Rule 1.15B. POOLED INTEREST-BEARING TRUST ACCOUNTS

(a)(1) Every lawyer or law firm holding funds in one or more trust accounts in accordance with Rule 1.15A(a) shall create and maintain a pooled interest-bearing trust account in a financial institution in Vermont that has been approved by the Professional Responsibility Board. Funds so held that are not reasonably expected to earn net interest or dividends, as defined in paragraph (2) of this subdivision, for the client or other person for whom they are held shall be deposited in that account. The interest or dividends accruing on this account, net of any transaction costs, as defined in paragraph (2) of this subdivision, shall be paid over to the Vermont Bar Foundation by the financial institution. No earnings of the account shall be made available to the lawyer or law firm. No lawyer may be disciplined for placing client funds in the pooled interest-bearing account if the lawyer made a good faith determination that the funds fit the provisions of this rule.

(2) For purposes of this rule,

(i) "Net interest or dividends" means the net of interest and dividends earned on a particular amount of one client's or other person's funds over the administrative costs, as defined in subparagraph (ii), allocable to that amount. In estimating the gross amount of interest or dividends to be earned on a particular amount of the funds of a client or other person, the lawyer or law firm shall consider the principal amount involved; available interest or dividend rates; and the time the funds are likely to be held, taking into account the likelihood of delay in any relevant proceeding or transaction.

(ii) "Administrative costs" means the portion of the following costs properly allocable to a particular amount of one client's or other person's funds paid to a lawyer or law firm:

(A) Financial institution service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest.

(B) Reasonable charges of the lawyer or law firm for opening, maintaining, or closing an account; accounting for the deposit and withdrawal of funds and payment of interest; and obtaining information and preparing or forwarding any returns or reports that may be required by a revenue taxing agency as to the interest and dividends earned on the funds of a client or other person.

(iii) "Transaction costs" means the following costs incident on opening and maintaining a pooled interest-bearing trust account created in accordance with paragraph (1) of this subdivision: Financial institution charges for opening and maintaining the account, or accounting for the deposit and withdrawal of funds and payment of interest or dividends to the Vermont Bar Foundation.

(b) A lawyer or law firm maintaining a pooled interest-bearing trust account created and maintained as required in this rule shall direct the financial institution:

(1) to remit interest or dividends, as the case may be, to the Vermont Bar Foundation; and

(2) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent; and

(3) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation.

(c) The preponderance of the interest or dividends received by the Foundation shall be used by the Foundation to support legal services for the disadvantaged. Remaining funds may be used for public education relating to the courts and legal matters.

(d) A financial institution shall be approved by the Professional Responsibility Board as a depository for pooled interest-bearing trust accounts created and maintained as required in this rule if it shall file with the Board an agreement, in a form provided by the Board, to notify Disciplinary Counsel whenever (1) any properly payable instrument is presented against such a trust account containing insufficient funds, irrespective of whether or not the instrument is honored; and (2) whenever any transaction, no matter the type, causes such an account to be overdrawn. The Supreme Court may establish rules governing approval and termination of approved status for financial institutions, and the Board shall annually publish a list of approved financial institutions. No pooled interest-bearing trust account shall be created or maintained under this rule in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days' notice in writing to the Board.

(e) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the format described below. If an instrument presented against insufficient funds is dishonored, the report shall be made simultaneously with, and within the time provided by law, for notice of dishonor. If an instrument presented against insufficient funds is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds. If any other transaction causes an account to be overdrawn, the report shall be made simultaneously with the forwarding of the financial institution's customary overdraft notice to the depositor.

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

(3) In the case of an overdraft caused by any other transaction, the report shall be a copy of the overdraft notice sent to the depositor by the financial institution.

(f) Every lawyer practicing or admitted to practice in Vermont shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(g) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(h) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Vermont.

(i) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of Vermont, upon presentation of an instrument which the institution dishonors.—Amended June 17, 2009, eff. Sept. 1, 2009; Dec. 21, 2010, eff. Feb. 21, 2011.

Historical Citation

Amended June 17, 2009, eff. Sept. 1, 2009; Dec. 21, 2010, eff. Feb. 21, 2011.

Reporter's Notes — 2011 Amendment

Rule 1.15B(d) is amended at the request of the Professional Responsibility Board to modernize and clarify the operation of the rule. The amendment makes clear that institutions must notify Disciplinary Counsel, rather than the Board, not only when an instrument presented against insufficient funds is honored or dishonored, but whenever any transaction— whether electronic, paper, wire, or other—causes an overdraft to an attorney trust account. The amendment reflects the evolving nature of banking practices and the fact that some newer types of transactions do not involve an instrument being presented against an account: for example, Automated Clearing House (ACH) transactions.

Conforming changes are made in Rule 1.15B(e).

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.15B has no equivalent in the Model Rules. The present amendments to this rule and the abrogation of former Rule 1.15C are intended to make clear that every lawyer or law firm holding client funds in a trust account pursuant to Rule 1.15A(a) must maintain a pooled interest-bearing account for "IOLTA" (Interest on Lawyers' Trust Accounts) funds —client or third-party funds that would not earn interest or dividends net of administrative costs if separately accounted for because they are of a small amount or are held for a period of short duration. These provisions are based in part on Maine Bar Rule 3.6(e), which, with minor changes, will become Maine Rule of Professional Conduct 1.15 effective August 1, 2009.

The interest or dividends on the pooled account, which may be significant, are to be paid to the Vermont Bar Foundation pursuant to Rules 1.15B(b) and (c) to support legal services for the poor or for public education on the legal system. In Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003), the Supreme Court in a five to four decision upheld an IOLTA program against a Fifth Amendment Takings Clause challenge because only client funds that would individually earn no net interest were involved.

Rule 1.15B makes clear that, in contrast to trust accounts that do not meet the "net interest" requirement, and to fiduciary accounts, pooled interest-bearing accounts must be maintained only in Vermont institutions that have been approved by the Professional Responsibility Board on the basis of an agreement that the institution will notify the Board of an overdraft on any such account held by it. The provisions of former Rule 1.15C(b)-(f) spelling out the details for implementation of this requirement have been adapted as Rule 1.15B(d)-(i).

The overdraft notification requirement is necessary for pooled interest-bearing accounts both because an overdraft necessarily affects the funds of clients other than the one to whose benefit an overdrawn instrument may have been written and because no single client has sufficient interest in or knowledge of the account to police its use. By contrast, a non-pooled trust account may be readily monitored and overseen by the client, and a fiduciary account is similarly subject to scrutiny by the beneficiary and other private and public parties with an interest in the funds. Compliance review and audit of such accounts pursuant to Rule 1.15B(b) or (c) provide further safeguards. From the perspective of the client or beneficiary, it is clearly preferable that the lawyer have the widest possible discretion to deposit or invest funds at the best possible terms regardless of the location and nature of the institution.