Vermont Rules of Professional Conduct
Rule 1.15 – Safekeeping Property

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Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 1.15 was last amended in 2016.
  - Rule 1.15(b) was amended to provide that the funds that a lawyer may keep in a client trust account to cover service charges is that amount "reasonably" necessary for that purpose, making clear that the rules do not provide a fixed amount or percentage but will be applied on a case-by-case basis.
  - Rule 1.15(c) was amended for consistency with the simultaneous addition of Rules 1.5(f) and (g).
- Blog posts on trust accounting & safekeeping property are here.

RULE 1.15. Safekeeping Property.

(a)(1) 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. Funds shall be kept in accordance with Rules 1.15A and B. 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 a period of six years after termination of the representation.

(2) For purposes of these rules, property held ''in connection with a representation'' means funds or property of a client or third party that is in the lawyer's possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. ''Fiduciary relationship'' includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

(b) A lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount reasonably necessary for that purpose.

(c) Unless a lawyer has entered into a nonrefundable fee agreement that complies with Rule 1.5(f), a lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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 stated in this rule 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.

(e) 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 property shall be kept separate by

the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Except as provided in paragraph (g):

1. a lawyer shall not disburse funds held for a client or third person unless the funds are ''collected funds.'' For purposes of this rule, ''collected funds'' means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer's trust account.
2. a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.

(g) In the following circumstances, a lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer's trust account within a reasonable period of time:

1. When the deposit is either a certified check, cashier's check, money order, official check, treasurer's check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing; or
2. When the deposit is a check drawn on the IOLTA account of an attorney licensed to practice law in the State of Vermont or on the IORTA account of a real estate broker licensed under 26 V. S. A. Chapter 41; or
3. When the deposit is a check issued by the United States of America or any agency thereof, or by the State of Vermont or any agency or political subdivision thereof; or
4. When the deposit is a personal check or checks in an aggregate amount that does not exceed $1,000 per transaction; or
5. When the deposit is a check or draft issued by an insurance company, title insurance company, or title insurance agency, licensed to do business in Vermont.

(h). If an uncollected deposit in reliance upon which a lawyer has disbursed trust account funds fails, the lawyer, upon obtaining knowledge of the failure, shall immediately act to protect the funds or other property of the lawyer's other clients or third persons held by the lawyer in accordance with this rule.

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 separate accounts. Separate accounts are to be used 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 the provisions of Rules 1.15A and B.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay service charges or other fees on that account. Accurate records must be kept regarding which part of the funds are 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] Paragraph (e) 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 are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only 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.

[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.

Reporter's Notes—2016 Amendment

Rule 1.15(b) is amended to provide that the funds that a lawyer may keep in a client trust account to cover service charges is that amount "reasonably" necessary for that purpose, making clear that the rules do not provide a fixed amount or percentage but will be applied on a case-by-case basis.

Rule 1.15(c) is amended for consistency with the simultaneous addition of Rules 1.5(f) and (g).

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.15 is amended in part to conform to changes in Model Rule 1.15, retaining a reference in V.R.P.C. 1.15(a) to V.R.P.C. 1.15A and B, for which there are no Model Rules equivalents, and incorporating as V.R.P.C. 1.15(f)-(h) the 2005 amendment adding V.R.P.C. 1.15(d)-(f) concerning client trust funds against which checks may be drawn. See Reporter's Notes to V.R.P.C. 1.15 (1999); Reporter's Notes to 2005 amendment of V.R.P.C. 1.15.

The Supreme Court addressed issues under V.R.P.C. 1.15 in *In re Farrar*, 2008 VT 31, 183 Vt. 592, 949 A.2d 438 (mem.) (admitted commingling of client funds contrary to V.R.P.C. 1.15(a) requires public reprimand in light of importance of protecting client funds and potential for actual injury to client, despite lawyer's unawareness that conduct violated rule), and *In re Sinnott*, 2004 VT 16, ¶ 18, 176 Vt. 596, 845 A.2d 373 (mem.) (former V.R.P.C. 1.15(c) [now (d)] did not apply to fees paid directly to the lawyer by the client).

Rule 1.15(a)(2), unique to the Vermont rule, is added as part of a group of amendments to Rules 1.15A and B intended to clarify the applicability of Rules 1.15, 1.15A and B to funds held by a lawyer other than in a professional capacity. ''Property held in connection with a representation,'' the key phrase in what is now Rule 1.15(a)(1) that determines the applicability of those rules, is now limited to property held in connection with a representation in a lawyer-client relationship or a fiduciary relationship that arises out of a lawyer-client relationship or a court appointment. Rule 1.15A(a) as amended makes clear that these rules govern both ''trust'' accounts, in which client funds arising from a representation are held, and ''fiduciary'' accounts, in which funds arising from a fiduciary relationship are held.

Note that new Rule 1.15(c) requires deposit in a lawyer's trust account of any fees or expenses paid in advance, no matter how designated, if the funds are to be applied as compensation for services subsequently rendered or reimbursement for expenses subsequently incurred. The rule does not require deposit in the trust account of a ''pure'' retainer, a flat fee paid to assure the lawyer's availability and not for performing services. If services are also to be performed, an additional agreement at a specified rate for those services is required, and any advance payment under that agreement must be deposited in the trust account. Either form of agreement is, of course, subject to the overriding requirement of Rule 1.5(a) that fees must be reasonable.

The ABA Reporter's Explanation is as follows:

TEXT:

1. Paragraph (b): Deposits to minimize bank charges

The Commission heard testimony that in some jurisdictions lawyers are unable to avoid bank charges unless they are permitted to deposit money in a client trust account to cover such charges. The addition of this new paragraph is designed to address that problem.

2. Paragraph (c): Advance payment of fees and expenses

This new paragraph provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses. The Commission is responding to reports that the single largest class of claims made to client protection funds is for the taking of unearned fees.

3. Paragraph (e): Expand to cover all instances of disputed funds

[Former] Rule 1.15(c) is presently written to cover disputes between the lawyer and ''another person,'' usually the client. The change proposed recognizes that at least three kinds of disputes are in far more general language, tightens the first two sentences into one and reiterates the lawyer's duty to pay over undisputed sums. The final additional sentence clarifies the lawyer's duty to promptly distribute all portions of the property that are not subject to dispute.

COMMENT:

[1] Consistent with the Commission's action with respect to Rule 1.18, a phrase has been added to make clear that prospective clients are included among the third parties to whom the lawyer owes a duty to protect property pursuant to this Rule.

While the black letter of this Rule is written in mandatory terms, the Comments are often permissive. Sometimes that may be appropriate, as where a safe deposit box is suggested unless something else is warranted by the circumstances. When the issue is close, permissive language has been retained. However, Rule 1.15(a) clearly requires that client property, including money, be kept separate from the lawyer's own, and the Comment has been changed to make that clear. A sentence has been added to provide guidance to lawyers regarding the proper maintenance of trust accounts [in accordance with V.R.P.C. 1.15A and B].

[2] This new Comment addresses new paragraph (b).

[3] This Comment deals with handling client funds that may be set aside for payment of fees. The [former] language refers only to funds received from third parties, whereas the usual payer will be the client. Further, the lawyer should not have to show that the client is in fact likely to leave town if, pursuant to agreement, the lawyer is entitled to have the security of funds paid over before the fee is actually earned.

In addition, as in Comment [1], the clear Rule 1.15(a) and (e) requirements that disputed client funds be kept in a separate account is made mandatory rather than permissive.

[4] This Comment deals with a practical problem in which a client's creditor tries to get at funds in the hands of the lawyer. There is no doubt that, as a matter of substantive law, in some cases the lawyer would be required to make the creditor whole if the lawyer remitted property to the client to which the creditor was found entitled. In those, but only those, cases, paragraph (e) mandates a lawyer's refusal to remit the funds to the client until the dispute is resolved, while this Comment reinforces and tries to explain this sometimes controversial point.

The Comment further explains that the lawyer's duty to protect client creditors only exists when the creditor has a claim against specific funds being held by the lawyer and that the lawyer's duty to protect the third party exists only when there is a nonfrivolous claim under applicable law. 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] These changes clarify that when a lawyer holds funds in a capacity other than as a lawyer representing a client, this Rule does not apply.

[6] The change to ''lawyers'' fund for client protection'' reflects the current nomenclature for these funds. The new language in the second sentence indicates a lawyer has an obligation to contribute to these funds in jurisdictions where they are mandatory.

Reporter's Notes — 2005 Amendment

Rules 1.15(d)-(f) are added to address a problem that has arisen as a result of a recent Advisory Ethics Opinion of the Vermont Bar Association's Professional Responsibility Committee (VBA Ethics Opinion 2002-4,

published April 2004). The opinion concluded that ‘‘Trust account checks can only be drawn on client funds after the deposit on which the check is drawn clears’’ based on the Committee’s reading of V.R.P.C. 1.15(b) and other provisions of the Rules of Professional Conduct. *Id*. While the opinion does not have binding legal effect, it is of sufficient persuasive force to put lawyers who ignore it at risk. The impact is thus significant in the many real estate closings, tort settlements, and other transactions in which funds for clients pass through lawyers’ hands. If the lawyer cannot disburse such funds until the checks with which they have been transmitted have cleared, clients will experience significant delays in receiving funds to which they are entitled, and sequential transactions, such as the simultaneous sale and purchase of real estate, will be hindered. See, generally, R. Kohn, ‘‘Trust Account Ethics Rules: Sensible, Bizarre, or a Combination?,’’ *30 Vt. Bar Jour.*, No. 2, pp. 20-26 (2004). The present rule is based on provisions adopted in other states to address this problem. See, e.g., Del. Lawyers’ Rules of Prof ’l. Conduct, R. 1.15(n); Rules Regulating the Fla. Bar, R. 5-1.1(i).

Rule 1.15(d) sets forth two basic principles that must be adhered to unless the exceptions set forth in Rule 1.15(e) apply:

(1) A lawyer may not disburse funds unless the disbursement is drawn against ‘‘collected funds’’ — i.e., those that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer’s trust account. (Under present banking practice, there is no way a lawyer can be certain that funds have been finally settled, because the bank into which the check has been deposited is only notified when a check is dishonored, not when it is honored. As of August 2004, in accordance with Federal Reserve Board Regulation CC, checks drawn on banks within the same Federal Reserve Board region are usually honored by the banks on which they are drawn within two or three business days, and checks drawn on banks in other regions are usually honored within seven business days, except in extremely unusual circumstances. Accordingly, as of August 2004, it will usually be reasonable for a lawyer to believe that a check has been finally settled three business days after deposit for checks drawn on banks within the same Federal Reserve Board region, and seven business days for checks drawn on other United States banks.)

(2) A lawyer may not use the funds of one client or other person held in trust to serve the needs of another client or person without full disclosure and permission of the owner. VBA Ethics Opinion 2002-4 essentially stands on the ground that a check drawn against uncollected funds in a trust account is in fact drawn against the collected funds of other clients that are held in the account.

The exceptions to these basic principles set forth in Rule 1.15(e) are based on the premise that certain categories of trust account deposits carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Four of the five categories of deposits enumerated in paragraph (e) reflect instruments issued by or drawn on sources of assured financial stability so that the likelihood that the instrument will be dishonored or that the deposit will otherwise fail is so slight that it may be treated as presumptively ‘‘collected.’’ The fifth category, personal checks aggregating $1,000 or less, covers the need for last- minute funds to cover minor and unanticipated closing costs and is a de minimis amount that can be readily repaid in the event of failure. The five categories in effect create ‘‘safe harbors’’ that allow the lawyer to draw against these uncollected funds, provided that the further requirement of paragraph (e) is met — that the lawyer ‘‘reasonably believes’’ that the instrument or instruments in question will clear and become ‘‘collected funds’’ in a reasonable time. (See discussion of clearance times above.) The essence of the rule is that a lawyer who draws against uncollected funds other than those within the safe harbors of paragraph (e) is in violation of the basic prohibitions of paragraph (d) and is thus subject to disciplinary action.

Rule 1.15(f) adds the further requirement that if a deposit fails, even though it was within one of the categories set forth in paragraph (e) and the lawyer’s belief that it would clear was reasonable, the lawyer must take immediate steps to protect the funds of other clients that are thus drawn upon — presumably by immediately making or securing reimbursement of the trust account to the amount of the failed deposit.

COMMENT:

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 which is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there are risk

that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust 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.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this rule 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.

A ''client's security fund'' 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 should participate.

Reporter's Notes

This rule was modified, and the next three rules added, in order to include mandatory IOLTA, random auditing, the financial support for random auditing, and reporting of overdrafts.

ANNOTATIONS

1. Admonition. When respondent held trust account checks payable to her firm for premiums owed to the firm without cashing the checks, thereby improperly commingling her funds with those of third parties, an admonition by Disciplinary Counsel was appropriate. No funds belonging to clients or third parties were improperly used; there were mitigating factors of lack of selfish or dishonest motive, no prior disciplinary record; a good faith effort to rectify the consequences of the violation, a full and free disclosure to disciplinary counsel, cooperation, and remorse; and the only aggravating factor was respondent's substantial experience in the practice of law. In re PRB Docket No. 2013.160, 2015 VT 54, ____Vt.___, _____1.3d –(mem.).

Sanction for commingling personal and client funds in respondent's client trust account was reduced from a public reprimand to a private admonition when respondent went beyond what was required of him, including hiring an accountant at his own expense and disclosing far more information than was required, when other mitigating factors included absence of a prior disciplinary record, lack of selfish or dishonest motive, presence of personal problems, positive character and reputation, presence of physical disability, and remorse, and when the only aggravating factor was respondent's 30 years of experience. In re PRB Docket No. 2012.155, 2015 VT 57, _____ Vt._____, _____A.3d _____(mem.).

Respondent violated the professional conduct rules regarding client funds and trust accounting systems by not fully documenting each transaction in her trust account on her check register, not having a single source to which she could go to identify all transactions, placing earned fees into her trust account, and having no documentation for a $3,000 electronic transfer from her trust account. Admonition was a proper sanction, as respondent's negligence in the management of her trust account arose out of ignorance of the rules, no client or third party was injured, and there was little potential injury; furthermore, there were several mitigating factors and no aggravating factors. In re PRB Docket No. 2014.168, 2015 VT 9, ____Vt. _____, 114 A.3d 480 (mem.).

Admonition was appropriate when respondent failed to regularly reconcile his trust accounts, failed to maintain a central trust accounting system, and placed unearned fees in his operating account. His mental state was one of negligence and no client had been injured; there were mitigating factors in that he lacked dishonest or selfish motive, immediately took steps to revise his trust accounting system, and had cooperated with disciplinary proceedings; and in aggravation, he had substantial experience in the practice of law and three prior disciplinary offenses that were remote in time and unrelated to the present charges. In re PRB Docket No. 2013.153, 2014 VT 35, 196 Vt. 633, 96 A.3d, 468 (mem.).

2. Bank fees. Rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees provides neither an appropriate dollar amount nor a method for its calculation; before attorneys are disciplined under this rule for holding small amounts of money in their trust accounts, they need specific standards. This lack of guidance is better remedied by rule change than by panel decision. In re PRB Docket No. 2014.133, 2015 VT 63, ___Vt., ___, ___A.3d___(mem.).

Respondent had not violated the rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees, as the rule provided no guidance as to what amount was proper and the panel was not prepared to find that the $157.57 deposited here violated the rule. In re PRB Docket No. 2014.133, 2015 VT 63, _____Vt., _____, A.3d _____(mem.).

3. Reprimand. Based on respondent's negligent mental state, the lack of actual injury, and the low potential for injury, a public reprimand was the presumptive sanction when respondent commingled personal and client funds in his client trust account. In re PRB Docket No. 2012.155, 2015 VT 57, ____Vt. _, _____A.3d _____(mem.).