

# Report of the Special Committee to review Ohio Rule of Professional Conduct 1.15

1 *To the Council of Delegates:*

2 The Special Committee to Review Ohio Rule of Professional Conduct 1.15 respectfully  
3 requests your favorable consideration of the following proposed amendment. Below is a  
4 proposal to amend section (d) and delete section (e) of Prof. Con. R. 1.15 and to make  
5 conforming changes to the comments under the Rule.

6 Respectfully submitted,

7 **Daniel R. Michel**, *Defiance*  
8 Co-chair

9 **Robert K. Leonard**, *Lima*  
10 Co-chair

## 11 **PROPOSED AMENDMENT**

### 12 **Rule 1.15: Safekeeping Funds and Property**

13 (a) A lawyer shall hold property of clients or third persons that is in a  
14 lawyer's possession in connection with a representation separate from the lawyer's own  
15 property. Funds shall be kept in a separate interest-bearing account in a financial  
16 institution authorized to do business in Ohio and maintained in the state where the  
17 lawyer's office is situated. The account shall be designated as a "client trust account,"  
18 "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be  
19 identified as such and appropriately safeguarded. Records of such account funds and  
20 other property shall be kept by the lawyer and shall be preserved for a period of seven  
21 years after termination of the representation or the appropriate disbursement of such  
22 funds or property, whichever comes first. For other property, the lawyer shall maintain a  
23 record that identifies the property, the date received, the person on whose behalf the  
24 property was held, and the date of distribution. For funds, the lawyer shall do all of the  
25 following:

26 (1) maintain a copy of any fee agreement with each client;

27 (2) maintain a record for each client on whose behalf funds are held  
28 that sets forth all of the following:

29 (i) the name of the client;

30 (ii) the date, amount, and source of all funds received on behalf  
31 of such client;

- 32 (iii) the date, amount, payee, and purpose of each disbursement  
33 made on behalf of such client;
- 34 (iv) the current balance for such client.
- 35 (3) maintain a record for each bank account that sets forth all of the  
36 following:
- 37 (i) the name of such account;
- 38 (ii) the date, amount, and client affected by each credit and  
39 debit;
- 40 (iii) the balance in the account.
- 41 (4) maintain all bank statements, deposit slips, and cancelled checks, if  
42 provided by the bank, for each bank account;
- 43 (5) perform and retain a monthly reconciliation of the items contained  
44 in divisions (a)(2), (3), and (4) of this rule.
- 45 (b) A lawyer may deposit the lawyer's own funds in a client trust account for  
46 the sole purpose of paying or obtaining a waiver of bank service charges on that account,  
47 but only in an amount necessary for that purpose.
- 48 (c) A lawyer shall deposit into a client trust account legal fees and expenses  
49 that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or  
50 expenses incurred.
- 51 (d) Upon receiving funds or other property in which a client ~~or third person~~  
52 has an interest, a lawyer shall promptly notify the client ~~or third person~~. Except as stated  
53 in this rule or otherwise permitted by law or by agreement with the client ~~or a third~~  
54 ~~person~~, *confirmed in writing*, a lawyer shall promptly deliver to the client ~~or third person~~  
55 any funds or other property that the client ~~or third person~~ is entitled to receive. Upon  
56 request by the client ~~or third person~~, the lawyer shall promptly render a full accounting  
57 regarding such funds or other property.
- 58 (e) ~~When in the course of representation a lawyer is in possession of funds or~~  
59 ~~other property in which two or more persons, one of whom may be the lawyer, claim~~  
60 ~~interests, the lawyer shall hold the funds or other property pursuant to division (a) of this~~  
61 ~~rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the~~  
62 ~~funds or other property as to which the interests are not in dispute. RESERVED~~
- 63 (f) Upon dissolution of any *law firm*, the former *partners*, managing *partners*,  
64 or supervisory lawyers shall promptly account for all client funds and shall make  
65 appropriate arrangements for one of them to maintain all records generated under division  
66 (a) of this rule.

67 (g) A lawyer, *law firm*, or estate of a deceased lawyer who sells a law practice  
68 shall account for and transfer all funds held pursuant to this rule to the lawyer or *law firm*  
69 purchasing the law practice at the time client files are transferred.

70 (h) A lawyer, a lawyer in the lawyer's *firm*, or a *firm* that owns an interest in a  
71 business that provides a law-related service shall:

72 (1) maintain funds of clients or third persons that cannot earn any net  
73 income for the clients or third persons in an interest-bearing trust account that is  
74 established in an eligible depository institution as required by sections 3953.231,  
75 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Legal  
76 Assistance Foundation pursuant to section 120.52 of the Revised Code.

77 (2) notify the Ohio Legal Assistance Foundation, in a manner required  
78 by rules adopted by the Ohio Legal Assistance Foundation pursuant to section  
79 120.52 of the Revised Code, of the existence of an interest-bearing trust account;

80 (3) comply with the reporting requirement contained in Gov. Bar R.  
81 VI, Section 1(F).

82 **Comment**

83 [1] A lawyer should hold property of others with the care required of a  
84 professional fiduciary. Securities should be kept in a safe deposit box, except when some  
85 other form of safekeeping is warranted by special circumstances. All property that is the  
86 property of clients or third persons, including prospective clients, must be kept separate  
87 from the lawyer's business and personal property and, if moneys, in one or more trust  
88 accounts. A lawyer should maintain separate trust accounts when administering estate  
89 moneys. A lawyer must maintain the records listed in division (a)(1) to (5) of this rule to  
90 effectively safeguard client funds and fulfill the role of professional fiduciary. The  
91 records required by this rule may be maintained electronically.

92 [2] While normally it is impermissible to commingle the lawyer's own funds  
93 with client funds, division (b) provides that it is permissible when necessary to pay or  
94 obtain a waiver of bank service charges on that account. The following charges or fees  
95 assessed by an IOLTA depository may be deducted from account proceeds: (1) bank  
96 transaction charges (*i.e.*, per check, per deposit charge); and (2) standard monthly  
97 maintenance charges. The following charges or fees assessed by a client trust account  
98 depository may not be deducted from account proceeds: (1) check printing charges; (2)  
99 not-sufficient-funds charges; (3) stop payment fees; (4) teller and ATM fees; (5)  
100 electronic fund transfer fees (*i.e.*, wire transfer fees); (6) brokerage and credit card  
101 charges; and (7) other business-related expenses, which are not part of the two  
102 permissible types of fees. Accurate records must be kept regarding which part of the  
103 funds are the lawyer's.

104 [3] Lawyers often receive funds from which the lawyer's fee will be paid.  
105 The lawyer is not required to remit to the client funds that the lawyer reasonably believes  
106 represent fees owed. However, a lawyer may not hold funds to coerce a client into

107 accepting the lawyer's contention. The disputed portion of the funds must be kept in a  
108 trust account and the lawyer should suggest means for prompt resolution of the dispute,  
109 such as arbitration. The undisputed portion of the funds shall be promptly distributed.

110 [3A] Client funds shall be deposited in a lawyer's or law firm's IOLTA account  
111 unless the lawyer determines the funds can otherwise earn income for the client in excess  
112 of the costs incurred to secure such income (*i.e.*, net income). In determining whether a  
113 client's funds can earn income in excess of costs, the lawyer or law firm should consider  
114 the following factors: (1) the amount of the funds to be deposited; (2) the expected  
115 duration of the deposit, including the likelihood of delay in the matter for which the funds  
116 are held; (3) the rates of interest or yield at the financial institutions where the funds are  
117 to be deposited; (4) the cost of establishing and administering non-IOLTA accounts for  
118 the client's benefit, including service charges, the costs of the lawyer's services, and the  
119 costs of preparing any tax reports required for income accruing to the client's benefit; (5)  
120 the capability of financial institutions, lawyers or law firms to calculate and pay income  
121 to individual clients; (6) any other circumstances that affect the ability of the client's  
122 funds to earn a net return for the client. The lawyer or law firm should review its IOLTA  
123 account at reasonable intervals to determine whether changed circumstances require  
124 action with respect to the funds of any client.

125 [4] It is recognized that third parties may have lawful claims against specific  
126 funds or other property in a lawyer's custody, such as a client's creditor who has a lien on  
127 funds recovered in a personal injury action. A lawyer may have a duty under applicable  
128 law to protect such third-party claims against wrongful interference by the client. In such  
129 cases, when the third-party claim is not frivolous under applicable law, the lawyer may  
130 refuse to surrender the property to the client until the claims are resolved. A lawyer  
131 should not unilaterally assume to arbitrate a dispute between the client and the third  
132 party, but, when there are substantial grounds for dispute as to the person entitled to the  
133 funds, the lawyer may file an action to have a court resolve the dispute.

134 [5] [RESERVED]

135 [6] [RESERVED]

136 [7] A lawyer's fiduciary duties are independent of the lawyer's employment at  
137 a particular firm or the rendering of legal services. Law firms frequently merge or  
138 dissolve. Division (f) provides that whenever a law firm dissolves, the former partners,  
139 managing partners, or supervisory lawyers must appropriately account for all client  
140 funds. This responsibility may be satisfied by an appropriate designee.

141 [8] All lawyers involved in the sale or purchase of a law practice as provided  
142 by Rule 1.17 should make reasonable efforts to safeguard and account for client property.  
143 Division (g) requires the lawyer, law firm or estate of a deceased lawyer who sells a  
144 practice to account for and transfer all client property at the time the client files are  
145 transferred.

146 **Comparison to former Ohio Code of Professional Responsibility**

147 Rule 1.15 replaces DR 9-102, which is silent on the handling of property  
148 belonging to third persons.

149 Rule 1.15(a) includes several provisions which are not explicitly provided for in  
150 DR 9-102. The rule requires that client and third-person funds are maintained:

- 151 1. In an insured, interest-bearing account;
- 152 2. In a financial institution permitted under Ohio law and in the state where  
153 the lawyer's office is situated; and
- 154 3. In an account designated as "client trust account," "IOLTA account," or  
155 with another identifiable fiduciary title.

156 To ensure the proper handling of funds, Rule 1.15 requires the lawyer to maintain  
157 the following financial records for a period of seven years:

- 158 1. Any fee agreements.
- 159 2. A record for each client's funds that sets forth:
  - 160 a. the client's name,
  - 161 b. the date, amount, and source of the funds received,
  - 162 c. the date, amount, payee, and purpose of each disbursement,
  - 163 d. the current balance.
- 164 3. A record of each bank account that sets forth:
  - 165 a. the name of the account,
  - 166 b. the date, amount, and client affected by each credit and debit,
  - 167 c. the balance in the account.
- 168 4. All bank statements, all deposit slips, and canceled checks, if provided by  
169 the bank, for each account.
- 170 5. A monthly reconciliation of the items listed in 2, 3, and 4 above.

171 Under DR 9-102 lawyers must keep financial records indefinitely.

172 Rule 1.15(b) is a restatement of DR 9-102(A)(1), which authorizes lawyers to  
173 deposit their own funds into the trust account for the sole purpose of paying or obtaining  
174 a waiver of bank service charges.

175 Rule 1.15(c) directs lawyers to place advances on expenses into the trust account.  
176 This is a change from DR 9-102(A), which precludes a lawyer from placing advances for  
177 expenses in the lawyer's trust account. The vast majority of jurisdictions consider  
178 advances for expenses to be client funds that must be deposited in the trust account.

179 There are no Disciplinary Rules comparable to Rules 1.15(d), ~~(e)~~, (f), and (g).

180 Rule 1.15(h) requires lawyers to comply with R.C. 120.52, 3953.231, 4705.09,  
181 and 4705.10, all rules adopted by the Ohio Legal Assistance Foundation, and Gov. Bar R.  
182 VI, (1)(F). This provision is the same as the requirements of DR 9-102(D) and (E).

### 183 **Comparison to ABA Model Rules of Professional Conduct**

184 Rule 1.15 is altered from the ABA Model Rule to clarify the lawyer's fiduciary  
185 responsibility. The primary divergence from the Model Rule is the adoption of the  
186 specific recordkeeping requirements in Rule 1.15(a)(1) to (5). These provisions are based  
187 on analogous rules adopted in Arizona, California, Colorado, Connecticut, Florida,  
188 Hawaii, Indiana, New Jersey, New York, Massachusetts, Minnesota, Oregon, Rhode  
189 Island, South Carolina, Vermont, and Virginia, as well as the ABA Model Rule on  
190 Financial Recordkeeping. Each of these jurisdictions, as well as the ABA Model Rule,  
191 incorporates similar recordkeeping requirements. The rules help ensure that Ohio  
192 lawyers fulfill their fiduciary duties.

193 Model Rule 1.15(a) requires lawyers to identify and appropriately safeguard all  
194 property other than funds. Rule 1.15(a) requires the lawyer to maintain a journal that  
195 identifies the property, the date received, the person on whose behalf the property was  
196 held, and the date of distribution.

197 Rule 1.15(c) directs lawyers to place advances on expenses into the trust account.  
198 This is the same as the Model Rule.

199 Rule 1.15(d) omits the reference in the Model Rule to a mandatory obligations  
200 owed by the lawyer to third parties.

201 Rule 1.15 (e) is reserved.

202 Rule 1.15(f) designates persons responsible for distributing client funds and  
203 maintaining financial records upon the dissolution of a law firm. This provision is not in  
204 the Model Rule. The frequency with which law firms are dissolved necessitates this  
205 requirement.

206 Rule 1.15(g), which also is not in the Model Rule, provides for the handling of  
207 funds upon the sale of a law practice. This provision is consistent with the careful  
208 attention to protecting client's interests during the sale of a law practice pursuant to Rule  
209 1.17.

210 Rule 1.15(h) incorporates the requirements of DR 9-102(D) and (E).

211 **Rationale for Proposal:**

212 In February, 2007, the Ohio Supreme Court enacted a new set of Rules of Professional  
213 Conduct Responsibility (“ORPC”) based upon the American Bar Association’s Model  
214 Code of Professional Responsibility. Part of the new Code, was ORPC 1.15 (d) and (e),  
215 which imposed all new requirements on Ohio attorneys to protect the interests of third  
216 parties. This rule represented a drastic change in Ohio ethics rules, with all new  
217 requirements to set aside, notify, and not disburse funds in which third parties potentially  
218 have a claim.

219 This rule has caused a great deal of concern among many Ohio practitioners. On July 1,  
220 2008, President Gary L. Leppla created a Special Committee<sup>1</sup> to study this newly enacted  
221 rule. According to President Leppla,

222 ... Rule 1.15 of the Ohio Rules of Professional Conduct sets forth certain  
223 standards for the handling of settlement proceeds in an attorney’s trust account.  
224 Issues raised in those provisions have been the subject of an informal nonbinding  
225 Advisory Opinion from the Board of Commissioners of Grievances and  
226 Discipline. These events have set off a great deal of discussion and have resulted  
227 in a great deal of controversy.

228 (Letter from President Leppla to Members of the Special Committee, July 1, 2008,  
229 Attached hereto).

230 The Special Committee was comprised of a broad range of attorneys representing the  
231 interests of injured plaintiffs, civil defendants, insurance in-house counsel, physicians,  
232 and attorneys involved in disciplinary proceedings. In addition, a representative of the  
233 Ohio Supreme Court’s Office of Disciplinary Counsel was actively involved in the work  
234 of the Committee.

235 The Committee worked quickly and diligently to address the concerns raised by members  
236 of the OSBA. The members of the Special Committee met for several hours to review  
237 and discuss ORPC 1.15. After defining the scope of concerns, a sub-committee was  
238 established to research the history of the Model Rule, as well as its enactment in other  
239 states. A copy of this sub-committee’s review is included with this Report.

240 In the end the Committee voted unanimously to seek a change in the rule, which appears  
241 in the draft attached hereto.

242 **Discussion**

243 Cases in which ORPC 1.15 typically applies, include (1) cases in which the attorney  
244 promises to attend to liens, (2) where the attorney makes no promises but is aware of

---

<sup>1</sup> The Special Committee was initially denominated as the “Special Committee on Third Party Claims”, but was later changed to the “Special Committee to review Ohio Rule of Professional Conduct 1.15.”

245 liens, and (3) where the attorney makes no promises and is not notice of liens. Of course,  
246 1.15 encompasses many other circumstances as well, which were also debated and  
247 discussed by the Committee, but the three scenarios outlined above, by far dominated the  
248 discussions.

249 One of the oft-repeated concerns expressed by members of the committee, is the conflict  
250 that 1.15 creates between client and counsel. The Rule creates an ethical duty to non-  
251 clients outside the attorney-client relationship, and limits the attorney's ability to  
252 represent his or her client zealously. Members noted that attorneys have a duty to their  
253 clients to determine whether claimed liens and subrogated interests are valid and  
254 computed correctly, and to identify statutory liens (Medicare, Medicaid, workers  
255 compensation, Veterans Administration, etc.). Notably, the law does not require an  
256 attorney to search out undisclosed liens and claims, so having a disciplinary rule which  
257 arguably requires an attorney to do just that, creates an inherent conflict by pitting an  
258 attorney to act against the interests of his or her own client.

259 Not surprisingly, the first reports of the rule's use, has been by aggressive chiropractors  
260 seeking to enforce payment of their full account. Many times, Members observed, a  
261 chiropractor would render treatment to a patient, resulting in a large unpaid bill,  
262 sometimes even exceeding the amount available through a verdict or settlement.  
263 Nevertheless, the chiropractor refused to yield one iota, threatening to use this new rule to  
264 bring an ethics complaint against the attorney unless the chiropractor's interests were  
265 fully protected. Similar threats have been made by aggressive health plans.

266 A thorough review was undertaken to review the history of the Model Rules, and the  
267 enactment of the Model Rules in many other states. Based upon this review, and taking  
268 into account the existence of other rules which provide adequate guidance in this area, the  
269 subcommittee recommended as follows:

270 "In the end, I advocate in favor of removing sections (d) and (e) of our Rule 1.15  
271 because (1) they are confusing in application; (2) they are heavily dependent on  
272 factual scenarios and substantive case law; and, (3) they do not add any more  
273 ethical guidance than Rule 8.4 does." I would add that the foregoing policy  
274 considerations should be articulated, perhaps in a comment: 1) Lawyers who  
275 commit to payment of client's debts should be held to their word. 2) Creditors  
276 should be free to see to security of funds available to pay them by existing means,  
277 including all those available at civil law and through the UCC. 3) An attorney's  
278 obligations in dealing with his client's creditors are should be defined by his  
279 agreement with his client, subject to (1).