

FREQUENTLY ASKED TRUST ACCOUNT QUESTIONS

- Q.** When must I set up a lawyer trust account?
- A.** ORPC 1.15-1(a) states that a lawyer shall hold property of clients or third persons 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."
- Q.** Where can I set up a trust account?
- A.** Lawyers must open a trust account in the jurisdiction where their office is located. RPC 1.15-1(a). The financial institution must be authorized by law to transact business in the state where the account is maintained; must be insured by the Federal Deposit Insurance Corporation or an analogous federal government agency; must have contracted with the Oregon Law Foundation (OLF) to report and remit interest earned on IOLTA accounts; and must have signed an overdraft notification agreement with the Oregon State Bar.
- Q.** Must I notify the OSB, the OLF, or PLF when I set up a trust account?
- A.** 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.

Lawyers do not have to notify the PLF about their trust accounts.

- Q.** Why must I complete an Annual IOLTA Certification?
- A.** Every active member of the Oregon State Bar must annually certify to the OSB whether the member maintains any lawyer trust account in Oregon. ORS 9.675. The member must disclose the financial institution in which each account is held and the account number for each account. You still must complete the form whether your office is in another jurisdiction and those lawyer accounts are not in Oregon (box 2) or whether you do not hold client funds or the funds of third parties or maintain any lawyer trust accounts (box 3).
- Q.** When can I disburse funds from my trust account?
- 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. Note, that checks for \$5,000 and over may be held by banks for seven banking days, whether drawn on a local, in-state, or out-of-state bank, therefore allow sufficient time for these checks.

To avoid the growing problem of check scams, wait at least ten banking days before disbursing funds in the following circumstances: (1) the transaction is with a new client or a client you are unsure about; (2) 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. Remember that drafts or

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other instruments may take longer than ten days to process. To verify that funds have been collected, ask your bank to contact the issuing bank.

For further discussion of banking rules, check scams, and the 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) and "Trust Account Lessons Cautionary Notes," *Oregon State Bar Bulletin* (July 2008) Helen Hierschbiel, "Scammers Take Aim at Lawyers: How to Avoid Becoming the Next Victim," *Oregon State Bar Bulletin* (May 2010), 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 a while. What should 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.

Funds held by a fiduciary are considered 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. ORS 98.332. 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 have 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. This shall be a separate account for each client or client matter or in a pooled interest bearing lawyer trust account with sub accounting 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. 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;

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- (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). Lawyer trust accounts must conform to the rules in the jurisdictions in which the accounts are maintained. Any inconsistencies between the rules of the jurisdictions will be resolved by the provision in ORPC 8.5(b).

Q. Can a client waive the right to interest?

A. No. Clients in the United States can have no choice regarding placement of funds into IOLTA and only those funds that cannot earn net interest are to be placed in the IOLTA. Rule 1.15-2(c) mandates that client funds that can earn net interest shall be placed in an interest bearing trust account for the clients benefit and the net interest earned by funds in such an account shall be held in trust as property of the client. Nothing prevents a client from making a subsequent tax deductible donation to the Campaign for Equal Justice or other charitable organization.

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

A: Where you bank matters! Put your lawyer trust account funds in one of the Leadership Banks identified on the Oregon Law Foundation website, www.oregonlawfoundation.org because those banks will maximize the rate of return on IOLTA accounts. For example, visionary banks pay at least 1% interest and charge no service fees for IOLTA accounts.

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 so a particular client did or can earn net interest. ORPC 1.15-2(e).

Q. What if a client earned or could earn net interest?

A. If a particular client's funds either earned or could 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 have not yet cleared, you must either wait until they clear or pay

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the costs out of your general account and reimburse the general account when the funds have cleared.

- Q.** Must I 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 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.** How long must I wait to withdraw funds from the trust account once I have done work for a client?
- A.** Generally you may withdraw funds from a trust account when 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. 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.** 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, call the PLF to meet with a practice management advisor. *Planning Ahead: A Guide to*

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Protecting Your Clients' Interests in the Event of Your Disability or Death can be accessed or ordered on 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 are complete trust account records?
- A.** ORPC 1.15-1(a) does not state what constitutes complete records. The ABA Model Rules for Client Trust Account Records advises retaining these records: receipts and disbursement journals containing a detailed record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement; ledger records for each separate client or third person; copies of retainers and fee agreements; copies of accountings to clients or third persons; copies of bills for legal fees and costs given to each client; copies of records showing disbursements on behalf of clients; the physical or electronic equivalent of checkbook registers, bank statements, deposit records, cancelled checks; copies of trial balances and reconciliations of the lawyer trust accounts; and copies of those portions of client files reasonably related to lawyer trust account transactions.
- 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 ongoing, contact a local bookkeeper or accountant.

IMPORTANT NOTICES

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