the legal profession.

Set-up fees, monthly fees, and annual fees assessed by banks and credit card processors are an expense of the law firm and the lawyer's responsibility. You can choose to build these costs into your billable fee along with credit card surcharges. For a discussion of billing client costs, see David J. Elkanich, Peter R. Jarvis, Roy Pulvers, and Allison D. Rhodes, "Billing Costs," *Fee Agreement Compendium* (2007). The handbook is included in BarBooks™ and available at no charge on the OSB website, www.osbar.org.

E. Disbursing Trust Account Funds

ORPC 1.15-1(c) states, "A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." You should send each client a monthly statement showing all sums deposited and disbursed. The general rule is that funds in a trust account may be withdrawn when earned and invoiced, unless you expect the client to dispute the amount due. ORPC 1.15-1(e). However, when the bill is sent, the client may not be aware of the amount of the bill or have had an opportunity to dispute the bill. Accordingly, you may wait a reasonable period – such as 30 days – after the client has been invoiced before withdrawing earned funds. OSB Legal Ethics Op No 2005-149.

NEVER write a check from the trust account unless those funds have cleared the bank. Writing a check on behalf of a client whose funds have not cleared the bank is the equivalent of using another client's money. The check being deposited for the client's benefit may be returned for insufficient funds or may not be honored by the bank for some reason.

NEVER write a trust check for "cash" or to pay personal or business expenses. Trust account checks should be written only to the client or for the benefit of the client. "Benefit of the client" includes payment from the trust account to the lawyer's general account to pay the lawyer's fees. The best practice is **never** to write a check from the trust account to pay a personal expense. If the client owes \$350 for fees, the lawyer should write a \$350 check from that client's trust money to the lawyer. The check should then be deposited into the lawyer's office account for the lawyer's general use. This provides the lawyer with a precise trust account record and a precise record of personal and business expenses.

F. Reconciling Account Records with Monthly Bank Statements

Reconcile the trust account *each* month without fail. If someone makes an error, it is easily discovered and corrected if the account is reconciled monthly. If you don't reconcile the trust account for many months, it may be almost impossible to find and correct any errors, and an ongoing error will eventually lead to an overdraft. An undiscovered and uncorrected error is an indication that you are not properly maintaining and safeguarding client funds.

Each month, the trust balances for each client must be added together. Use the bank statement to reconcile the trust journal. Compare the bank statement list of deposits and disbursements with the trust journal records. Mark all deposits and disbursements that are shown on both. Then, using a reconciliation form (usually on the back of the bank statement), subtract from the bank statement balance any checks that have not cleared the bank, and add any deposits not shown on the bank statement. This balance should equal the amount shown in the trust journal. It should also equal the total of the individual client ledger card balances.

If you maintain a check register in lieu of a trust journal, reconcile the check register to your bank statement and perform the steps described above. If you use an accounting program, run the reconciliation feature and check off disbursements and deposits that have cleared the bank. Run a report showing each client's current trust balance and compare it to your reconciliation.

G. Closing the Trust Account

A checklist describing the steps involved in closing a lawyer trust account is available on the PLF website, www.osbplf.org.

H. Death of Sole Signatory on the Trust Account

When the sole signatory on a trust account dies, the court may take jurisdiction and appoint one or more lawyers in good standing with the OSB to act as custodian of the affected lawyer's law practice. ORS 9.705-ORS 9.755. This process is slow and can be expensive. A better practice is for sole practitioners to plan ahead for the unexpected by selecting an "assisting attorney." This process is described in the PLF handbook, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, available at the PLF website, www.osbplf.org. If you would like assistance with this process, call the PLF for an appointment with a practice management advisor.

I. Sample Trust Account Transactions, Trust Account Trial Balances, and Trust Account Reconciliation

On a duplicate deposit slip, list each check or cash amount separately. For each entry made, identify the client and matter, if necessary. In the sample duplicate deposit slip shown here, Mr. Brown is shown as having remitted \$500 in cash, and three checks are listed: one for client Smith from States Insurance (\$30,000), one from Mr. Jones for \$1,000, and one from Mr. Martin for \$250.

SAMPLE DUPLICATE DEPOSIT SLIP

DATE 3/04/16

		DOLLARS	CENTS
CURRENCY			
Brown		500	--
COIN			
CHECKS			
1	States Insurance/Smith	30,000	--
2	Jones	1,000	--
3	Martin	250	--
4			
5			
TOTAL		31,750	--

This sample duplicate deposit slip shows the client names for accounting purposes. If you deposit cash, write the amount of cash from each client on the duplicate deposit slip. Your bank deposit slip should reflect the total cash deposited. Photocopy or scan each client check and attach it to the duplicate deposit slip or the deposit receipt the bank provides for the law firm records.

When you make a deposit, enter the amount in the “Trust Account Journal.” Using the example above, the following entries should be made to the Trust Account Journal for clients Brown, Smith, Jones, and Martin:

TRUST ACCOUNT JOURNAL

Date	Client	Payee	Receipts	Disbursements	Balance
3/04/16	Brown	Brown	500.00		500.00
3/04/16	Smith	States Ins.	30,000.00		30,500.00
3/04/16	Jones	Jones	1,000.00		31,500.00
3/04/16	Martin	Martin	250.00		31,750.00

You must enter these same amounts on the individual client ledger cards for clients Brown, Smith, Jones, and Martin.

CLIENT LEDGER CARD

NAME: Brown, Chris MATTER: Corporate FILE NO. 674

ADDRESS: 789 Your Street, Anywhere, OR 97000 PHONE: 503-123-4567 LAWYER: Roberta Long

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance
3/04/16	Brown, Chris	Retainer	Cash								500.00	500.00

CLIENT LEDGER CARD

NAME: Smith, Jamie MATTER: Personal Injury FILE NO. 675

ADDRESS: 1464 SW First, Anywhere, OR 97000 PHONE: 503-648-9764 LAWYER: Roberta Long

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance
3/04/16	Smith, Jamie	Settlement	1798								30,000.00	30,000.00

CLIENT LEDGER CARD

NAME: Jones, John MATTER: Dissolution FILE NO. 673

ADDRESS: 123 Main Street, Anywhere, Oregon 97000 PHONE: 503-999-0000 LAWYER: Roberta Long

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance
3/04/16	Jones, John	Retainer	678								1,000.00	1,000.00

CLIENT LEDGER CARD

NAME: Martin, Mark MATTER: Real Estate FILE NO. 672

ADDRESS: 7436 Elmwood, Anywhere, OR 97000 PHONE: 503-246-9878 LAWYER: Roberta Long

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance
3/04/16	Martin, Mark	Retainer	890								250.00	250.00

To disburse funds from the trust account, prepare a check and fill in the “For” or “Memo” line on the bottom left of the check. This should include the client’s name and the reason for the disbursement.

Roberta Long Lawyer Trust Account 123 Main Anywhere, OR 97000	March 18, 2016
Pay to the Order of <u>Smith Court Reporting</u> \$ 200.00	
<u>Two Hundred and 00/100ths</u> ----- Dollars	
Memo <u>Jones / Court Reporter</u>	

Once the check has been written, make the entry noted in bold in the Trust Account Journal:

TRUST ACCOUNT JOURNAL

Date	Client	Payee	Receipts	Disbursements	Balance
3/04/16	Brown	Brown	500.00		500.00
3/04/16	Smith	States Ins. Co.	30,000.00		30,500.00
3/04/16	Jones	Jones	1,000.00		31,500.00
3/04/16	Martin	Martin	250.00		31,750.00
3/14/16	Jones	Roberta Long		30.00	31,720.00
3/18/16	Jones	Smith Court Reporting		200.00	31,520.00
TOTALS			31,750.00	230.00	31,520.00

You must also make the entry on Mr. Jones' client ledger card. The sample client ledger card for Mr. Jones (shown on the following page) includes the transactions described above. The \$1,000 retainer paid on March 4, 2016, and the \$200 court reporting fee paid on March 18, 2016, are noted in bold. Also included is a disbursement to lawyer Long's office account on March 14, 2016 to pay off Jones' outstanding accounts receivable balance of \$30.00. (See Section VII. B. for a description of other transactions on the Jones account.)

The sample Trust Account Reconciliation in the Index of Forms is an easy format to follow for reconciling a trust account. To reconcile an account, the amounts in parts one, two, and three of the reconciliation form must be identical. If there is a discrepancy between any of the figures, it must be resolved before the account is considered to be in balance. Finding the error can sometimes be daunting, but being off even one penny means the account does not balance.

Using an accounting program to track trust funds is much more efficient and accurate than maintaining manual records or spreadsheets, provided you use the software correctly. One entry can generate a check and post data to the trust account journal and to the client's individual ledger. On pages 31 and 32 of this book are reports similar to those generated in QuickBooks®

and Quicken®. Reconciling your trust account in these programs takes only a few minutes and involves entering the ending balance on the reconciliation screen and marking the cleared deposits and checks. After the program indicates the account is in balance, you can prepare a report for the individual client accounts to see whether they (the individual accounts) balance with your reconciled balance.

The foregoing is typical of the procedures necessary to maintain proper trust account records. For practical assistance with trust accounting issues, lawyers and staff are encouraged to call the practice management advisors at the Professional Liability Fund, (503) 639-6911 or 1-800-452-1639, for free and confidential help with trust accounts. Questions relating to a lawyer's ethical obligations under the Oregon Rules of Professional Conduct should be directed to the General Counsel of the Oregon State Bar at (503) 620-0222 or 1-800-452-8260.

CLIENT LEDGER CARD

NAME: JONES, JOHN MATTER: DISSOLUTION FILE NO. 673

ADDRESS: 123 MAIN STREET, ANYWHERE, OREGON 97000 PHONE: 503-999-0000 LAWYER: ROBERTA LONG

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance
1/04/16	Jones, John	Retainer	110								1,000.00	1,000.00
1/14/16	Office	eFiling Fee					200.00		200.00			
1/14/16	Costs – Robert Long	eFiling Fee	5024					200.00	0.00	200.00		800.00
1/14/16	Sheriff	Service Fee	5025							20.00		780.00
1/21/16	Office	Scanning Fee					5.00		5.00			
1/31/16	Fees – Roberta Long	Statement Sent		500.00		500.00						
1/31/16	Roberta Long	Fees & Costs	5026							505.00		275.00
1/31/16	Dep. To Office Acct.	A.R.	5026		500.00	0.00		5.00	0.00			
2/04/16	Office	Delivery Fee					5.00		5.00			
2/29/16	Fees – Roberta Long	Statement Sent		300.00		300.00						
2/29/16	Roberta Long	Fees & Costs	5030							275.00		0.00
2/29/16	Dep. To Office. Acct.	A.R.	5030		270.00	30.00		5.00	0.00			
3/04/16	Jones, John	Retainer	678								1,000.00	1,000.00
3/14/16	Dep. To Office Acct.	A.R.	5031		30.00	0.00					30.00	970.00
3/18/16	Smith Court Rptg	Ct. Reporter	5032							200.00		770.00

VIII. FREQUENTLY ASKED TRUST ACCOUNT QUESTIONS

Q. How many days after a check has been deposited do I have to wait before disbursing any funds?

A. Wait a prudent amount of time for the funds to clear. A check is not deemed “cleared” until it is honored and collected by the issuing bank, even if your bank has a policy of making funds available in a shorter period.

For an ordinary transaction with an established client or known third party, wait three banking days for locally written checks, five banking days for checks written within Oregon, but outside your local area, and ten or more banking days for out-of-state checks.

To avoid the growing problem of check scams, wait at least ten banking days before disbursing funds in any of the following circumstances: (1) the transaction is with a new client or a client you are unsure about; (2) the amount of the check is very large; (especially compared with the extent of legal services provided, if the check is a retainer); (3) the check is from an unknown third party; or (4) any aspect of the transaction raises (or should raise) your suspicions. Keep in mind that drafts or other instruments may take longer than ten days to process. To verify that funds have cleared, ask your bank to contact the issuing bank.

For a thorough discussion of banking rules, check scams, and the amount of time that may be necessary for funds to clear, see Sylvia Stevens, “Waiting for ‘Go’ Dough: A primer on disbursing client funds,” *Oregon State Bar Bulletin* (June 2006), Leonard DuBoff and Christy O. King, “Lawyers Beware: Avoiding the Scams,” *Oregon State Bar Bulletin* (November 2008), Kimi Nam, “Check Scams Target Lawyers,” *In Brief*, no. 106 (November 2008), Sheila Blackford, “Check Scams Becoming More Sophisticated,” *In Brief*, no. 108 (November 2010), Beverly Michaelis, “Scam Update: New Ways They Can Get Your Money,” *In Brief*, no. 120 (January 2013), Beverly Michaelis, “Don’t Get Scammed! Fraud Prevention Tip,” *In Brief*, no. 121 (September 2013), Barbara Fishleder, “Oregon Law Firm Targeted by Scam,” *In Brief*, no. 124 (December 2014), and Jennifer L. Meisberger, “Sophisticated Scams: Protect Your Clients’ Money,” *Oregon State Bar Bulletin* (June 2015).

Q. My trust account has had an outstanding check for several years. What do I do about it?

A. If the money cannot be returned to the client, you must comply with ORS 98.302-98.436 (Uniform Disposition of Unclaimed Property Act). Effective January 1, 2010, unclaimed funds held in lawyer trust accounts must be reported to the Department of State Lands (DSL), but paid over to the OSB with a copy of the DSL reports. The reporting forms can be found on the DSL website at <http://www.oregon.gov/dsl/UP/pages/upforms.aspx>. Forms 1a and 2a must be completed and sent to the DSL with copies of the reports and the unclaimed funds forwarded to the OSB. In no circumstance may you take unclaimed funds for your own purposes. OSB Legal Ethics Op No 2005-48.

Pursuant to ORS 98.332, funds held by a fiduciary are deemed abandoned if the owner has not accepted payment of the funds, corresponded in writing about the funds or otherwise indicated interest in the funds within two years after the funds are payable or distributable to the owner. Funds deemed abandoned as of June 30 of each year are to be reported to the DSL during the month of October of that same year, although earlier reporting may be allowed upon written request.

Q. Can I have more than one trust account?

A. Yes. Lawyers who represent clients in more than one jurisdiction may be required to establish multiple trust accounts. In addition, client funds that can earn “net interest” must be deposited in a separate trust account in which interest accrues for the client’s benefit. ORPC 1.15-2(c).

Q. What is “net interest?”

A. ORPC 1.15-2(d) provides: “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.”

Q. Can I set up a lawyer trust account for a client outside of Oregon?

A. In Oregon, trust funds must be deposited in a trust account in the jurisdiction in which the lawyer’s office is situated. See ORPC 1.15-1(a). Furthermore, lawyer trust accounts must conform to the rules in the jurisdictions in which the accounts are maintained. Any inconsistencies between the rules of the various jurisdictions will be resolved by ORPC 8.5(b).

Q. Can a client waive the right to interest?

A. Nothing in ORPC 1.15-2 prohibits a client from waiving the right to interest earned on funds held by the lawyer and authorizing payment of the interest to the (OLF). This is a departure from former DR 9-101(D)(1). Because there may be tax implications in the

client's waiver of interest income and corollary charitable contribution, the lawyer should inform the client of that possibility and recommend that the client seek independent tax advice before deciding how to proceed. If the lawyer chooses to advise the client on this point, the lawyer may have a self-interest conflict under ORPC 1.7(a)(2) in giving such advice and, if so, must obtain the client's informed consent pursuant to ORPC 1.7(b). *See OSB Legal Ethics Op No. 2005-117.*

Q. Which banks offer the best interest rates on IOLTA accounts?

A: The OLF monitors interest rates and can tell you which banks offer the best rate of return. For more information, visit the OLF website at www.oregonlawfoundation.org.

Q. Do I have to notify the OSB, the OLF, or PLF when I set up a trust account?

A. Every lawyer must certify annually that the lawyer is in compliance with ORPC 1.15-1 and ORPC 1.15-2. If a lawyer fails to file an annual certification when due, the OSB Executive Director will send written notice of default to the lawyer. If the lawyer fails to cure the default within 60 days after the date the notice is given, the lawyer is automatically suspended. (ORS 9.675(2)). For instructions on completing the annual certification, visit the OSB website, www.osbar.org/IOLTA.

Lawyers opening a new IOLTA account are no longer required to complete a "Notice of Enrollment" form and submit it to the OLF within 30 days of establishing the account. When the requirement for annual certification was deleted from ORPC 1.15-2(m) and moved to ORS 9.675(2), the "Notice of Enrollment" requirement for new accounts was removed.

Lawyers are not required to notify the PLF about their trust accounts.

Q. Must I notify clients that I participate in the IOLTA program?

A. Yes. Inform your clients that you participate in the IOLTA program and have interest-bearing accounts available in appropriate cases. You can leave brochures in the office for clients to read, post a notice indicating that the office participates in these programs, or include a statement to this effect in an engagement letter or monthly billing.

Q. Am I required to place client funds in a federally insured account?

A. Yes. See ORPC 1.15-2(h)(2). Effective January 1, 2013, funds deposited in a non-interest-bearing transaction account (including an Interest on Lawyer Trust Account [IOLTA]) no longer receive unlimited deposit insurance coverage by the Federal Deposit Insurance Corporation (FDIC). All of a depositor's accounts at an insured depository institution, including all non-interest-bearing transaction accounts, are now insured by the FDIC only up to the standard maximum deposit insurance amount (\$250,000), for each deposit insurance ownership category. If you are holding more than the insured limit in IOLTA for any one client, we recommend that you allocate funds between multiple

institutions and remind clients of the aggregate federal insurance limits to assure that each client's funds are fully protected. See Sylvia Stevens, "Trust Accounts and the FDIC," *Oregon State Bar Bulletin* (October 2008).

- Q.** Am I required to monitor my trust account?
- A.** Yes. You must review your IOLTA account at reasonable intervals to determine whether circumstances have changed such that a particular client did or can earn net interest. ORPC 1.15-2(e).
- Q.** What if I find that a client did or can earn net interest?
- A.** If a particular client's funds either did or can earn net interest, transfer the funds into an appropriate interest-bearing account and request a refund in writing for any interest that may have been remitted to the OLF. ORPC 1.15-2(f). Review ORPC 1.15-2(f) (1) and (2) for further details.
- Q.** Can I pay client costs directly out of the trust account?
- A.** Yes, as long as the client has money in the trust account to cover the costs. If funds have been deposited on behalf of a client but have not yet cleared, you must either wait until they clear or pay the costs out of your general account and reimburse the general account when the funds have cleared.
- Q.** Do I have to keep a minimum balance in my trust account?
- A.** Only if the bank requires a minimum balance. Most banks do not. If a minimum balance is required, deposit just enough money to meet the bank's requirement. See ORPC 1.15-1(b).
- Q.** What if the bank takes check-printing charges from the trust account?
- A.** You can deposit your own money into the trust account to cover the check-printing charges. ORPC 1.15-1(b) permits lawyers to deposit their own funds into the lawyer trust account to pay bank service charges or meet minimum balance requirements in amounts necessary for those purposes.
- Q.** What if I have an overdraft on the trust account?
- A.** ORPC 1.15-2(l) states, "Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing The lawyer shall include a full explanation of the cause of the overdraft." See ORPC 1.15(2)(i) for further details.

- Q.** What happens when a sole signatory on the trust account dies?
- A.** When the sole signatory on a trust account dies, the court may take jurisdiction and appoint one or more lawyers in good standing with the OSB to act as custodian of the affected lawyer’s law practice. ORS 9.705-ORS 9.755. This process is slow and can be expensive. A better practice is for sole practitioners to plan ahead for the unexpected by selecting an “assisting attorney.” This process is described in the PLF handbook, *Planning Ahead: A Guide to Protecting Your Clients’ Interests in the Event of Your Disability or Death*. If you would like assistance with this process, call the PLF for an appointment with a practice management advisor. To view or order *Planning Ahead: A Guide to Protecting Your Clients’ Interests in the Event of Your Disability or Death*, visit the PLF website, www.osbplf.org.

Q. How long must I keep trust account records?

- A.** ORPC 1.15-1(a) states, “Complete records of [trust] 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.”

Q. What do I do when a client overpays a billing statement?

- A.** You must deposit the entire client payment to the trust account. Only the amount due the lawyer or law firm can be disbursed from trust in payment of the client’s bill. Contact the client and get instructions on whether you should refund the overpayment or leave the money in the trust account for future costs.

Q. Can I charge “nonrefundable” flat fees?

- A.** Flat fees, earned on receipt, are allowed if the fee arrangement complies with ORPC 1.15-1(c) and ORPC 1.5(c)(3). However, there is no such thing as a “non-refundable” fee. Fees are always subject to refund if the specified services are not performed. *In re Thomas*, 294 Or 505, 526, 659 P2d 960 (1983). ORPC 1.5(c)(3)(ii).

ORPC 1.15-1(c) and ORPC 1.5(c)(3) provide that a lawyer shall not enter into an arrangement for, charge, or collect a fee denominated as “earned on receipt” unless it is pursuant to a written agreement signed by the client which explains that: (a) the funds will not be deposited into the lawyer trust account, and (b) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed. (ORPC 1.5(c)(3)).

Whether, or to what extent, a lawyer must refund fees paid in advance when a client terminates the lawyer’s services in bad faith near the end of a matter is an open question. OSB Legal Ethics Op No 2005-151.

Practice Tip: Avoid using the term “nonrefundable” in your written agreement with the client. Such a designation may be misleading, if not false, in violation of

ORPC 8.4(a)(3), which prohibits conduct involving “dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” OSB Legal Ethics Op No 2005-151.

Q. How long do I have to wait to withdraw funds from the trust account once I have done work for a client?

A. The general rule is that you may withdraw funds from a trust account when they are earned and invoiced, unless you expect the client to dispute the amount due. ORPC 1.15-1(e). However, until the bill is received, the client will be unaware of the amount of the bill. Accordingly, you may want to wait a reasonable period – such as 30 days – after invoicing the client before withdrawing earned funds. OSB Legal Ethics Op No 2005-149.

Q. Are there any other regulations or rules that apply to trust accounts?

A. ORPC 1.15-2(a) provides that IOLTA accounts shall be operated in accordance with such “operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.” This provision represents one of several amendments to ORPC 1.15-2 since its original adoption. In commentary appearing in the 2005 OSB House of Delegates Agenda, it is noted, “[This] language is added to require compliance with any regulations adopted by the Bar for the operation of trust accounts. In 1989, the Supreme Court issued regulations for the operation of trust accounts, but they do not appear to have been widely distributed and were largely unknown among practitioners. There was also no readily available means for enforcing the regulations. Making clear in the rule that such regulations may be adopted will help to ensure that they are publicized and that members are subject to discipline for noncompliance.” Lawyers would be well advised to monitor developments in this area.

Q. Where can I get additional help with trust accounting or IOLTA requirements?

A. Visit the OLF website at www.oregonlawfoundation.org and click on the Info for Lawyer’s link or call the OLF Administrator, (503) 620-0222 or 1-800-452-8260. For assistance with setting up a system for trust accounting, call the practice management advisors of the PLF, (503) 639-6911 or 1-800-452-1639 or visit the PLF website, www.osbplf.org. For assistance with reconciling your trust account on an ongoing basis, contact a local bookkeeper or accountant.

SAMPLE REPORT USING QUICKBOOKS®

(QuickBooks® replica report reflecting trust account activity and individual client transactions.
Actual reports generated in this program will differ in format and detail.)

11:42 a.m.
02/29/2016
Cash Basis

Type	Date	Num	Memo	Paid Amount	Balance
Client Trust Accounts					
David Jones					
Deposit	1/13/2016		Deposit	3,000.00	3,000.00
Check	1/25/2016	0001	Filing Fee	-250.00	2,750.00
Total David Jones				2,750.00	2,750.00
Harold Anderson					
Deposit	1/13/2016		Deposit	5,000.00	5,000.00
Total Harold Anderson				5,000.00	5,000.00
Sharon Brown					
Deposit	1/27/2016		Deposit	2,500.00	2,500.00
Check	2/11/2016	0002	Medical Report	-300.00	2,200.00
Total Sharon Brown				2,200.00	2,200.00
Total Client Trust Accounts				9,950.00	9,950.00
TOTAL				9,950.00	9,950.00

SAMPLE REPORT USING QUICKEN®

(Quicken® replica report reflecting trust account activity and individual client transactions.
Actual reports generated in this program will differ in format and detail.)

Trust Account by Client

03/01/16 through 03/31/16

	Date	Num	Description	Category	Paid Amount
David Jones					
	3/1/2016		Deposit	Retainer	3,000.00
	3/14/2016	0001	eFiling	Cost - Filing Fee	-250.00
					2,750.00
Harold Anderson					
	3/2/2016		Deposit	Retainer	5,000.00
					5,000.00
Sharon Brown					
	3/4/2016		Deposit	Retainer	2,500.00
	3/22/2016	0002	Check	Cost - Medical Report	-300.00
					2,200.00
OVERALL TOTAL					9,950.00

CHART OF ACCOUNTS

TRUST ACCOUNT

Category	Type	Description
Retainer	Income	Received from client
Settlement Funds	Income	Received on behalf of client
Attorney Fees	Expense	Fees paid
Bank Charges	Expense	Check printing and other bank charges
Client Net	Expense	Net proceeds to client
Costs	Expense	Paid on behalf of client
Deposition	Sub	Court reporter fees
Filing Fee	Sub	Court, county, etc.
Recording Fees	Sub	Court, county, etc.
Reports	Sub	Hospital, doctor, investigator, etc.
Service Fees	Sub	Process service
Witness Fees	Sub	Witness fee, mileage, etc.
[Trust]	Bank	Lawyer's Trust Account

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CLIENT LEDGER CARD

NAME: _____ MATTER: _____ FILE NO. _____

ADDRESS: _____ PHONE: _____ ATTORNEY: _____

DATE	NAME	MEMO	CK. NO.	FEES			COSTS ADVANCED			TRUST		
				Charged	Received	AR Bal.	Advanced	Received	Balance	Disbursed	Received	Balance

TRUST ACCOUNT JOURNAL

Date	Client	Payee	Receipts	Disbursement	Balance
TOTAL					

**TRUST ACCOUNT
(ALTERNATE FORM) JOURNAL**

DATE	MATTER/CLIENT REFERENCE	RECEIPTS	DISBURSEMENTS	BALANCE

TRUST ACCOUNT RECONCILIATION

For the Month Ended _____

Amounts

Lawyer Individual Trust Account Ledger Balances¹

Client _____	\$	_____
Client _____		_____
Client _____		_____
Client _____		_____
Client _____		_____
Client _____		_____
Client _____		_____
Client _____		_____
Client _____		_____
Client _____		_____
Attorney Funds for Bank Charges, if any		_____
1. Total Lawyer Individual Trust Account Ledger Balances	\$	_____*
2. Lawyer Trust Account Journal (or Check Register) Balance	\$	_____*
Bank Statement Balance	\$	_____
Less Outstanding Checks	-	_____
Plus In-Transit Deposits	+	_____
3. Reconciled Bank Statement Balance	\$	_____*

**These amounts (1, 2, and 3) must be identical to each other for the trust account to balance.*

¹ Note: Need separate line for each person's account as shown on a separate ledger card/page.