

## **Recent Changes to Trust Account Books and Records Requirements**

**by**

**Cassie Hanson, Senior Assistant Director  
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (August 3, 2015)

Pursuant to Rule 1.15(i), Minnesota Rules of Professional Conduct (MRPC), the Lawyers Professional Responsibility Board amended Appendix 1 effective June 26, 2015. Every attorney engaged in the private practice of law must maintain the books and records described in Appendix 1 to comply with the applicable provisions of the MRPC relating to funds and property received and disbursed on behalf of clients or otherwise held in a fiduciary capacity. The purpose of the amendments was to provide additional guidance regarding the books and records every lawyer engaged in private practice must maintain pursuant to Rule 1.15(h), MRPC. Appendix 1 can be found in the rules section of our website.

Paragraph I of Appendix 1 was amended to require that lawyers maintain books and records separately for each individual IOLTA account, which may factor into a lawyer's decision whether to open a separate interest-bearing account on behalf of a client. Paragraph I(9) was added to provide lawyers with additional guidance about where to open a trust account. Trust accounts must be maintained in a financial institution that is authorized by federal or state law to do business in Minnesota, is located, or has a branch office located, in Minnesota, and has executed a "Trust Account Overdraft Notification and Interest on Lawyer Trust Account (IOLTA) Comparability Agreement." A list of approved financial institutions can be found in the trust account resource section of the director's website, listed above.

Appendix 1 was also amended to provide additional clarification regarding how lawyers may use their trust account and how to handle credit card payments by clients. Paragraph I(2)(b) was amended to confirm that lawyers may not make ATM or other cash withdrawals from a trust account and that lawyers may not issue trust account checks in payment of personal or business expenses. Paragraph I(3)(b) was updated to provide guidance about how much in personal funds lawyers may keep in a trust account to cover related bank fees and charges. Lawyers may keep a "nominal" amount, which is defined to "not exceed \$200," to cover the maintenance costs of a trust account. Paragraph I(10) was added to address how a lawyer should handle payment of fees by credit card. Some credit card companies will separately debit transactional and other fees from the lawyer's business account while posting funds to the trust

account. If the credit card company is unable to do so, the credit card payments should be deposited into the lawyer's business or other non-trust account with the unearned portion of the funds to be immediately transferred to the lawyer's trust account.

The new amendments to Appendix 1 also provide lawyers with additional guidance on problematic record keeping practices. For example, a negative balance in a client subsidiary ledger can often prevent a lawyer from detecting a shortage in trust funds. Paragraph I(4) was amended to clarify how a lawyer should handle an unrectified negative balance in a client subsidiary ledger when computing a monthly trial balance. Paragraph I(4) has always provided that client subsidiary balances should not be negative. The amended paragraph I(4) provides that if a lawyer performs a trial balance and a negative client subsidiary balance has not yet been resolved, the balance should be viewed as "zero" when calculating the trial balance total. "A negative client subsidiary ledger balance may not serve to reduce the trial balance total." See paragraph I(4).

Appendix 1 has not been amended since it was adopted on Sept. 30, 2005. Some of the changes to Appendix 1 reflect advances in technology and are designed to make record keeping easier. Some lawyers had questioned why books and records were required to be printed in hard copy and could not be maintained in a more convenient electronic form, such as on a USB flash drive or a separate hard drive. Amended paragraph I(7) provides that lawyers may retain, on a monthly basis, required books and records in a PDF form on an electronic device separate from the one on which the books and records were created so long as they are regularly backed up on an appropriate storage device. These records, printed or electronic, must also be maintained for the required six-year period.

Lastly, Appendix 1 was amended to address the most frequent cause of overdrafts on lawyer trust accounts; the disbursement of funds before they clear the trust account. Paragraph I(11) was added to prohibit a lawyer from disbursing funds from a trust account unless the bank, which maintains the trust account, has made the funds available for disbursement and the instrument that is the source of the deposit has cleared the bank account on which it was issued. Generally, a local check will clear within three business days. It is acceptable to issue checks the same day as a deposit of cash, a deposit made by wire transfer, or of a certified check, as is the ordinary practice in real estate closings, which remains an exception per paragraph I(11). In those situations, it is imperative that the lawyer deposit the funds before the bank's cutoff for the day's business, which is usually three o'clock. Out of town checks may take up to ten days or longer to clear (i.e., paid by the issuer's bank). Where the lawyer has reason to be concerned about whether a check being deposited will clear, the lawyer should

not issue trust account checks against that deposit prior to confirming with the issuing bank that the deposited check has cleared. Finally, each lawyer must learn their individual bank's policy for when local and out of town checks clear and follow it accordingly. The Director does not consider overdrafts caused by a lawyer issuing funds from a trust account prior to the deposit instrument clearing to be bank error. The Director will pursue an overdraft inquiry in such situations, which likely will include an audit.