



SUPREME COURT OF MISSOURI

en banc

August 21, 2007
Effective January 1, 2008

In re:

Repeal of subdivision 4-1.15, entitled “Safekeeping Property,” and the Comment, Code Comparison and Supplemental Missouri Comment thereto, of Supreme Court Rule 4, entitled “Rules of Professional Conduct,” and in lieu thereof adoption of a new subdivision 4-1.15, entitled “Safekeeping Property,” and a new Comment and Supplemental Missouri Comment thereto.

ORDER

1. It is ordered that effective January 1, 2008, subdivision 4-1.15 of Supreme Court Rule 4 and the Comment, Code Comparison, and Supplemental Missouri Comment thereto be and the same are hereby repealed and a new subdivision 4.1-15, a new Comment, and a new Supplemental Missouri Comment thereto adopted in lieu thereof to read as follows:

4-1.15 SAFEKEEPING PROPERTY

(a) As used in this Rule 4-1.15(a) to (i), the following terms mean:

(1) "Client trust account," an account denominated as such or by words of similar import in which a lawyer or law firm holds funds on behalf of a client or third person and on which withdrawals or transfers can be made on demand, subject only to any notice period that the financial institution is required to observe by law or regulation. Every client trust account shall be either an IOLTA account or a non-IOLTA trust account.

(2) "Daily overnight financial institution repurchase agreement," an agreement established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(3) "Eligible institution," a bank or savings and loan association authorized by federal or state law to do business in Missouri, the deposits of which are insured by an agency of the federal government, or an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Missouri that has voluntarily chosen to offer and maintain IOLTA accounts to its lawyer and law firm customers. To be an "eligible institution," the foundation also must determine that the institution:

(A) pays no less on IOLTA accounts than the lesser of:

(i) the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each IOLTA account that meets the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and these factors do not include that the account is an IOLTA account. The institution also shall consider all product option types for an IOLTA account offered by the financial institution to its non-IOLTA customers by either using the available account option as an IOLTA account or paying the comparable interest rate or dividend on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or

(ii) an amount on funds that would otherwise qualify for the investment options noted at Rule 4.1.15(a)(6)(B) to (D) equal to 60% of the federal funds target rate as of the first business day of the quarter or other IOLTA remitting period, which amount is deemed to be already net of allowable reasonable fees;

(B) only deducts allowable reasonable fees from the interest or dividends on an IOLTA account;

(C) remits at least quarterly the interest or dividends earned on each IOLTA account, net of allowable reasonable fees, if any, to the foundation, which shall be the sole beneficial owner of the interest or dividends earned on the IOLTA account;

(D) transmits with each remittance a report, on a form and through any manner of transmission approved by the foundation, that identifies each lawyer or law firm for whose IOLTA account the remittance is sent, the amount of the remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends remitted, the amount and type of charges or fees deducted, if any, and the average account balance for the period in which the report is made; and

(E) transmits to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

(4) "Financial institution," a bank or savings and loan association authorized by federal or state law to do business in Missouri, the deposits of which are insured by an agency of the federal government.

(5) "Foundation," the Missouri lawyer trust account foundation described in this Court's order of October 23, 1984.

(6) "IOLTA account," a pooled client trust account held at an eligible institution that is comprised of client and third person funds that

cannot otherwise earn income for the client or third person in excess of the costs incurred to secure such income, and which is:

(A) an interest-bearing checking account;

(B) a money market account with or tied to check-writing;

(C) a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities; or

(D) an open-end money market fund solely invested in or fully collateralized by United States government securities.

(7) “Non-IOLTA customers” includes all of the customers of the financial institution other than those who maintain IOLTA accounts.

(8) “Non-IOLTA trust account,” an interest-bearing client trust account established at a financial institution as:

(A) a separate client trust account for the deposit of the funds of a particular client or third person, the net earnings of which will be paid to the client or third person who owns the deposited funds; or

(B) a pooled trust account with subaccounting by the financial institution or by the lawyer or law firm that will provide for computation of the net interest or dividend earned by the funds of each

client or third person and also will provide for the payment thereof to the client or third person.

(9) "Open-end money market fund," a fund holding itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940 and, at the time of the investment, having total assets of at least \$250,000.000.

(10) "United States government securities," United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(b) For purposes of Rule 4-1.15(a) to (i), "allowable reasonable fees" are per check charges, per deposit charges, a fee in lieu of minimum balance, sweep fees and a reasonable IOLTA account administrative fee. Allowable reasonable fees may be deducted from interest or dividends earned on an IOLTA account, provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers. Fees or charges in excess of the interest or dividends earned on the IOLTA account, for any month or quarter, shall not be taken from interest or dividends of any other IOLTA account. No fees or charges may be assessed against or deducted from the principal of any IOLTA account. All other fees are the responsibility of the lawyer or law firm and may be charged to the lawyer or law firm. Eligible institutions may elect to waive any or all fees on IOLTA accounts.

(c) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a "Client Trust Account" or words of similar import maintained in the state where the lawyer's office is situated or elsewhere if the client or third person consents. Every client trust account shall be either an IOLTA account or a non-IOLTA trust account. No earnings from an IOLTA account or a non-IOLTA trust account shall be made available to any lawyer or law firm, nor shall any lawyer or law firm have a right or claim to such earnings. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for five years:

(1) after termination of the representation, or

(2) from the date of the last disbursement of funds,

whichever is later.

(d) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(e) A lawyer shall deposit into a client 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.

(f) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in this Rule 4-1.15 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(g) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the lawyer shall keep the property separate until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(h) Unless exempt as provided in Rule 4-1.15(i), a lawyer or law firm shall establish and maintain one or more IOLTA accounts into which shall be deposited all funds of clients or third persons, but only in compliance with the following provisions:

(1) no earnings from such account shall be made available to the lawyer or law firm, and the lawyer or law firm shall have no right or claim to such earnings;

(2) a lawyer or law firm shall deposit in an IOLTA account all funds of clients and third persons from which no income could be earned for the client or third person in excess of the costs incurred to secure such income, and all other client or third person funds shall be deposited into a non-IOLTA trust account;

(3) in determining whether client or third person funds should be deposited in an IOLTA account or non-IOLTA trust account, a lawyer shall take into consideration the following factors:

(A) the amount of interest that the funds would earn during the period they are expected to be deposited;

(B) the cost of establishing and administering a non-IOLTA trust account for the benefit of the client or third person, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to the benefit of a client or third person;

(C) the capability of financial institutions or lawyers or law firms to calculate and pay interest to individual clients or third persons;

(D) any other circumstance that affects the ability of the client or third person funds to earn income, in excess of the costs incurred to secure such income, for the client or third person;

(4) The determination of whether the funds of a client or third person can earn income in excess of costs as provided in Rule 4-1.15(h)(3) shall rest in the sound judgment of the lawyer or law firm, and no lawyer

shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment;

(5) the lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances require further action with respect to the funds of any client or third person; and

(6) A lawyer or law firm required to establish and maintain an IOLTA account under this Rule 4-1.15 shall maintain IOLTA accounts only at an eligible institution that voluntarily chooses to offer such accounts. The foundation shall annually publish a list of eligible institutions, shall update the list seasonably, and shall provide a copy of the updated list to any Missouri lawyer upon written request.

(i) Every lawyer shall certify in connection with this Court's annual enrollment statement that the lawyer or the law firm with which the lawyer is associated either maintains an IOLTA account with an eligible institution as provided in Rule 4-1.15(h) or is exempt because the:

(1) lawyer is not engaged in the practice of law;

(2) nature of the lawyer's or law firm's practice is such that the lawyer or law firm does not hold client or third party funds;

(3) lawyer is primarily engaged in the practice of law in another jurisdiction and not regularly engaged in the practice of law in this state;

(4) lawyer is associated in a law firm with at least one lawyer who is admitted to practice and maintains an office in a jurisdiction other than the state of Missouri and the lawyer or law firm maintains a pooled trust account for the deposit of funds of clients or third persons in a financial institution located in such other jurisdiction outside the state of Missouri and any interest or dividends, net of any service charges and fees, from the account is being remitted to the client or third person who owns the funds or to a nonprofit organization or government agency pursuant to the laws or rules governing lawyer conduct of the jurisdiction in which the financial institution is located; or

(5) Foundation has exempted the lawyer or law firm from the requirement of maintaining an IOLTA account and depositing client and third person funds therein because a lawyer or law firm:

(A) maintains an IOLTA account that has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(B) establishes that no eligible institution within reasonable proximity to his, her or its office offers IOLTA accounts.

The foundation may establish criteria and procedures by which an exemption under this Rule 4-1.15(i)(5) may be obtained.

(j) A lawyer shall securely store a client's file for 10 years after completion or termination of the representation absent other arrangements

between the lawyer and client. If the client does not request the file within 10 years after completion or termination of the representation, the file shall be deemed abandoned by the client and may be destroyed.

A lawyer shall not destroy a file pursuant to this Rule 4-1.15(j) if the lawyer knows or reasonably should know that:

(1) a legal malpractice claim is pending related to the representation;

(2) a criminal or other governmental investigation is pending related to the representation;

(3) a complaint is pending under Rule 5 related to the representation; or

(4) other litigation is pending related to the representation.

Items in the file with intrinsic value shall never be destroyed.

A lawyer destroying a file pursuant to this Rule 4-1.15(j) shall securely store items of intrinsic value or deliver such items to the state unclaimed property agency. The file shall be destroyed in a manner that preserves client confidentiality.

A lawyer's obligation to maintain trust account records as required by Rule 4-1.15(a) to (i) is not affected by this Rule 4-1.15(j).

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box,

except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. *See, e.g., ABA Model Financial Recordkeeping Rule.*

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, Rule 4-1.15(d) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds is the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Rule 4-1.15(g) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule 4-1.15 are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule 4-1.15.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

SUPPLEMENTAL MISSOURI COMMENT

In 2007, Rule 4-1.15 was amended to require lawyers to maintain IOLTA accounts if not exempted by Rule 4-1.15(i). It is expected that a lawyer or law firm will exercise good faith judgment in determining whether funds of a client or third party are of such a nominal amount or are expected to be held by the lawyer for such a short period of time that the funds cannot earn interest or dividend income for the client or third party in excess of the costs incurred to secure such income. All relevant factors should be considered in this determination, including, for example, the cost of establishing and maintaining accounts for the benefit of clients or third persons, service charges, accounting fees and tax reporting procedures, the nature of the transactions involved and the likelihood of delay. It is also expected that placement of the funds will be reviewed at reasonable intervals if the funds remain on hand to determine if changed circumstances require further action with respect to such funds. The amended Rule 4-1.15 conforms with the decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

Amended Rule 4-1.15 also requires that IOLTA funds be deposited with institutions paying interest and dividends comparable to rates paid to the institution's own other similarly-situated non-IOLTA customer. This recognizes that additional options have developed and are being offered in the marketplace by financial institutions from which qualifying IOLTA

balances should also benefit. Apart from the important goal of fairness in the treatment of IOLTA funds, the comparability and other modifications in amended Rule 4-1.15 are important to the purposes of the IOLTA program: providing a source of funds to support civil legal services to the poor, improve the administration of justice, and promote other programs for the benefit of the public as are specifically approved from time to time by this Court.

7. It is ordered that notice of this order be published in the Journal of The Missouri Bar.

8. It is ordered that this order be published in the South Western Reporter.

Day – to – Day

LAURA DENVIR STITH
Chief Justice